

Redefining and Regulating Public Contracting in
China:
Comparative and International Perspectives

by

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Abstract

Government plays a central and critical role in a country's social and economic development and in the management of that nation's affairs. Government procurement laws regulate behaviors of government officials in their business activities. The major research question of this thesis is to explore, in an authoritarian state like China, whether the country's public contracting law and its implementation can be improved to a high level of transparency which in turn achieves the goal of good governance of the government without fundamental changes to the country's political and judicial system. Or, in other words, the Western tradition of transparency and rule of law, which was rooted in the value of liberal democracy, can be adapted to local norms of governance in China. Moreover, since the nature of both buying and selling by the government and SOEs are contracts between publicly funded entities and private sectors, by considering all of the commonalities between Public Procurement and Privatization Policy, the author redefines the "Public Contracting", as a combination of *Public Procurement* and *Privatization Policy* (Government Selling), which includes all the business activities of the Government and SOEs, such as buying, selling, and leasing from or to the private sector. By comparing to procurement rules and practices mainly in Japan, but also in Hong Kong, it shows in this thesis the extent to which international procurement rules of transparency and rule of law are mediated in local context. The author concludes that the public contracting system in China might be partially

improved to a higher level of transparency and rule of law without a fundamental change to the country's political and judicial system by solutions such as instituting a unified review body to check, balance, review, and correct decisions and conducts of government officials in government purchasing and selling. However, without a fundamental political reform, some issues in government procurement, such as transparency and justification of planned expenses at the budgeting stage, cannot be addressed.

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List of Acronyms

ADB	Asian Development Bank
ARL(China)	Administrative Reconsideration Law
CNR	China North Locomotive & Rolling Industry Corporation
CSR	China South Locomotive & Rolling Industry Corporation
DOJ (United States)	Department of Justice
DPJ	Democratic Party of Japan
DSM (WTO)	Dispute Settlement Mechanism
FCPA	Foreign Corrupt Practices Act
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GPA	Agreement on Government Procurement
GPL (China)	Government Procurement Law
GPRB (Japan)	Government Procurement Review Board
GZMBF	Guangzhou Municipal Bureau of Finance
LDP (Japan)	Liberal Democratic Party
LPCP (China)	Law on Promotion of Cleaner Production
LPSME (China)	Law on Promotion of Small & Medium Sized Enterprises
MIIT (China)	Ministry of Industry & Information Technology
MOE (China)	Ministry of Education
MOF (China)	Ministry of Finance
MOFA (Japan)	Ministry of Foreign Affairs
MOST (China)	Ministry of Science and Technology
NAO (China)	National Audit Office
NDPC (China)	National Development & Planning Commission

NDRC (China)	National Development & Reform Commission, formerly known as the NDPC
NPC (China)	National People's Congress
NRCSC (China)	National People's Congress Standing Committee
OECD	Organization of Economic Cooperation & Development
OGPR (Japan)	Office of Government Procurement Review
PYDBF	Panyu District Department of Finance
SDR	Special Drawing Rights
SEC (United States)	Securities Exchange Commission
SOEs	State-owned Enterprises
TBL (China)	Tendering & Bidding Law
UNCITRAL Model Law	United Nations Commission on International Trade Law Model Law on Procurement of Goods, Construction and Services
WTO	World Trade Organization

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Chapter 1: Introduction

“The most important political distinction among countries concerns not their form of government but their degree of government”.¹ Inspired by the theory of Selective Adaptation,² especially the element of “Complementarity”,³ the major theme and research question of this thesis is to explore, in a nation with an undemocratic government, whether or not the Chinese state procurement system can be improved and reformed to include a high level of transparency and rule of law. That is, can the Chinese state procurement system achieve a high degree of good governance without a radical or fundamental political and judicial reform? To evaluate the prospect for the People’s Republic of China to reform its government contract laws to promote transparency and accountability, the procurement rules and practices in China are compared to those in Japan and also in Hong Kong.

In this chapter, *Government Procurement* and *Government Selling/Privatization Policy* are defined. The “Public Contracting” concept is then redefined. A brief introduction to the issues in Public Contracting laws and practices then follows.

By drawing on existing literature on procurement, transparency, selective

¹ Samuel P. Huntington, *Political Order in Changing Societies*, (New Haven and London: Yale University Press, 1967) at 1.

² See generally, Pitman B. Potter, “Legal Reform in China: Institutions, Culture, and Selective Adaptation” (2004) 29:2 *Law & Social Inquiry* 476.

³ *Ibid.*

adaptation and institutional capacity, the major research question presented above is discussed. The discussions explain the interrelations among government contract reform, transparency, and good governance, which will provide a theoretical basis for the discussions in the following chapters.

1.1. Government, Government Procurement, and Government Contract

1.1.1. The Role of Government

Government plays a central and critical role in a country's social and economic development and in the management of that nation's affairs. However, the government's role can have both positive and negative outcomes.⁴ Positive governance can "help society achieve its collective needs and meet its aspirations" and "uphold and adapt some of the formal rules systems that underpin successful development".⁵ On the other hand,

"Governments also affect resource allocation through such policies as procurement, competition, state-owned enterprises, subsidies, infrastructure development, regulation, and tax expenditures. These create high stakes for political rent seeking. If not subject to transparency and accountability,

⁴ OECD, Committee on International Investment and Multinational Enterprises, *Public Sector Transparency and International Investment Policy* (Paris: OECD 2003) at 6-7.

⁵ *Ibid.*

governments can condone or promote corruption, stifle entrepreneurship, innovation and market adjustment and fail to achieve social, environmental, and economic goals.”⁶

The above explanation by the OECD not only points out the critical role of governments, but also stresses the importance of transparency rule systems in checking and balancing government powers.

1.1.2. Government Procurement

In the above OECD text, among those policies through which resource allocation is made by the government, procurement is identified as the first one on the list. However, most of the other policies listed above, such as competition, state-owned enterprises, infrastructure development, regulation, and tax expenditures, are also interrelated with procurement and the issues discussed in this thesis. This is not a coincidence, but rather, it reflects the importance of government procurement in the course of government’s resource allocation.

Government procurement generally refers to “the purchasing by government bodies from external providers of the products and services these bodies need in

⁶ *Ibid.*

order to carry out their public service mission".⁷ Government procurement provides a huge market and a long term opportunity for both domestic and international enterprises. In OECD countries, government procurement accounts for 15% of the GDP.⁸ In the European Union, government expenditures count over EUR 1.5 trillion in total.⁹ As for the case in China, with the country's fast economic growth, the size of government procurement, both in central and local level, has increased 21.37% annually since 2002 and totals over RMB 700 billion (USD 100 billion) in 2009.¹⁰ Compared to the United States, whose government procurement counts over \$122 billion in 2008 with an annual increasing rate of 9.6%,¹¹ China's government procurement is much bigger than that of the United States in terms of the increasing rate.

⁷ Sue Arrowsmith, *Government Procurement in the WTO*, (Hague: Kluwer Law International, 2003) at 2-3.

⁸ OECD, *Bribery in Public Procurement: Methods, Actors, and Counter-Measures*, (Paris: OECD, 2007) at 9.

⁹ OECD, *Integrity in Public Procurement: Good Practice From A to Z*, (Paris: OECD, 2007) at 10.

¹⁰ "Woguo zhengfu caigou baochi gaosu zenzhang, 2009 nian tupo qi qian yi yuan" (The size of government procurement exceeds RMB 700 billion), *Xinhua News* (7 May, 2010), online: Government of China

<http://www.gov.cn/jrzq/2010-05/07/content_1601362.htm>.

¹¹ According to the government procurement statistic report by the Office of the United States Trade Representative to the WTO, the amount of government procurement of the United States in fiscal year 2008, not including the defense procurement, is about 122.11 billion (including both federal and state procurement entities), compared to approximately 67.4 billion in 2002 (excluding the defense procurement), the annual increase rate is about 9.6%. See, USTR, "Statistics for 2002 reported under article xix:5 of the agreement", online: WTO <<http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/PLURI/GPA/76A5.doc>>; "Statistics for 2008 reported under article xix:5 of the agreement" <http://members.wto.org/crnattachments/2010/GPA/USA/10_1332_00_e.xls>. See also, Federal Procurement Data System, online: FPDS <<https://www.fpds.gov/fpdsng/cms/index.php/reports>>.

1.1.3. Public Procurement, Privatization Policy, and Redefining of “Public Contracting”

The term “government procurement” is synonymous to a number of other terms, such as “public procurement”, “state procurement”, “Public Contracting”, “public purchasing”, etc. For example, “Public Contracting” means “an agreement to perform a particular task to benefit the community at large that is financed by government funds”.¹² If we keep it in mind that the essential element of this definition is that such activity is “financed by government funds”, we may understand the distinction between the term “government procurement” and “public procurement”. Although in literature, “government procurement” can be found as exchangeable to “public purchasing” and “public procurement”,¹³ the distinction between the term “government” and “public” implies that procuring entities in such procurement activities is not limited to “‘classical’ forms of ministries and municipal authorities”, but may also include other entities that are funded by government funds but is better be labeled as a “public entity” instead of a “government entity”, such as public hospitals, educational and research institutions, and “independent government agencies,

¹² *West's Encyclopedia of American Law*, 2nd ed., (St. Paul, MN: West Group Publishing, 1998).

¹³ See e.g., Bernard M. Hoekman & Petros C. Mavroidis eds, *Law and Policy in Public Purchasing: The WTO Agreement on Government Procurement*, (Ann Arbor, MI: University of Michigan Press, 1997) at 1.

commercial state-owned enterprises, and joint venture enterprises with private sector organizations".¹⁴

Although "Public Contracting" is always understood as a synonym to "public purchasing" and "government procurement", there is an important de facto issue that also concerns the government entering into contract with private sector or in other words the government's privatization policy. The privatization policy is "government selling" of sorts, and it concerns the government activity to sell or lease its property, such as public lands, state-owned enterprises, and other state-owned assets, to the private sector. Moreover, from the author's view, besides the privatization policy, there are also other forms of *Government Selling* that may include: 1) selling of goods, properties, or assets confiscated by the government; and 2) bankruptcy liquidation auction executed by the Courts for enforcement of judicial rulings. Government Selling seems at odds with Government Purchasing, but a sound government selling system also involves similar due procedures as in Government Purchasing, such as bidding and competition.

In countries such as China and Japan where a large state sector exists, regulating *government selling* is as critical as regulating government procurement. In the case of China, "Lease of Lands for Commercial Use", "Construction Works",

¹⁴ Arrowsmith, *supra* note 7 at 114-115.

“Government Procurement”, and “Transfer of Assets Ownership” are the “Four Major Fields of Corruption” identified by Zhu Rongji, then the Premier of China.¹⁵ “Lease of Lands for Commercial Use” refers to the lease of land from government to private sector, and the “Lands for Commercial Use” not only refers to the “Commercial Lands”, but also includes all types of other “non-public use”, especially the development of condominium buildings, which is one of the most rampant hot beds of bribery in China. Statistics from the Supreme People’s Procuratorate has shown that, from 2007 to 2008, there are 7990 cases in China that involve bribery in land leasing.¹⁶ In the “Lease of Lands for Commercial Use”, the real estate developer usually pays bribes to government officials, and in return officials usually provide land to developers at unreasonably low prices. In such “selling” or “leasing” transactions, developers acquire land from the government, and therefore, this most closely constitutes “government selling”. “Transfer of Assets Ownership” refers to the sale of State-owned enterprises assets to the private sector. This field also most closely constitutes government selling and has also become a hotbed for corruption, because government officials have the power to sell SOEs to the private sector at

¹⁵ Zhu Rongji, “Zhu rongji tichu jinnian lianzheng gongzuo sanxiangyaoqiu” (Zhu Rongji’s Remarks on the State Council working conference on anti-corruption”, *People’s Daily* (21 February 2002), online: *People’s Daily*

<<http://www.people.com.cn/GB/shizheng/16/20020221/671044.html>>.

¹⁶ See “Guotu guanyuan fubai gaofa” (Corruption becomes pervasive among land officials), *Xinhua News* (1 June 2010), online: *Xinhua News*

<http://news.xinhuanet.com/local/2010-06/01/c_12163995.htm>.

unreasonably low prices.¹⁷ It should be noted that in the infamous case of Gu Chujun's the business man paid RMB 0.9 billion and acquired several SOEs that had a total worth of RMB 13.6 billion.¹⁸ "Construction Works" refers to the Government Procurement of public works. Therefore, it belongs to the category of government procurement. Among the "20 typical cases concerning corruption in construction works" disclosed by the Ministry of Supervision, the average bribery amount is RMB 5.5 million, and 57 director-general level officials were involved and charged.¹⁹ In order to tackle this problem, the Central government even established a "Central Leading Unit for Tackling Issues in the Field of Construction Works" (*Zhongyang zhili jianshe gongcheng lingyu tuchu wenti gongzuo lingdao xiaozu*).²⁰ In following the above explanation, it is apparent that all the "Four Major Fields of Corruption" can be divided to two Categories, Government Procurement and Privatization Policies (Government Selling). "Government Procurement" and "Construction Works" falls into the former category. The "Lease of Lands for Commercial Use" and the "Transfer of Assets Ownership" belongs to the Privatization Policy (Government Selling) category.

¹⁷ See "Tongxi guoyou zichan liushi" (Critical analysis on the loss of state assets), *Xinhua News* (7 March 2006), online: Xinhua News <http://news.xinhuanet.com/fortune/2006-03/07/content_4267355.htm>.

¹⁸ See "Gu chujun an zhongshen weichi yuanpan" (Gu Chujun's case was upheld at the final instance), *People's Daily* (10 April 2009) online: People's Daily <<http://finance.people.com.cn/GB/9108643.html>>.

¹⁹ See "20 qi gongcheng jianshe lingyu fabai dianxing anjian, pingjun mei an sheji jin'e wubai wushi wan yuan" (20 typical cases concerning corruption in construction works), *People's Daily* (21 May 2010) online: People's Daily <<http://fanfu.people.com.cn/BIG5/11655296.html>>.

²⁰ *Ibid.*

According to Zhu, “transparent rules” and “bidding and tendering procedures” must be imposed to all of these four fields to tackle corruptions.²¹

Although the market economy has already been established in China, China’s State-owned Enterprises (SOEs) are still the dominant power in the economy, and SOEs have monopolized many important sectors, such as energy, telecommunication, and transportation.²² However, according to the Protocol of China’s Accession to the World Trade Organization (WTO) and China’s Government Procurement Law,²³ China’s SOEs are not subject to regulation by the Government procurement. As a result, Chinese SOEs have become fertile ground for corruption.²⁴ In order to eliminate rent-seeking behavior and the waste of public funds, whether SOEs are buying products/services or are selling their assets to private sectors within or outside the country, their contracting activities must be regulated just as those of the government agencies.

²¹ See Zhu, *supra* note 15.

²² See “Guoyou qiye jituan zongzichan 20 wanyi, xiang longduan hangye jizhong” (The assets in state owned group companies total about 20 trillion, increasingly involved in monopolized sectors), *People’s Daily* (6 September 2006), online: People’s Daily <<http://finance.people.com.cn/GB/1045/4783887.html>>.

²³ *Government Procurement Law of PRC*, 2002, Art. 2.

²⁴ For example, according to the most recently released documents from the U.S. Department of Justice, American companies have bribed executives in some big Chinese SOEs in order to get contract from them. See U.S. Department of Justice, News Release, “Control Components Inc. Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$18.2 Million Criminal Fine”, online: Department of Justice <<http://www.usdoj.gov/opa/pr/2009/July/09-crm-754.html>>.

In the case of Japan, the linkage and connection between Government Procurement and Government Selling is even more obvious. Chapter 4 of the Accounts Law of Japan is titled “Contract”, and it is the major legislation of Japan which regulates not only procurement, but also selling by all the central government entities in Japan.²⁵ The Cabinet Order Concerning Budget, Settlement of Account, and Accounting, which serves as the implementing rules of the Accounts Law, also has an equivalent chapter on “Contract” that provides detailed regulations for government contracts.²⁶ Similarly, both the procurement and selling by local government entities in Japan are mainly regulated by the Section 6 of the Chapter 9 of the Local Autonomy Law, and the Section 6 is also titled “Contract”.²⁷ According to both the Chapter 4 of the Accounts Law and the Section 6, Chapter 9 of the Local Autonomy Law, it regulates “the buying and selling, leasing, and undertaking of government contracts”.²⁸

Since the nature of both buying and selling by the government and SOEs are contracts between publicly funded entities (Government /SOEs) and private sectors entities, Public Procurement and Privatization Policy have many commonalities. Based on these commonalities the “Public Contracting” can be redefined as a combination of *Public Procurement* (Government Procurement) and *Privatization Policy* (Government Selling), which includes all the business

²⁵ *Accounts Law of Japan (Kai-kei Hou)*, Law No. 53, 2006, c.4.

²⁶ *The Cabinet Order on Budget, Balance, and Accounting*, Cabinet Order 130, April 30, 2009.

²⁷ *Local Autonomy of Japan (Chi-hou Ji-chi Hou)*, Law No. 13, 2009, c. 9, s. 6.

²⁸ *Accounts Law of Japan*, Art. 29; *Local Autonomy Law of Japan*, Art. 234.

activities of the Government and State-owned Enterprises, such as buying, selling, and leasing to or from the private sector.²⁹

In the OECD article cited at the beginning of this chapter, almost all of the government resource allocation policies, such as procurement, competition, state-owned enterprises, infrastructure development, regulation, and tax expenditures, can be included in the redefined scope of the “Government Contract”. Contract is generally a civil law topic, and the autonomy of contract does not make it subject to be regulated by the government.³⁰ However, because of the nature of the Government, Government Contract must be regulated differently from other civil contracts.³¹

Based on the discussion of government procurement and selling, this paper advances a proposal of regulating and reviewing activities and disputes of both (Chapter 5).

²⁹ It is difficult to find an appropriate term that includes both government procurement and selling, and, as mentioned earlier, “public contract” is always referred to as synonym to “public procurement”, “government procurement”, or “public purchasing”, the author hereby attempts to redefine “public contract” in a broader sense which includes both public purchasing and selling. Although other terms were also considered by the author, such as “Government Commerce”, which is used in public procurement in the United Kingdom where the government agency that is responsible for public procurement is named as “Office of Government Commerce”. See Office of Government Commerce, online: <http://www.ogc.gov.uk/about_OGC.asp>. However, it is the author’s belief that the term “public contract” is self evident in presenting the legal nature of buying and selling by the government.

³⁰ See e.g., Patrick S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979). See also, Ewan McKendrick, *Contract Law - Text, Cases and Materials* (Oxford: Oxford University Press, 2005).

³¹ See Arrowsmith, *supra* note 7 at 2-3.

1.2. What is the Issue? --Transparency and Secondary Objective in Public Contracting

1.2.1 "Illegitimate Practices" in Government Procurement

Given the considerable size of the government procurement contracts and markets,³² as well as the fact that the nature of government money used for procurement purposes comes from taxpayers, "value for money" is always a goal for government to achieve in government procurement activities.³³ As a way to achieve this goal, competition is always involved in government procurement and, as a side effect, it makes the latter "a hotbed for bribery",³⁴ and government procurement thus "has been identified as the government activity most vulnerable to corruption".³⁵ Corruption, together with other behaviors, such as patronage and nepotism, are defined by Arrowsmith as "illegitimate practices" in government procurement,³⁶ and "the potential (of such "illegitimate practices" in government procurement) to damage a country's economy is considerable".³⁷ This is particularly evident in the case of China. As pointed out not only in Zhu Rongji's remark,³⁸ but also in other government documents,³⁹

³² See OECD *supra* note 8 & 9, Ministry of Finance of PRC, *supra* note 10.

³³ See Arrowsmith, *supra* note 7 at 3.

³⁴ OECD, *supra* note 8 at 9.

³⁵ OECD, *supra* note 9 at 9.

³⁶ See Arrowsmith, *supra* note 7 at 16.

³⁷ See OECD, *supra* note 8 at 9.

³⁸ See Zhu, *supra* note 15.

the transparency and integrity of government procurement (including procurement of construction services) in China has always suffered from the intervention by senior government officials, and in most cases, “illegitimate practices”, such as corruption and patronage, were at play.

In the case of Japan, government procurement has been a long term issue in Japanese politics, and such cases can be easily found. A notable example is the case of Matsuoka Toshikatsu,⁴⁰ in which then the Minister of Agriculture and Forestry favored certain companies in winning government contracts and in return these companies provided political funding to the minister. If we look back to Japanese political history, we can find that there is a tradition of “Relations between Politics and Money” (Seiji to Kane). The “Lockheed Affair” case, the bribery scandal involving former Prime Minister Kakuei Tanaka, is another salient example.⁴¹ In the Japanese context, what needs to be noted is that, most of the corruption cases in government procurement concern politicians not

³⁹ See e.g., National Development and Reform Commission (NDRC), News Release, “Guojia fagaiwei zhuren makai zai jinian zhaobiao toubiao fa shishi wuzhounian huiyi shang de jianghua” (Remarks by Ma Kai, Director of the National Development and Reform Commission, at the ceremony for the fifth anniversary of the promulgation of the *Tendering and Bidding Law*) (March 25, 2005), online: NDRC <<http://www.spdc.gov.cn/b/b200507131.htm>>.

⁴⁰ See generally, Aurelia George Mulgan, *Power and Pork: A Japanese Political Life* (Canberra: Asia Pacific Press, 2006).

⁴¹ See e.g., Henry Scott Stokes, “Tanaka Suffers Setback in the Lockheed Case”, *The New York Times* (1 November 1981), online: The New York Times <<http://www.nytimes.com/1981/11/01/world/tanaka-suffers-setback-in-the-lockheed-case.html>>.

bureaucrats. This is an interesting issue which will be discussed in detail in subsequent chapters.

1.2.2 “Illegitimate Practices” in Government Selling

Not only are “Illegitimate practices”, such as Corruption, patronage and nepotism, present in Government procurement, but are also pervasively embedded in Government Selling. In China, following the economic reform, thousands of state-owned enterprises were privatized and sold to private sectors. On the other hand, a booming real estate market means more and more land is leased from the government to the developer.⁴² According to Zhu’s remark, most of the SOEs and lands were sold at unreasonably low prices, and corruption and patronage in these cases.⁴³ Although so many SOEs and lands have already been sold or leased to private sectors through various “illegitimate practices”, this is never the end of the story, and these issues still currently exist.⁴⁴

According to the most recent official media report, as of the end of 2008, the

⁴² See Frank Upham, “Chinese Property Rights and Property Theory” (2009) 39:3 *Hong Kong Law Journal* at 611.

⁴³ See Eva Pils, “Chinese Property Law as an Image of PRC History” (2009) 39:3 *Hong Kong Law Journal* 595-611. See also, Eva Pils, “Land Disputes, Rights Assertion, and Social Unrest in China: A Case From Sichuan,” in (2005) 19:1 *Columbia Journal of Asian Law* at 235-292.

⁴⁴ See e.g., Wang Yuanzhi and Cao Keqi, (2008) 31:6 “Wuquanfa dui nongmin tudi quanyi zhi baohu” (On the protection of peasant’s land rights in Property Right Law), in *Shanxi daxue xuebao (zhexue shehui kexue ban)* (*Journal of Shanxi University (Philosophy and Social Science)*), at 98-103. See also, Unirule Institute of Economics, “Chengshi hua beijing xia tudi chanquan de shishi he baohu” (Realization and protection of land rights under the background of urbanization), online: Unirule Institute of Economics <<http://www.unirule.org.cn/xiazai/20071/35.pdf>>.

assets of all the central State-owned enterprises totals over RMB 18 Trillion (CAD 3 Trillion), and 80% of which are in the listed SOEs.⁴⁵ What needs to be noted is that this only refers to the assets of the SOEs owned and managed by the Central Government, and it does not include the statistics of the SOEs owned by sub-national levels of government. Therefore, compared to the size of government procurement of the country, which counts about RMB 700 billion,⁴⁶ the assets in China's SOEs can be even more vulnerable to corruption if it is not regulated in an effective way to be prevented from being traded illegally and at unreasonably low prices.

Similarly, in the case of Japan, selling public assets to the private sector also drew various controversies. Following the privatization of Japanese postal services, many public assets of the postal services were sold to private sectors at unreasonably low prices. The case of "kanpo no yado" is a typical example, in which 70 hotels worth JPY240 billion in total were proposed to be sold collectively by the publicly-owned Japanese Postal Services to private real estate

⁴⁵ See "Zhi quniandi zhongyang qiye zichan yi jiejin 18 wan yi yuan" (By the end of last year, the assets of central SOEs total about 18 billion), *Xinhua News* (23 June 2009), online: Xinhua News <http://news.xinhuanet.com/fortune/2009-06/29/content_11621278.htm>. To ensure the accuracy of the Chinese language materials and cases collected online, most of the Chinese online materials collected in this thesis come from two major official media in China: the Xinhua Net, which is the official website of the official Xinhua News Agency in China; and the official website of the People's Daily, which is the major official newspaper of the Chinese Communist Party and the Chinese Central Government.

⁴⁶ See, *supra* note 10.

development company at the price of JPY1.09 billion.⁴⁷ This proved to be even more controversial due to the fact that the president of the Orix Real Estate Group, the proposed buyer, was found to be the Chairman the Government-appointed Committee for the Privatization of Postal Services.⁴⁸

1.2.3 Transparency as a Major Issue in Public Contracting

In the efforts to tackle the corruption problem in public procurement, the most notable work has been done by OECD.⁴⁹ According to the OECD, transparency and accountability are identified as “key conditions for promoting integrity”⁵⁰ and one of the “most effective deterrents to corruption”⁵¹ in public procurement by allowing the public to “scrutinize” government’s decisions and conducts and suppliers’ performance in procurement activities.⁵²

⁴⁷ “Minister of Internal Affairs & Communication Investigation on the Assets Evaluation is not transparent” *Sankei ShinBun* (13 January 2009), online: Sankei ShinBun <<http://sankei.jp.msn.com/topics/politics/11115/pl11115-t.htm>>.

⁴⁸ *Ibid.*

⁴⁹ See generally, Kenneth W. Abbott, “Rule-Making in the WTO, Lessons from Cases of Bribery and Corruption”, in Simon J. Evenett & Bernard Hoekman eds, *The WTO and Government Procurement*, (Northampton, MA: Edward Elgar Publishing 2006). See also, John Linarelli, “Corruption in Developing Countries and in Countries in Transition: Legal and Economic Perspectives”, in Sue Arrowsmith & Arwel Davies eds, *Public Procurement: Global Revolution*, (Hague: Kluwer Law International, 1998), at 131.

⁵⁰ OECD, *supra* note 9 at 10.

⁵¹ OECD, *Fighting Corruption and Promoting Integrity in Public Procurement* (Paris: OECD, 2005), at 11.

⁵² *Ibid.*

Transparency plays a central role in Public Contracting reform, and the role of transparency in Public Contracting will be further discussed in Section 1.4.3 of this chapter.

1.2.4. Secondary Policy Objectives in Government Procurement

However, transparency is an issue not only closely associated with preventing corruptions and other “illegitimate practices”, but also related to other concerns in public procurement.

Given the huge market of government procurement and the great discretionary power of the state in awarding contracts, governments always tend to use this power to achieve secondary policy objectives that are commercially unrelated to the primary purpose of the procurement.⁵³ These secondary objectives can be categorized in two categories according to the different purposes,

- a. Economic or commercial reasons, such as, supporting “infant” or disadvantaged industries, fostering small & medium size enterprises.

⁵³ See Arrowsmith, *supra* note 7 at 14-15, & 325. See also, Christopher McCrudden, “Social Policies in Public Procurement: A Legal Overview”, in Arrowsmith & Davies, *supra* note 49 at 219; Federico Trionfetti, “Discriminatory Public Procurement and International Trade” (2000) 23:1 *World Economy* 57-76.

- b. Social, environmental and other non-economic reasons, including those related to supporting social and ethnic minorities, environmental protection, and even for human rights purposes.⁵⁴

Secondary objectives can affect transparency as the state or the government enjoys a broader range of discretion in designing and achieving these goals.⁵⁵

On the other hand, since most of the secondary objectives serve domestic policy goals, it is only natural that government procurement, in achieving these domestic policy goals, always involves discriminatory behavior or practices against foreign suppliers.⁵⁶

Much research has been carried out and published in literature that deal with such discriminatory behaviors and particularly focus on under what conditions these objectives can be justified.⁵⁷ One work worth citing is related to social policy objectives. It is McCrudden's most recent work that systematically examines and justifies the use of government procurement as a tool in achieving social policy goals.⁵⁸

⁵⁴ *Ibid.*

⁵⁵ See Arrowsmith, *supra* note 7 at 327.

⁵⁶ *Ibid.*

⁵⁷ See e.g., Arrowsmith, *supra* note 7 at 325.

⁵⁸ See generally, Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, & Legal Change*, (Oxford: Oxford University Press, 2007).

1.2.5. Interrelationship among “Illegitimate Practices”, Secondary Objectives, Transparency, and Non-Discrimination

As we have seen above, “illegitimate practices”, such as corruption, nepotism, patronage; and secondary policy objectives of the state that can be justified under certain conditions, including those for commercial and social reasons; both are closely related to issues of Transparency and Non-discrimination. The Interrelations might be explained below:

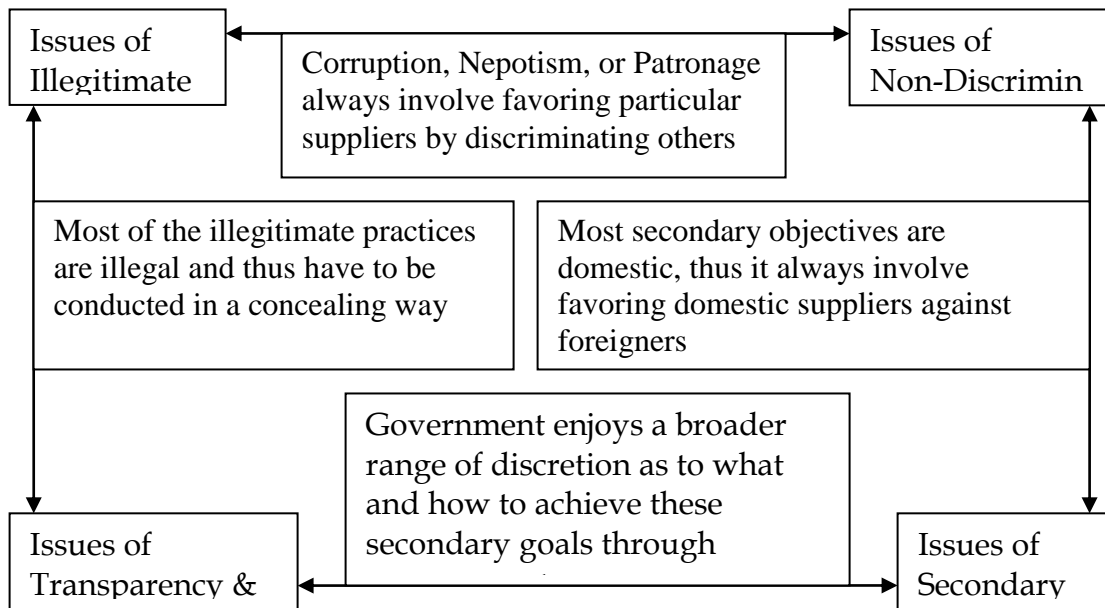


Figure 1

Interrelations of Transparency, Non-Discrimination, Illegitimate Practices, and Secondary Objectives

From a free trade perspective, transparency and non-discrimination are two primary issues in government procurement.⁵⁹ Transparency is without question a major issue, non-discrimination, from a domestic perspective however, might be better divided into two categories: discrimination against foreign products and discrimination against non-local domestic products. As will be discussed in Chapter 3, these two types of discriminations can be treated in different manners.

1.3. Why Is It Important to Regulate and Reform Public Contracting?

Public contracting, whether it is buying or selling, involves the use of public funds or assets. Thus, abuse of such activities may affect social welfare and human rights as a whole. Whereas achieving the goal of “Value for Money” in Public Contracting law can reduce the costs and save more public funds so that the saved money can be channeled to social welfare services, Public Contracting law, which regulates the behavior of government officials in business activities, is also closely associated with good governance. Hence Public Contracting reform also serves China’s overall domestic reform agenda.

⁵⁹ See Arrowsmith, *supra* note 7 at 154 & 448. See also, OECD, *supra* note 51 at 11.

1.3.1. Public Contracting and Human Rights

As mentioned earlier, Public Contracting concerns accumulation and distribution of public funds. Public funds are used for the public good. If more public funds are misused in public procurement or wasted in selling public assets, there will be less money that can be distributed or social welfare, and thus people in the society need to pay more out of their own pockets for the social benefits they are entitled to as fundamental human rights, which the government is supposed to be responsible for. For example, in public procurement, purchasing more expensive medical equipment may result in more costly medical tests for the patients. On the other hand, public selling, such as selling the land use rights to real estate developer or selling SOEs to private entrepreneur at an unreasonable low prices, will deeply affect the housing rights of the people living on the land that is to be developed and the labour rights of the workers in the SOEs that are sold to private companies.

Moreover, as mentioned earlier, public procurement is often used as a way to achieve such secondary policy objectives as rural development, environmental protection, and labour standard compliance.⁶⁰ Therefore, public procurement is closely associated with human rights as a set of sound procurement rules can encourage the supplier to comply with human rights standards.

⁶⁰ See generally, McCrudden, *supra* note 58.

1.3.1.1. Public Procurement and Health Rights

Following China's economic reform, the Chinese government no longer provided free healthcare to its people. Consequently the cost of healthcare has becoming increasingly burdensome for Chinese patients.⁶¹ An important reason of the high cost of healthcare is due to the corruption in procuring medical devices by public hospitals. For instance, Siemens AG, a German equipment giant that is listed in the U.S. Securities Exchange, was accused of paying a bribe of USD \$14.4 million "in connection with USD \$295 million in sales of medical equipment" to five Chinese hospitals.⁶² The Siemens case is just an example, and the reason why it became known to public is that it was disclosed by the Securities Exchange Commission of the United States. A lot of other cases that involve domestic suppliers are even more pervasive.⁶³ These corruption activities in procuring medical devices have significantly increased the cost and financial burden of the patients, and their rights to proper healthcare have been compromised due to procurement related corruption. According to an official report by experts

⁶¹ For the financial situation of China's public health system, see, e.g., Liming Lee, "The Current State of Public Health in China", (2004) 26 *Annual Review of Public Health* 327. See also, Sukhan Jackson, Adrian C. Sleight, Li Peng & Liu Xi-Li, "Health Finance in Rural Henan: Low Premium Insurance Compared to the Out-of-Pocket System", 181 *The China Quarterly* 137-157.

⁶² See U.S., Securities and Exchange Commission (SEC), News Release, "SEC Charges Siemens AG for Engaging in Worldwide Bribery", online: SEC <<http://www.sec.gov/news/press/2008/2008-294.htm>>.

⁶³ See e.g., "Yuan hunansheng renmin yiyuan yuanchang shouhui an zhenxiang" (The truth of the corruption case of the former head of the Hunan Provincial People's Hospital), *People's Daily* (29 December 2006), online: <<http://legal.people.com.cn/GB/42733/5231799.html>>.

commissioned by the National Development and Reform Commission (NDRC), the average profit rate of selling such medical equipments from dealers to hospitals is 112%, and therefore it is noted that the price in such procurement must be monitored,⁶⁴ and an effective way to control the high price of such medical equipment is to monitor the procurement process of the equipment.

1.3.1.2. Public Contracting and Social Welfare

In June 2009, in order to supplement the shortage of funds in China's Social Security Fund (*Quanguo Shehui Baozhang Jijin*), the Chinese Central Government has adopted an important policy, which stipulates that the ownership of 10 per cent of the shares in all the newly listed SOEs must be transferred to the National Council of Social Security Fund.⁶⁵ This makes the "security of funds" in the National Social Security Fund closely tied to the performance and conduct of SOEs.⁶⁶ Corruption in procurement and in selling assets of SOEs to private

⁶⁴ See National Development & Reform Commission (NDRC), News Release, "Woguo yiliao qixie shichang he jiage qingkuang de diaoyan baogao" (Research Report on the Domestic Medical Equipment Market and Price Situation) (2006), online: NDRC <<http://www.sdpc.gov.cn/yjq/W020060711533235210478.doc>>.

⁶⁵ See "Qidong guoyougu zhuanchi zhengce yizai chongshi shebao jijin" (The launch of the policy on transferring of state-owned shares is aimed at consolidating the Social Security Fund), *Xinhua News* (19 June 2009), online: Xinhua News <http://news.xinhuanet.com/fortune//2009-06/19/content_11569960.htm>.

⁶⁶ Discussions on the Transfer of state owned shares to the National Social Security Fund have been in place before the policy was officially adopted. See, for example, Chen Jiagui & Wang Yanzhong, *Zhongguo shehui baozhang fazhan yanjiu* (Report on China's Social Security Development 2001-2004), vol. 2 (Beijing: Social Sciences Academic Press, 2004). See also, Liu Xiaoxue & Chen Xinggen, "Some Reflections on the Transferring State-owned Assets to the National Social Security Fund" (2006) 5 *Journal of Shanghai Finance University* 49-53.

sectors may critically affect the security of funds in the National Social Security Fund, which is crucial to the social welfare of the Chinese people.

1.3.1.3. Privatization Policy and Housing Eviction

In a country where socialism is still the symbol of the country, in which all lands in urban areas belong to the state,⁶⁷ all rural lands are collectively owned at the local level,⁶⁸ although the state reserves the right to requisition rural lands.⁶⁹ As such, the land in both urban and rural area can be taken over for use by the state. Following China's economic reform and urban development, more and more land in urban areas have been taken by the state for real estate or infrastructure development, while in rural area, lands were taken to advance industrialization and urbanization.⁷⁰ This became one major source of social unrest in China, as many people who lost their homes in urban China and farmers who lost both their homes and lands in the rural areas, could not get sufficient compensation. In most of these cases, corruption was involved.⁷¹ Real estate developers and other private firms who took these lands through the local government usually paid bribes to local officials in order to pay less compensation than the actual

⁶⁷ *Property Rights Law of the PRC*, 2007, Art. 47.

⁶⁸ *Property Rights Law of the PRC*, 2007, Art. 58.

⁶⁹ *Property Rights Law of the PRC*, 2007, Art. 42.

⁷⁰ See e.g., Benjamin W. James, "Expanding the Gap: How the Rural Property System Exacerbates China's Urban-Rural Gap" (2007) 20:2 *Columbia Journal of Asian Law* 451-491.

⁷¹ See e.g., Pils, *supra* note 43.

amount they were supposed to pay.⁷² As noted earlier, this is so called “Lease of Lands for Commercial Use” that Zhu Rongji refers to as one of the four major fields where corruption occurs.⁷³ This becomes a serious human rights issue as it violates people’s rights to adequate housing.

1.3.1.4. Public Contracting and Labor Rights

Public Contracting, both public purchasing and selling, is closely associated with labor rights. In terms of the selling issue, the privatization policy that was implemented in China’s SOEs has also created human rights issues that contribute to another source of social unrest. As a result of corruption, SOEs were sold to private owners at unreasonably low prices and assets in those SOEs were undervalued. Consequently, more and more workers that used to work in these SOEs were forced by the private entrepreneur to be laid off, and not only their rights to employment, but also their healthcare rights were also infringed upon due to the corruption in privatization.⁷⁴ This so called “Transfer of Assets Ownership”, which is one of the “Four Major Fields of Corruption” as discussed in Section 1.1.3.⁷⁵ On the other hand, public procurement also concerns labor

⁷² See e.g., Arjun Subrahmanyam, “Land Use in China: The Impact of the Economic Revolution” [November 2004] *China Law & Practice*.

⁷³ Zhu, *supra* note 15.

⁷⁴ See Dorothy J. Solinger, “Globalization and Human Rights for Workers in China”, in Mahmood Monshipouri, *et al* eds, *Constructing Human Rights in the Age of Globalization*, (Armonk, N.Y.: M.E. Sharp, 2003).

⁷⁵ See Zhu *supra* note 15.

rights. As mentioned in Section 1.2.4, public procurement is always used as a way to achieve secondary policy objectives, among which promotion of labor rights is one of the major policy goals.⁷⁶ Compliance with certain labor standards by suppliers in government procurement is a key requirement for contract awarding.⁷⁷ Therefore, both public purchasing and selling are closely related to labor rights.

1.3.2. Public Procurement and China's Domestic Reform

China's Accession to the World Trade Organization (WTO) in 2001 signaled a milestone in the country's economic development. More importantly, however, China's WTO membership also served the country's internal reform agenda:

"The Chinese government has embarked on this strategy for its own sake, not to fulfill treaty commitments to foreigners, and Chinese leaders have sought WTO membership not simply because they believe that it will open more markets to Chinese products, but because they see membership as giving them extra leverage to force through difficult changes in the domestic economic system."⁷⁸

⁷⁶ See generally, McCrudden, *supra* note 58.

⁷⁷ *Ibid.*

⁷⁸ Donald C. Clarke, "China's Legal System and the WTO: Prospects for Compliance" (2003) 2 *Washington University Global Studies Law Review* 97.

Similarly, China's current efforts in joining WTO's plurilateral Agreement on Government Procurement can also be seen as further effort aimed at its domestic institutional reform.

"Governments with genuine internal commitment to reform may, indeed, find membership of international agreements valuable for entrenching domestic reforms against domestic political opposition".⁷⁹

Thus, the efforts of joining to the GPA present a need to reform the national procurement system and, even further, the need to improve the domestic government and legal system by promoting good governance, since "an effective public procurement system has been seen as an important aspect of this good governance".⁸⁰ The relationship between government procurement and political and legal system in the Chinese context can be seen with reference to the following:

"The existing Chinese practice of government procurement leaves much to be desired, particularly seen in the light of the GPA. Mostly the problems are structural, tied stubbornly to the Chinese political and legal system."⁸¹

⁷⁹ See Arrowsmith, *supra* note 7 at 6-7.

⁸⁰ *Ibid.*

⁸¹ Kong Qingjiang, *China and the World Trade Organization* (Singapore: World Scientific, 2002) at 200.

The above argument on the “stubborn tie” between the problems in government procurement and the Chinese political and legal system can also be understood with reference to the power relations and the interrelationship between various government agencies in China and the distinctive Chinese regulatory culture.

The power relations and the interrelationship between various government agencies in China have been described as the “fragmented authoritarian”, which means the “authority below the very peak of the Chinese political system is fragmented and disjointed”⁸² because the “functional divisions of authority among bureaucracies” always tend to be “self-supporting” and protect their own interests.⁸³

While in a western liberal tradition the government can be described as an agency that requires political leaders and officials from within the government to be accountable to the subjects of regulation according to the norms of transparency,⁸⁴ in China’s distinctive regulatory culture, however, regulators

⁸² Kenneth G. Lieberthal, “The Fragmented Authoritarianism Model and its limitations”, in Kenneth G. Lieberthal & David M. Lampton, eds., *Bureaucracy, Politics, and Decision Making in Post-Mao China*, (Berkeley & Los Angeles: University of California Press, 1992) at 8-9.

⁸³ *Ibid.* However, conflicts of interest among different departments within the government are not unique in China. Similar situations also happen in other countries. For a useful explanation that examines the relationship between public procurement and organizational conflicts of interest in the United States, see: Daniel I. Gordon, “Organizational Conflicts of Interest: A Growing Integrity Challenge” (2005) 35:1 *Public Contract Law Journal* 25-41.

⁸⁴ The Chinese regulatory culture has been described as a “patrimonial Sovereignty”, see Pitman B. Potter, “Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices”, (2003) 1 *Washington University Global Studies Law Review* 124-25.

and officials are only accountable to their superiors within the government but not to the subjects of rule.⁸⁵

Given the nature and the reality of the country's regulatory culture and political institution as discussed above, *Transparency, Judicial review, and the Uniform application of national laws and regulations* are identified as three key issues for China in complying with its WTO commitments,⁸⁶ and China's WTO membership serves as a strong driving force for the country to reform its administrative law regime.⁸⁷ It has been realized that "administrative law regime is very closely connected to the WTO",⁸⁸ and "the impact of the WTO to China's legal system is mainly about the system and perception of governance that is closely associated with the administrative law regime".⁸⁹ Furthermore, the administrative law regime has been recognized not only as "the most important component to realize rule of law", but also as "essential to realize the WTO's concept of Free Trade".⁹⁰ Most importantly, the "Construction of China's

⁸⁵ *Ibid.*

⁸⁶ Stanley B. Lubman, "Statement submitted to the Congressional-Executive Commission (CECC) on China", online: CECC <<http://www.cecc.gov/pages/hearings/020702/lubman.php>>.

⁸⁷ See Ying Songnian & Wang Xixin, "WTO yu zhongguo xingzheng fa zhidu gaige de jige guanjian wenti" (WTO and Several Key Issues in China's Administrative Law Reform) (2001) 5 *Zhongguo Faxue (Chinese Legal Sciences)* 5-15.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

administrative Law System is a de facto component of the reform of the political system".⁹¹

Therefore, Public Contracting reform can play a significant role in China's overall domestic reform.

1.4. Research Question in Scholarly Context

As noted earlier, the major research question of this thesis is to explore, in an authoritarian state like China, whether the country's Public Contracting law and its implementation can be improved to a high level of transparency that in turn achieves the goal of good governance of the government without fundamental changes to the country's political and judicial system. In other words, can the Western tradition of transparency and rule of law, which are rooted in the values of a liberal democracy, be adapted to local norms of governance in China?

The formation of this research question is based on existing literature on public procurement & domestic reform, selective adaptation, institutional capacity, transparency and good governance, and review and remedy procedures.

⁹¹ See, Luo Haocai, "Shehui zhuanxing zhong de woguo xingzheng fazhi" (Our Country's Administrative Law System in Social Transition) (2003) 1 *Guojia xingzheng xueyuan xuebao* (Academic Journal of the State Academy of Administration) 4.

1.4.1. Major Research Question: Public Procurement Reform and Political and Institutional System

The most influential scholarly work to this thesis is Schwartz's article in which he presents two different views on the relations between public procurement reform and the political and judicial system.⁹² On one hand, Schwartz notes the work of Lipset and Lenz,⁹³ and points out that the implication of their work to public procurement is that,

“Efforts to bring open government procurement systems to developing countries and transitional economies can not be divorced from broader efforts to institute free markets, democracy, and rule of law.”⁹⁴

This coincides with Linarelli, who argues that,

“The elimination of corruption in public procurement in developing and transitioning countries depends on much more than good procurement rules. It will depend on long-lasting and credible reform of the executive, legislative and

⁹² Joshua I. Schwartz, “On Globalization and Government Procurement”, in Sue Arrowsmith and Martin Trybus eds, *Public Procurement: The Continuing Revolution*, (Hague: Kluwer Law International, 2003), at 23.

⁹³ Seymour M. Lipset & Gabriel S. Lenz, “Corruption, Culture, and Markets”, in Lawrence E. Harrison & Samuel Huntington eds., *Culture Matters: How Value Shape Human Progress*, (New York: Basic Books, 2000), at 112-124.

⁹⁴ Schwartz *supra* note 92 at 33.

judicial organs of state that surround the procurement system and upon which a properly functioning procurement system depends for its viability.”⁹⁵

However, Schwartz argues that,

“Procurement modernization and reform need not await a complete political and cultural transformation. Rather the usually imperfect institutions that are the hallmark of a society in transition are often effective enough to sustain the momentum of reform.”⁹⁶

According to Schwartz, “building supporting governmental and social institutions is more difficult than simply adopting a system of legal rules.”⁹⁷ Adaptation of legal institutions from western countries to developing countries is a long-term process. Development of judicial and administrative institutions should be synchronized to the development of democratization and should be undertaken “in a fashion that is respectful of national, cultural and political circumstances that may require foreign models”.⁹⁸

Furthermore, Schwartz points out that an “integrated but flexible approach”, at the local level, is more functional in adapting foreign models of procurement

⁹⁵ Linarelli, *supra* note 49 at 125.

⁹⁶ Schwartz, *supra* note 92 at 45.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

rules than “slavish copying of foreign models and rigid adherence to preordained development sequences are likely to be counterproductive”.⁹⁹ This approach, together with the two contradictory views on the relation between procurement reform and political and institutional reform suggest the paradigms of *Selective Adaptation* and *Institutional Capacity*.

1.4.2. Selective Adaptation

In Schwartz’s article, by drawing on Carothers’ book, he also argues that “the process of presenting procurement reforms must reflect a consensus of a range of developed and developing countries, rather than exclusively reflecting U.S. or EU norms”.¹⁰⁰ This view is also shared by Simmons who argues that “where international rules do not comport well with indigenous legal culture, expectations for compliance should not be high”.¹⁰¹ This is because, according to Bull, “law could influence compliance only in the presence of a social system marked by shared norms and beliefs”.¹⁰² These arguments reveal that adaptation of non-local procurement rules is dependant on compatibility with local “underlying norms”. As a matter of fact, this concerns a dynamic of Selective Adaptation “by which non-local institutional practices and organizational forms

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ Beth A. Simmons, “Compliance with International Agreements” (1998) 1 *Annual Review of Political Sciences* 84.

¹⁰² See generally, Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, (New York: Columbia University Press, 1980).

are mediated by local norms".¹⁰³ According to Potter, non-local rules, such as international or foreign laws, are always interpreted selectively to meet with local norms. This coincides with Morgenthau's notion that "governments generally retain the right to interpret and apply the provisions of international agreements **selectively**".¹⁰⁴

Selective adaptation, according to Potter, concerns, first of all, the understanding of the contents and effects of both local and non-local (foreign and/or international) norms upon which domestic and foreign rules are based and this is described as the element of "*perception*" in Selective Adaptation.¹⁰⁵ In Public Contracting laws, this means the understanding by the local legislators and officials in China or in other transitional countries on the content and effects of their domestic procurement laws, foreign procurement rules of developed countries, and international procurement rules made by international organizations such as the WTO or the United Nations. Secondly, the adaptation of non-local rules depends on the degree of social acceptance by the local communities, and this is described as the element of "*legitimacy*".¹⁰⁶ As Fisher noted, "(non-local) rules will be better complied with when they follow commonly held notions of fairness and morality" because "perceived legitimacy of a legal rule or authority heightens the sense of obligation to bring behavior

¹⁰³ Potter, *supra* note 2 at 478.

¹⁰⁴ Simmons, *supra* note 101 at 80.

¹⁰⁵ Potter, *supra* note 2 at 478.

¹⁰⁶ *Ibid.*

into compliance with the rule”.¹⁰⁷ Thirdly, and most importantly, the degree of local mediation and adaptation of non-local rules depends on the element of “*Complementarity*”, which describes “ circumstances by which apparently contradictory priorities are combined for new effect, while still preserving essential characteristic of each component”.¹⁰⁸

From the author’s point of view, “*Complementarity*” is the most important element of *Selective Adaptation* in the context of discussion in this thesis. As mentioned earlier, the major research question of this thesis is to explore, in an authoritarian state, the prospect of improving China’s Public Contracting law and its implementation to a higher level of transparency that in turn achieves the goal of good governance without fundamental changes to the country’s political and judicial system. Why is it that China’s political and judicial system can not be radically changed? It is largely due to the political reality of China which determines the weak nature of the judiciary.

China’s judiciary has long been criticized for its lack of judicial independence due to its role in Chinese political institutions.¹⁰⁹ If so, how can a government, not in a form of liberal democracy achieve a high degree of government without being checked and balanced by an independent judiciary in a system of rule of

¹⁰⁷ Simmons, *supra* note 101 at 87.

¹⁰⁸ Potter, *supra* note 84 at 119.

¹⁰⁹ See generally, Stanley Lubman, *Bird in a Cage: Legal Reform in China after Mao*, (Stanford: Stanford University Press, 2000).

law? According to Peerenboom, in addition to the liberal democratic model, there are also different types of rule of law.¹¹⁰ Both Peerenboom and Lubman noted that in China state power is centralized and dominated by the Communist Party. There is no such thing as an independent judiciary in China.¹¹¹ However, Peerenboom also suggests that the legal system in China may be characterized by a “thin sense” rule of law where laws are relatively enforceable and “the gap between the law on the books and law in practice should be narrow”.¹¹² On the other hand, although the legal system may be labeled as a “thin sense of rule of law”, in the field of administrative law regime, it “produces comparatively suboptimal results because of a variety of context-specific factors”, such as “a weak judiciary, poorly trained judges and lawyers”, and the “citizenry, many of whom are afraid to challenge government officials”.¹¹³ In China, the power of the government is much stronger than that of the judiciary. Thus, judiciary power can not serve as a counter-balance to government power. As stated earlier, “the administrative power is far stronger than judicial power, and this is the reality which leads the administrative litigation system to be weak in nature”.¹¹⁴ Therefore, in cases and disputes concerning government procurement, which involve checking and regulating government officials, it is hard for individuals

¹¹⁰ See generally, Randall Peerenboom, *China's Long March toward Rule of Law*, (New York: Cambridge University Press, 2002).

¹¹¹ See generally, Lubman, *supra* note 109 and Peerenboom, *supra* note 110.

¹¹² See, Peerenboom, *supra* note 110, at 65.

¹¹³ See, Peerenboom, *supra* note 110, at 17.

¹¹⁴ See, Wang Zhenyu, “Zhengdi guansi weihe ling fayuan touteng?” (Why litigations on land expropriation become a headache for the court?) *Nanfang Daily* (20 October 2008) online: <<http://news.163.com/08/1020/08/4OMF8MIP00012Q9L.html>>.

and private sector actors to seek remedy from “a weak judiciary” and “poorly trained judges and lawyers”. Government procurement is a typical area where the government officials’ action and behavior may strongly affect the interest of citizens and private enterprises. Moreover, government procurement is a highly technical field, in which cases should not be handled by “poorly trained judges”. As discussed earlier, “public procurement law tends to be comprised of a set of rules to foster government accountability to the public, or bureaucratic accountability to the public treasury.”¹¹⁵

Because of the reluctance by the Communist Party to reform the country’s political and judicial system, it is hard to expect that the current regime will be changed soon. However, it does not necessarily mean that nothing can be done to improve Public Contracting regulations before a complete political and judicial reform. As mentioned earlier, “procurement modernization and reform need not await a complete political and cultural transformation.

Rather the usually imperfect institutions that are the hallmark of a society in transition are often effective enough to sustain the momentum of reform.”¹¹⁶

Therefore, the major research question can be better understood in light of Selective Adaptation as “Whether and how a set of procurement rules of transparency and rule of law borrowed from the western tradition of rule of

¹¹⁵ John Linarelli, “The WTO Transparency Agenda: Law, Economics, and International Relations Theory”, in Arrowsmith & Trybus, *supra* note 92 at 250.

¹¹⁶ Schwartz, *supra* note 92 at 45.

law can be adapted to and function in China's state procurement system to promote good governance in the Chinese government while the Communist Party's authoritarian political system and its dominance in judicial system can be preserved without a radical reform". As such, the feature of "Good Governance" and "Transparency" must be clearly defined. This can be discussed by reference to the paradigm of "*Institutional Capacity*".

1.4.3. Good Governance, Transparency, Rule of Law, and Judicial Independence

It is useful to start by specifying the meaning of "Good Governance", "Transparency", "Rule of Law", and "Judicial Independence". Although all of these terms can be defined in different ways under various contexts, due to the volumes of works already done by the OECD & ADB on good governance and public procurement,¹¹⁷ it is useful to make a clear distinction between "good governance" and "transparency", and between "rule of Law" and "judicial independence" by citing the work of ADB and OECD.

First of all, according to the ADB, the term "governance" is defined as "the manner in which power is exercised in the management of a country's economic

¹¹⁷ See e.g., ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, *Curbing Corruptions in Public Procurement in Asia and the Pacific: Progress and Challenges in 25 Countries*, (Manila: Asian Development Bank, 2006).

and social resources for development”, and “good governance” has four key elements, including participation, predictability, transparency, and accountability. Whereas “participation” refers to the democratic system of the country, “predictability” concerns rule of law.¹¹⁸ Moreover,

“Transparency refers to an environment in which the objectives of policy, its legal, institutional, and economic framework, policy decisions and their rationale, data and information related to monetary and financial policies, and the terms of agencies’ accountability, are provided to the public in a comprehensible, accessible, and timely manner”.¹¹⁹

“Transparency refers to the availability of information to the general public and clarity about government rules, regulations, and decisions. It can be strengthened through the citizens’ right to information with a degree of legal enforceability. Transparency in government decision-making and public policy implementation reduces uncertainty and can help inhibit corruption among public officials.”¹²⁰

“(Accountability means) Public officials must be answerable for government behavior, and responsive to the entity from which their authority is derived.”¹²¹

¹¹⁸ ADB, *Governance: Sound Development Management*, (Manila: Asian Development Bank, 1999), at 3.

¹¹⁹ OECD, *Glossary of Statistical Terms*, online: OECD <<http://stats.oecd.org/glossary/detail.asp?ID=4474>>.

¹²⁰ ADB, *supra* note 118 at 7.

¹²¹ ADB, *supra* note 118 at 5.

Therefore, as we may find, the concept of “good governance” is a term as defined by the ADB in a broad sense that concerns transparency, accountability, rule of law, and democracy.¹²²

In the Chinese context, the terms of transparency and accountability can be contrasted with the term “responsible agency” and “patrimonial sovereignty”.¹²³ While “Responsible agency” is used to describe government, in a western liberal tradition, an agency requires political leaders and officials from within the government to be **accountable to** the subjects of regulation according to the norms of transparency; “patrimonial sovereignty” is used to describe China’s distinctive regulatory culture where regulators and officials are only accountable to their superiors within the government but not to the subjects of rule.¹²⁴ As mentioned earlier, transparency and accountability are key features in public procurement in preventing corrupt and discriminatory practices and behaviors.¹²⁵ The above description of distinction of regulatory culture between China and the West gives a general picture that suggests the fundamental issues present in China’s legal system and government institutions that would without question undermine the ability of the government in achieving goals and values of the its procurement activities.

¹²² ADB, *supra* note 118 at 3.

¹²³ Potter, *supra* note 84 at 124-125.

¹²⁴ *Ibid.*

¹²⁵ See OECD, *supra* note 8 & 9 at 9.

The above discussions strictly illustrate an overarching picture of transparency, in the context of Public Contracting laws. Transparency can be further discussed with reference to “Information Transparency” and “Regulatory Transparency”.¹²⁶

Similar to the general definition above, transparency in public procurement is, first of all, an “information problem”.¹²⁷ According to the EU, in the context of public procurement,

“Transparency means ensuring that information on procurement rules, practices, and opportunities are made widely available in an easily usable form to all interested parties (and particularly potential suppliers), as well as ensuring the right to access to that information. Furthermore, procurement policies and practices should be seen to be transparent and information provided should be respected.”¹²⁸

¹²⁶ See generally, Ljiljana Biukovic, “Selective Adaptation of WTO Transparency Norms and Local Practices in China and Japan” (2008) 11:4 *Journal of International Economic Law* 803-825.

¹²⁷ Linarelli, *supra* note 115 at 257.

¹²⁸ WTO, *Communication from the European Committees, Ensuring the Transparency in Procurement Policies and Practices*, WT/WGTGP/W/17 (May 25, 1998).

In scholarly works, transparency in public procurement is seen as “both (i) the rules to be applied in conducting procurements and (ii) information on specific procurement opportunities that are made clearly known to affected parties”.¹²⁹

Nevertheless, transparency in procurement is not only “characterized by clear rules”, but also “(characterized) by means to verify that those rules were followed”.¹³⁰ This suggests another aspect of transparency, the “Regulatory Transparency”, which means “the capacity of regulated entities to identify, understand, and express views on their obligations under the rule of law”.¹³¹ In this sense, “Transparency is an essential part of all phases of the regulatory process - from the initial formulation of regulatory proposals to the development of draft regulations, through to *implementation, enforcement, and review and reform*, as well as the overall management of the regulatory system”.¹³² In this sense, transparency increases the government accountability because,

“Transparency encourages the development of better policy options, and helps reduce the incidence and impact of arbitrary decisions in regulatory

¹²⁹ Sue Arrowsmith, “Towards an Agreement on Transparency in Government Procurement” (1998) 47 *International & Comparative Law Quarterly* 796.

¹³⁰ Gosta Westring and George Jadoun, *Public Procurement: Manual for Central and Eastern Europe* (Paris/Turin: SIGMA/International Training Centre of the ILO, 1996) at 6.

¹³¹ OECD, *Regulatory Policies in OECD Countries: From Intervention to Regulatory Governance* (Paris: OECD, 2002) at 65.

¹³² *Ibid.*

implementation. Transparency is also rightfully considered to be the sharpest sword in the war against corruption".¹³³

Therefore, while "information transparency" describes transparency in a thin sense, "regulatory transparency" embraces the true meaning of "accountability", which interprets transparency in a comprehensive manner.

Whereas the term "transparency" can be discussed in a broader sense of "regulatory transparency" that embraces the meaning of both "transparency" and "accountability", rule of law can be seen as a "societal goal served by judicial independence", or in other words, judicial independence is "a means to secure" the goal of rule of law.¹³⁴

Again, if we revisit the major research question of this thesis, it can be better explained in this way: Good governance is an ultimate goal for the Chinese government to achieve by reforming China's public procurement without any radical and fundamental changes to the country's judicial and political reform. If good governance can be seen as a set of four key elements: democracy (participation), rule of law (predictability), transparency, and accountability,¹³⁵ then the question may be better described as two folded. Firstly, is the element of

¹³³ *Ibid.*

¹³⁴ *Re Provincial Court Judges*, [1997] 3 S.C.R. 3

¹³⁵ ADB, *supra* note 118 at 3.

democracy a precondition for the realization of the other three elements? Can a higher level of transparency, accountability, and rule of law be achieved without a liberal democracy? Secondly, if judicial independence is “a means to secure” rule of law, is judicial independence the only means to secure the goal of rule of law? Is it possible to achieve the goal of rule of law by other means? Can a certain level of rule of law in public procurement be achieved through the approach of an independent review body without an independent judiciary? And this perhaps is so called a rule of law “in a thin sense” as described by Peerenboom.¹³⁶

1.4.4. Transparency, Institutional Capacity, Administrative Law Reform, and the Importance of Enforcement

Transparency in public procurement reform has a strong linkage to institutional capacity and administrative law. As Linarelli points out,

“A policy of transparency runs through the **constitutional and administrative law** of mature **participatory democracies**, manifested in **rules** and **institutions** designed to make government operations open to public scrutiny”.¹³⁷

¹³⁶ See, Peerenboom, *supra* note 110, at 65.

¹³⁷ Linarelli, *supra* note 115 at 248.

Therefore, in a country without a participatory democracy, issues of transparency may arise in “rules and institutions”. From the institutional perspective and in the Chinese local context, this may be understood by reference to the paradigms of Institutional Capacity.

Whereas the dynamic of Selective Adaptation helps to understand interpretation and making of local rules through the lens of the resonance between non-local rules and local norms, institutional capacity determines the implementation and functionality of local rules. According to Potter, institutional capacity can be examined by reference to issues of *Institutional Purpose* and policy goals, *Geographical Location* of institutions, *Institutional Orientation* such as “habitual practices that inform institutional performance”, and *Institutional Coherence* that concerns the integrity of “individuals within institutions”.¹³⁸ The case studies conducted throughout this thesis will be discussed by reference to these institutional issues.

Rules of transparency in public procurement also strongly inform the administrative law regime of the country. As Linarelli notes,

“Public procurement law is a blend of contract rules and administrative law rules...public procurement law exists at the intersection of public and private

¹³⁸ Potter, *supra* note 2 at 471-474.

law, as a set of principles intended to regulate the activities of the sovereign in the market place. Much of public procurement law is a set of rules imposing a framework of public law on the offer and acceptance rules found in contract law. Public law reflects public law values. Public procurement law tends to be comprised of a set of rules to foster government accountability to the public, or bureaucratic accountability to the public treasury.”¹³⁹

Because of the uniqueness of public procurement law, a procurement reform, or a Public Contracting law reform, is a de facto administrative law reform. As mentioned earlier, the administrative law reform is essential to China’s political reform.¹⁴⁰ Procurement procedures, however, as Linarelli argues in another book, “can not be a substitute for enforcement”.¹⁴¹ According to Linarelli, “indeed, legal and institutional reform outside of public procurement perhaps should precede procurement reform”,¹⁴² because a country can not move onto the reform of political and bureaucratic institutions with a judiciary that is corrupt or not independent.¹⁴³

Furthermore, Linarelli argues that,

¹³⁹ Linarelli, *supra* note 115 at 250.

¹⁴⁰ See Luo, *supra* note 90.

¹⁴¹ Linarelli, *supra* note 49 at 135.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

“Procurement reform often occurs in a vacuum, with little or no emphasis on fundamental institutional reform. It is an overlay on existing legal and administrative frameworks. If procurement reform cannot occur in the absence of such fundamental reform, however, then there would seem to be little that the improvement or tightening of procurement procedures alone will do.”¹⁴⁴

Enforcement is the preceding issue in procurement reform, because it is not only a way to provide remedy to aggrieved suppliers, but also an approach to ensure and monitor the lawful practice of the procuring entity:

“(An enforceable right of review for bidders when public entities breach the rules) is particularly important because experience has shown that the most successful procurement systems are those that provide bidders with a legal basis to challenge the actions of procurement officials when they breach the rules”.¹⁴⁵

Bearing all of these in mind and by taking a “flexible approach”, the major reform proposals to be suggested in this thesis is the reform of the procedures, rules, and institutions of enforcement and review in public procurement, but not the bidding, tendering, or contract awarding procedures.

¹⁴⁴ *Ibid.*

¹⁴⁵ Robert R. Hunja, “Obstacles to Public Procurement Reform in Developing Countries”, in Arrowsmith and Trybus, *supra* note 92 at 15.

1.5. Methodology

1.5.1. Comparative Method as Major Research Methodology

The discussions above have shown that Public Contracting law is closely associated with the local conditions and the underlying social norms in the society and issues within the institution. Therefore, a comparative approach will be used throughout this thesis because it “helps us to understand the dynamics of social, as well as legal change, and it can give us important clues as to the structure and location of power within a given society”.¹⁴⁶

This thesis will conduct case studies in China and Japan on Public Contracting law, and will also compare the procurement enforcement systems in China, Japan, and Hong Kong.

Comparing China with Japan in Public Contracting will be of particular value. First of all, China and Japan share a common cultural background with regard to an adherence to Buddhism and Confucianism.¹⁴⁷ It is widely recognized that

¹⁴⁶ Mary Ann Glendon, Paolo G. Carozza, & Colin B. Picker, *Comparative Legal Traditions: Text, Materials and Cases on Western Law*, 3rd ed. (St. Paul, MN: West Group, 2006) at 14.

¹⁴⁷ For shared cultural background such as between China and Japan, see, for example, Chen, Kenneth Kuan Sheng, *Buddhism in China: A historical survey*, (Princeton, NJ: Princeton University Press, 1964). In terms of the influence of the Confucianism, see, for example, Max Weber, *The Religion of China: Confucianism and Taoism*, (Macmillan, 1951). Because of the shared cultural background, literatures by Kurt Ebert, Rene David and John Brierley

Japanese culture greatly borrowed from and was influenced by China. More importantly, regarding the role of the government, both Japan and China are centralized nation-states where political, economic, and social powers are highly centralized to the national government. Both of these countries have been ruled by one party for decades of time without a switch of power. Although Japan is seen as a liberal democracy, however, it has been ruled under the Liberal Democratic Party ever since 1995.¹⁴⁸ The Centralized nation-state and the long-time one party rule is a distinct feature of Japan's political system that are different from Western liberal democracies, most of which are federal governments with regular switches of power. These changes in power occur regardless of whether they follow a common law tradition such as Canada, the United States, the United Kingdom, or Australia, or civil law system such as Germany or France. Although it can be argued that the UK and France are not federal republics, the power of their central government are not as huge as that of Japan or China. Therefore, China and Japan share similarities in the role played by their governments.

categorize Japanese law together with Chinese law as "Religious and Traditional Law" under "Laws of the Far East". See Kenneth L. Port, "The Case for Teaching Japanese Law at American Law Schools" (1994) 43 *DePaul Law Review* 643.

¹⁴⁸ In terms of the influence of Confucianism on Japanese political system, see, for example, Sylvia Brown Hamano, "Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights" (1999) 1 *University of Pennsylvania Journal of Constitutional Law* 415.

1.6. The Structure of the Thesis

The Structure for the remainder this thesis is as follows:

Chapter 2 of this thesis will focus on the legal framework of China's public procurement. It will be followed by Chapter 3, in which several case studies on public procurement in China will be presented to analyze and explain the existing procurement laws and issues.

In Chapter 4, a comparative approach will be taken while looking at procurement rules and cases in Japan in light of WTO's Agreement on Government Procurement.

Based on the discussion on previous chapters, in chapter 5 the author will present a proposal for reform with a set of policy suggestions before drawing final conclusions in Chapter 6.

1.7. Value of the Research

China is a country with the largest population in the world and huge social, cultural, economic diversity in the society. The incompatibility between its economic performance and political institutions is becoming a major source of a

set of social problems, such as income gap and human rights issues.¹⁴⁹ Given the reality of “Patrimonial sovereignty” as nature of the country’s regulatory culture, how to improve the governance through greater transparency and enhanced accountability remains a crucial question for decades to follow. Similar institutional problems also weigh on the judicial system which extremely undermines rule of law and judicial independence. This thesis seeks a new approach to reform Public Contracting and enhance government accountability and transparency while still preserving the fundamental political system of the country.

This thesis also supports the theory of Selective Adaptation, especially the element of “Complementarity”, as a useful approach to understand and explain the reception of international and foreign rules locally. As a widely recognized rule-oriented member of the GPA, Japan has a liberal democracy with constant political scandals with regard to public contracting, in both buying and selling. These are deeply rooted from its local political and socioeconomic conditions as well as its historical and cultural background. Comparing and analyzing examples and cases that arise from Public Contracting laws and practices in China and Japan and contrasting it to international treaty rules will be helpful to examine the dynamic of selective adaptation in different cultural contexts.

¹⁴⁹ See e.g., James, *supra* note 70.

Chapter 2:

Public Procurement in China: Regulatory Framework

2.1. Public Procurement in China: Size and Coverage

Given the nature of the local regulatory culture in China as explained in the first chapter, as well as the fact that government procurement is “most vulnerable to corruption”,¹⁵⁰ it is not difficult to understand why “Construction works” and “government procurement” are identified by Zhu Rongji as fields “where, as proved by many facts, many severe corruption cases were born”.¹⁵¹ This can be understood from the sheer scale of government procurement.

Following the fast economic growth of China, public procurement has become a huge market and one of the major fields of corruption. The size of public procurement in China, at both central and local level, has increased 39.5% annually since 2002 and totals over RMB 400 billion (USD 60 billion).¹⁵²

According to the OECD, the proportion of government procurement in the GDP should be even higher in many non-OECD countries than OECD countries.¹⁵³

¹⁵⁰ OECD, *supra* note 9 at 9.

¹⁵¹ Zhu, *supra* note 15.

¹⁵² See, *supra* note 10.

¹⁵³ OECD, *supra* note 8 at 9.

In a country with one of the largest state sectors in the world and where economic power is highly centralized by the state, China's government procurement, however, only accounts for 1.6 percent of the country's GDP.¹⁵⁴ Is this because government expenditures in China are much lower than in other OECD countries? This is certainly not the case. According to a report by the Development Research Center of the State Council, many products, services, and infrastructural construction projects that are included in the OECD countries' calculation for Government procurement, are not covered in the Chinese context.¹⁵⁵ This narrow range of coverage is also proven by the fact that the government expenditures on official cars and other relevant costs count over RMB 400 billion, which, alone, equals the official figures on the country's size of Government procurement.¹⁵⁶ Moreover, the costs incurred by the government for government employees' dining-and-wining (Gong Kuan Chi he) account for another RMB 200 billion.¹⁵⁷ The above expenditure figures not only show the rather large size of China's government procurements but also demonstrate the incompatibilities in the statistic method for computation in public procurement

¹⁵⁴ This can be calculated based on the statistics provided separately, for the Statistics in GDP. See "Zhongguo GDP zenzhang 11.4%" (China's GDP increased by 11.7% in 2007) *Xinhua News* (24 January 2008), online: Xinhua News <http://news.xinhuanet.com/fortune/2008-01/24/content_7485380.htm>. For statistics on government procurement, see Ministry of Finance of PRC, *supra* note 10.

¹⁵⁵ Development Research Center of the State Council, "Zhengfu caigou cai jingji fazhan zhong de zuoyong yu diwei" (The role and importance of government procurement in economic development) *People's Daily* (January 21, 2008) online: *People's Daily* <<http://theory.people.com.cn/GB/49154/49155/6800155.html>>.

¹⁵⁶ "Gongche xiaofei, gongkuan chihe yinian chaoguo liuqian yi" (Government expenses on officials cars, dining & meals exceed 600 billion last year) *People's Daily* (17 March 2006), online: *People's Daily* <<http://finance.people.com.cn/GB/1047/4212272.html>>.

¹⁵⁷ *Ibid.*

between China and OECD countries. It is not only in terms of statistical method, but more importantly, the scope of domestic rules governing procurement – compared to the *actual* size of the government procurement, those covered and regulated under domestic laws are just a small portion. In other words, those not covered are totally subject to the discretion of procuring entities, or, its political superiors.¹⁵⁸ Furthermore, as mentioned earlier, China’s SOEs, whose purchasing power are even stronger than the government’s, are not covered by the state procurement laws and regulations.

All of these points raise the question of “how and to what extent is government procurement regulated legally in China?” Therefore, it is important to understand the public procurement regulatory framework of the country.

2.2. Regulatory Framework of China’s Public Procurement

2.2.1. Laws, Regulations, and Rules

The Chinese legal system, according to the country’s Legislation Law, consists of various levels, types, and authorities of *Laws, Regulations, and Rules*.¹⁵⁹

¹⁵⁸ See National Development and Reform Commission (NDRC), *supra* note 38.

¹⁵⁹ *Legislation Law of the People’s Republic of China*, 2000, Art. 2.

Laws (“Fa lv”)

According to the Constitution and the Legislation Law of China, the “*Laws*” consist of legislations made and enacted by the National People’s Congress (NPC) and/or its Standing Committee (NPCSC).¹⁶⁰ *Laws* are the first tier in the legal system. In terms of public procurement, it includes the *Government Procurement Law (GPL, 2002)*, *Tendering and Bidding Law (TBL, 1999)*, and the *Criminal Law (Rev. 2009)*.

Regulations (“Fa gui”)

Besides those national laws enacted by the NPC and/or the NPCSC, there are also *Regulations (“Fa gui”)* that lays on the Second Tier of the legal system. There are two kinds of regulations: *Administrative Regulations (“Xing zheng Fa gui”)* and *Local Regulations (“Di fang xing Fa gui”)*.

Administrative Regulations are those made by the State Council that should be applied nation-wide.¹⁶¹ *Administrative Regulations* are made for two purposes: one is to facilitate the implementation of the national laws, and the other is to regulate administrative matters for which the State Council as the Country’s highest executive branch should be responsible. An important feature of China’s

¹⁶⁰ *Legislation Law of the People’s Republic of China*, 2000, Art. 7.

¹⁶¹ *Legislation Law of the People’s Republic of China*, 2000, Art. 56.

regulatory culture is that the *Laws* made by the NPC or the NPCSC always tend to be ambiguous which only provide with some general principles, whereas the *Administrative Regulations*, which are usually in the form of “Implementing Regulations for the XX Law”, normally serve as a detailed version of the *Law* to provide practical guidance. However, in the field of public procurement, unfortunately, the implementing rules have not been promulgated yet. Although the *TBL* and the *GPL* were taken into effect in 1999 and 2002 respectively, it took a very long time for the State Council to draft the implementing regulations of these two major laws governing government procurement. The “Draft for Comment” version of the *TBL* was published by the State Council in October 2009 and welcomed comments from the public. The “Draft for Comment” version of the *GPL* was not made to public until January 12, 2010. Since the *TBL* and the *GPL* came into effect in 1999 and 2002 respectively, China’s public procurement is regulated with the absence of *Administrative Regulations*. Instead, *Administrative Rules* made by the Ministry of Finance (MOF) and the National Development & Reform Commission (NDRC) serve as detailed guidelines in public procurement to supplement the *GPL* and *TBL*.

Local regulations are those regulations made by the provincial-level People’s Congress and are applied locally. According to the Legislation Law of the PRC, *Local Regulations* are subordinate to the national *Laws* and *Administrative*

Regulations, so they can not be in conflict with the latter.¹⁶² In the area of public procurement, most of the provinces in China have made their own *Local Regulations* in the form of “Implementing Rules” to provide detailed procurement guidelines in addition to the *Administrative Rules* made by the aforementioned MOF and the NDRC.

Rules (“Gui Zhang”)

Whereas laws and regulations belong to the first tier and second tier respectively in China’s legal system, *rules* can be considered as the third tier in the country’s legal system. Similar to regulations, there are also two kinds of *rules*:

Administrative Rules (“Bu men Gui Zhang”) and *Local Rules (“Di fang Zheng fu Gui Zhang”)*. *Administrative Rules* are made by the ministries, commissions and bureaus that are directly under the State Council,¹⁶³ and they serve as the implementation rules for the *Laws* and *Administrative Regulations*, and they are also applied nation-wide. As to be explained in detail in the following section, in China’s government procurement, the Ministry of Finance (MOF) is responsible for the implementation of the *GPL*, while the National Development & Reform Commission (NDRC) is in charge of the matters concerning the *TBL*.

¹⁶² *Legislation Law of the People’s Republic of China*, 2000, Art. 63.

¹⁶³ *Legislation Law of the People’s Republic of China*, 2000, Art. 71.

Local Rules are made by the provincial level governments for the purpose of local implementation of national *Laws, Administrative Regulations, and Local Regulations*.¹⁶⁴ In China's public procurement, provincial governments make even further detailed guidelines for their subordinate authorities to follow in conducting procurement. However, they do not necessarily appear as formal "Local Rules", but rather it may be made in the form of "notices" (*Tong Zhi*), or "decisions" (*Jue Ding*), which are so called "normative documents".¹⁶⁵

2.2.2. Government Procurement Law (GPL) and Tendering and Bidding Law (TBL)

The *Government Procurement Law of the PRC (GPL)* was adopted in 2002 by the National People's Congress Standing Committee (NPCSC). The *GPL*, together with the *Tendering and the Bidding Law (TBL)* that was adopted in 1999, are the two major laws that regulate government procurement in China.¹⁶⁶ While the

¹⁶⁴ *Legislation Law of the People's Republic of China*, 2000, Art. 73.

¹⁶⁵ "Normative Documents" refers to the binding government documents that exist in China's legal practice but not prescribed as a legal form of document in the *Legislation Law of the PRC*. For detailed discussion on "Normative Documents", see, Kong Qingjiang, "Conflict of Normative Documents and Its Management in China" (2009) 4:4 *Frontiers of Law in China* 633-646. See also, Peerenboom, *supra* note 110.

¹⁶⁶ One thing needs to be noted here is the technical assistance from the Asian Development Bank (ADB) during the drafting and formulation of China's Government Procurement Law. See Asian Development Bank (ADB), *Technical Assistance Completion Report PRC: Formulation of the Government Procurement Law*, ADB TA No.: 3631, online: ADB <<http://www.adb.org/Documents/TACRs/PRC/tacr-prc-3631.pdf>>. See also, Asian Development Bank, *Technical Assistance Report: Technical Assistance to the People's Republic of China for the Formulation of the Government Procurement Law*, TAR: PRC 34607, online: ADB <<http://www.adb.org/Documents/TARs/PRC/R41-01.pdf>>.

GPL focuses on the procuring entities, suppliers and methods in procurement of goods and services, the *TBL* regulates the tendering and bidding procedures in the procurement of construction projects.¹⁶⁷

In China's regulatory culture, most of the laws are initially drafted by one or a few ministries and commissions that are related to the legal issues of the bills. After the completion of initial drafting process, the draft will be submitted to the State Council for approval before it get sent to the National People's Congress for further revision and final adoption. In the case of the making of the *GPL*, the initial drafting work was handled by the Ministry of Finance (MOF) because in China the budget and the government funds used in public procurement are prepared and provided by the MOF at the central level and Department of Finance (DOF) at local level. For that reason, MOF and DOFs are prescribed in the *GPL* as the government agency responsible for monitoring and supervising the government procurement activities at the central and local level.

However, the *TBL*, on the other hand, is drafted by then the National Development and Planning Commission (NDPC), which is now reformed as and succeeded by the National Development & Reform Commission (NDRC). The rationale for assigning the drafting work to the DNPC instead of the MOF are the

¹⁶⁷ For a full discussions on the China's *GPL* and its relationship to the *TBL*, see e.g., Ping Wang, "China's Evolving Legal Framework on Public Procurement" (2004) 13:6 *Public Procurement Law Review* 285-318. See also, Ping Wang, "China's New Government Procurement Law" (2002) 11:6 *Public Procurement Law Review*, NA133-139.

construction projects, which is the main subject of the *TBL*, are usually related to infrastructure and other big government-funded projects. All of these require a great deal of government funding and thus must be approved by the then NDPC, now the NDRC at the central level and the local DPC or DRC at local level. As a result of this, it is prescribed in the *TBL* that procurement of construction works and infrastructure projects must be subject to this law.¹⁶⁸ More importantly, the NDRC is responsible for handling matters and disputes related to the *TBL*. In fact, the *TBL*, which only includes 68 articles, merely serves as binding guidelines for the tendering and bidding process, and the major issue of this legislation is its conflicting provisions with the *GPL* especially in terms of the supervisory authority of government procurement.¹⁶⁹ This thesis will focus on contents of the *GPL* rather than the *TBL*, but a notable case on the issue of the conflict of these two laws will be presented in the Chapter 3.

The content of China's *GPL* generally includes the following parts: 1) General provisions and principles; 2) Procuring entities; 3) Method of procurement; and 4) Bid challenge procedures.

¹⁶⁸ *Tendering & Bidding Law of the People's Republic of China* (hereinafter as "*TBL*"), 1999, Art. 3.

¹⁶⁹ See, Fuguo Cao, "China's Government Procurement Reform: From the *Bidding Law* to the *Government Procurement Law*", in Arrowsmith & Trybus, *supra* note 92 at 61-84. See also, "Government Procurement Requires Transparent Business", *People's Daily* (6 November, 2007), online: People's Daily <<http://society.people.com.cn/GB/41165/6486644.html>>.

2.2.2.1. General Provisions and Principles in China's GPL: Source of Domestic Preference and Secondary Policy Objectives

Some general provisions and principles that need to be followed in China's government procurement are set in the first chapter of the *GPL*. These include: the definition of procurement, goods, services, and construction works;¹⁷⁰ the general principles such as openness and transparency, fair competition, impartiality and good faith;¹⁷¹ procurement as a way to facilitate economic and social policy objectives such as environmental protection, development of remote and minority regions, supports to medium and small sized enterprises; preference and priority to domestic suppliers;¹⁷² and finance ministry and finance departments as the supervisory authority for government procurement

¹⁷⁰ *Government Procurement Law of the People's Republic of China* (hereinafter as "*GPL*") Art. 2. In terms of the categorization of the Goods, Services, and Constructions Works, the inconsistencies between the *GPL* and the *TBL*, such as the conflict over the tendering requirements for "Goods and Services in Construction Works", have been noted by scholars. See, Cai Chunhong, "Zhengfu caigou fa zhong de lifa jishu xiaci" (The Technical defects in the making of the Government Procurement Law) [2004] 2 *Faxue* (Legal Science) 28-33. See also, Wang, *supra* note 167 at 304-309. Some literatures also explain and give example of the definition of each category, see, Wang Yong, "WTO Zhenfu Caigou Xieyi yu Woguo Zhenfu Caigou Fa zhi Bijiao" (The Comparison between WTO's GPA and China's Government Procurement Law) [2002] 6 *Zhenzhi yu Falv* (Politics and Law) 75.

¹⁷¹ *GPL* Art. 3. Some Chinese scholars have discussed that these principles, such as openness and transparency, fair competition, impartiality and good faith, can all be explained and interpreted in light of and by reference to those similar principles set forth in WTO's GPA so that these principles in the statutory texts of the *GPL* can be more meaningful and practical. See, Zhang Zhiqian, "WTO yu Woguo Zhenfu Caigou Lifa" (WTO and China's Government Procurement Law Making) [2002] 7 *Dangdai Faxue* (Contemporary Law Review) 67. See also, Wang, *supra* note 163 at 74-75. See also, Zhou Hongjun & Dai Zhongxian, "WTO Zhenfu Caigou Xieyi yu Woguo Zhenfu Caigou Fa" (WTO's GPA and China's Government Procurement Law) [2003] 5 *Bulletin of East China University of Politics and Law* (Huadong Zhengfa Xueyuan Xuebao) 42.

¹⁷² *GPL* Art. 9 & 10. For comments on "Buy National" and other secondary policies, see, Wang, *supra* note 167 at NA134.

activities.¹⁷³ These principles, such as preference to domestic suppliers and social and economic policy objectives in government procurement are of particular importance in China's government procurement policy-making.

As mentioned in the first chapter, given the huge market of the government procurement and the state's great discretionary power in awarding contracts, the governments always tend to use this power to achieve secondary policy objectives that are commercially unrelated to the primary purpose of the procurement.¹⁷⁴ To support and complement these provisions in the *GPL*, another two laws were passed by the NPCSC in the same year to coincide with the adoption of the *GPL*. The first law is the *Law on Promotion of Cleaner Production* (LPCP), which states that governments at all levels shall give priority to purchasing products that conserve water and energy and products made out of recycled waste which are conducive to protecting the environment and resources¹⁷⁵. The *Law on Promotion of Small and Medium-sized Enterprises* (LPSME), provides that the government shall give priority to small and medium-sized

¹⁷³ *GPL* Art. 13. For a full explanation on the supervisory authority and enforcement review system provided in China's *GPL*, see, Wang Yaqin, "Woguo zhengfu caigou de zhiyi yu tousu zhidu" (The Query and Complaint System in China's Government Procurement) [May 2004] *Xingzheng yu Fa (Administration & Law)* 79-82. However, Wang Yaqin's article does not point out the problem in China's bid challenge system. For a critical review on this issue, see e.g., Jingbin Tian, "Enforcement of Public Procurement Rules in China", in Arrowsmith & Trybus, *supra* note 92 at 85-102. This issue will be explained in detail in Section 2.2.2.4.

¹⁷⁴ See Arrowsmith, *supra* note 7 at 14-15, 325. See also, McCrudden, *supra* note 53 at 219; Trionfetti, *supra* note 53 at 57-76.

¹⁷⁵ *Law of the People's Republic of China on Promotion of Cleaner Production*, 2002, Art. 16.

enterprises when purchasing goods or services.¹⁷⁶ Furthermore, except for the national legislations adopted by the National People's Congress (NPC) and its Standing Committee, there are also a number of regulations, rules, or normative documents governing or pertaining to government procurement issued by the State Council or various ministries, departments, and local governments. These rules or documents, however, are designed mainly to underline the *Government Procurement Law* and other national legislations rather than to supplement the latter. For example, aimed at being a nation with innovative technology, policy documents have been issued to prioritize the purchase of domestic products with innovative technology in government procurement¹⁷⁷. Recognizing the importance of government procurement in supporting independent innovation, the government ensures that priority is given to domestic companies with independent innovative technologies.¹⁷⁸

Secondary objectives may cause legal issues in government procurement. For example, secondary objectives can affect transparency as the state or the

¹⁷⁶ *Law of the People's Republic of China on Promotion of Small and Medium-sized Enterprises*, 2002, Art. 34.

¹⁷⁷ State Council, *the Supporting Policies for the Guidelines on National Medium- and Long-term Program for Science and Technology Development (2006-2020)* (hereinafter as "Supporting Policies for S&T Development"), c.4.

¹⁷⁸ Other similar policies include: government procurement will also be used to support domestic companies in formulating international technological standard; products with independent innovative technologies will be given priority even if the prices are higher than other domestic products; foreign companies will receive preferred treatment only when they have committed to transfer technologies to their local partners. See, *Supporting Policies for S&T Development*, Art. 22, 23, 25, 28, 33, 34.

government enjoys a broad range of discretion in designing and achieving these goals.¹⁷⁹ Moreover, since most of the secondary objectives are for domestic policy goals, it is natural that in achieving these domestic policy goals, government procurement always involves discriminatory behavior or practices against foreign suppliers.¹⁸⁰ A case study demonstrating this genre of discriminatory behavior follows in the chapter 3.

2.2.2.2. Procuring Entities Defined in the GPL

1). Exclusion of SOEs as Procuring Entities

Provisions on procuring entities are always an important feature in a country's state procurement law, because it provides limits and restrictions on the coverage of government procurement. In China's *GPL*, the procuring entities that are subject to the law are limited to "government agencies", "public institutions", and "publicly funded organizations".¹⁸¹ According to the definition, it includes government agencies, public schools and universities, hospitals, and research institutions. What needs to be noted is that SOEs are explicitly excluded from the *GPL*, and this is in accordance with China's commitment to the WTO upon its accession in 2001. However, pervasive corruption in procurement within China's

¹⁷⁹ See Arrowsmith, *supra* note 7 at 327.

¹⁸⁰ *Ibid.*

¹⁸¹ *GPL* Art. 2 & 15.

SOEs suggests the need to include procurement by the SOEs into the state procurement regime. This will also be discussed later in the chapter 3.

2). Procuring Agencies

According to the *GPL*, at the central level, a catalogue of goods and services should be maintained by the Ministry of Finance (MOF). All the procurement of the items listed on the catalogue by the Central government should be conducted through a procuring agency under the MOF. Similarly, at local level, a catalogue of goods and services should be maintained by local DOFs, and all the procuring entities under the local government should procure the listed items through the procuring agencies.

The institution of procuring agencies carries the purpose of lowering the administrative cost and improving the efficiency and professionalism of the procurement process. Procuring agencies established under the MOF or local DOFs are presumed to be highly efficient and professional, and it is supposed to prevent corruption in government procurement since suppliers would have no direct contact with procuring entities. However, in practice this makes the procuring agencies hotbeds for bribery. A notable case showcasing the corruption in procurement agencies is the case of the Guangzhou Municipal Government Procurement Center, in which almost all the employees of the

procurement center were charged for corruption.¹⁸² This reveals that the institution of procuring agency is a failure, and it can neither reduce the cost of government procurement, nor can it be a way to tackle corruption.

2.2.2.3. Methods of Procurement Prescribed in the *GPL* and the *TBL*

As mentioned earlier, while the procurement methods for goods and services are prescribed in the *GPL*, that of construction works are subject to the *TBL*.

According to the *GPL*, methods of procurement that can be used in China's government procurement include:

1. Open Tendering
2. Selective Tendering
3. Competitive Negotiations
4. Single Source Procurement
5. Request for Quotation (price information only)

As mentioned earlier, the drafting of both the *GPL* and the *TBL* were helped by the ADB through its technical assistance program, and during the drafting process of China's *GPL* and *TBL*, the *UNCITRAL Model Law on Procurement of Goods, Construction and Services* and other international and foreign instruments

¹⁸² See "Guangzhoushi zhengfu caigou zhongxin woan kaishen yuan zhuren chengren shouhui" (The case of the Guangzhou Municipal Government Procurement Centre is tried in the court, the former head pleaded guilty), *Xinhua News* (5 March 2008), online: Xinhua News <http://news.xinhuanet.com/local/2008-03/05/content_7718549.htm>.

were heavily borrowed from in the *GPL & TBL*, and as a result, the methods and procedures for procurement in both laws are rarely criticized by scholars or suppliers. Take the *TBL* for example, it is noted that,

“The most outstanding achievement, however, is with its improvement of procurement procedures. By modelling the Bidding law on modern international procurement legislation, those drafting the Bidding Law have achieved many improvements on some key points of the bidding procedures. These include a new provision on a publishing system for procurement notices, more emphasis on the principle of non-discrimination in qualification and drafting specifications, better bid opening systems, better evaluation and award systems and strengthened administrative measures for enforcement.”¹⁸³

However, the major issues in China’s government procurement are not about the procurement procedures, but it rather concerns the bid challenge procedures, the integrity, impartiality, and accountability of procurement officials, and the supervisory body.

2.2.2.4. Challenge Procedures Provided in the *GPL*

Another critical feature of the *GPL* concerns the bid challenge procedures provided in the *GPL* as a remedy to suppliers. This is by default the greatest

¹⁸³ See Cao, *supra* note 169 at 66.

source of criticism from outside observers due to the inability and inefficiency of the review body and the court.

According to the *GPL*, there are three-step bid challenge procedures for suppliers to follow: *queries*, *complaints*, and *litigations*.¹⁸⁴

According to the *GPL*, if suppliers have questions, or believe that their rights and interests have been infringed upon in procurement documents, the procurement process, or the result of bid-winning, or the completion of any transactions in government procurement activities, the suppliers may submit *queries* to the procuring entities or its procurement agency, and the procuring entities shall reply in a timely manner.¹⁸⁵ This is the first step.

If the supplier is not satisfied with the reply from the procuring entity, or if the procuring entity fails to give a reply within the prescribed time limit, the supplier may appeal to government procurement supervisory authorities in the corresponding level of government. This is defined in the *GPL* as a *complaint*.¹⁸⁶

According to the *GPL*, the DOFs and MOF's, both the local and central governments respectively, are in charge of supervision and administration of government procurement activities. The government procurement supervisory

¹⁸⁴ See *GPL*, c. 6.

¹⁸⁵ See *GPL*, Art. 51-54.

¹⁸⁶ See *GPL*, Art. 55.

authorities shall make a decision on the complaint and inform the supplier within 30 days after receipt of the complaint. The supervisory authorities may also inform procuring entities to suspend their procurement activities.¹⁸⁷ However, the same article of the *GPL*, also provides that other departments in the government may perform certain duties in supervision and administration of government procurement activities as well,¹⁸⁸ and more importantly, procurement of construction services are subject to the Tendering and Bidding Law that is beyond the control of the MOF or DOFs.¹⁸⁹ As mentioned earlier in this chapter, this causes confusion and disputes over the issue of identifying supervisory authority.¹⁹⁰

If the complainant refuses to accept the decision made by the supervisory authority, or if the supervisory authority fails to make a decision in the prescribed time period, *litigation* is the last step: the supplier may appeal for administrative reconsideration according to legal provisions or lodge an

¹⁸⁷ *Ibid.*

¹⁸⁸ See *GPL*, Art. 13.

¹⁸⁹ See *GPL*, Art. 4.

¹⁹⁰ The conflicts between the *GPL* and the *TBL* over the supervisory authority has caused many confusions, a representative case is about the conflicts between The Ministry of Finance (MOF) and The National Development and Reform Commission (NDRC), see, “Zhengfu caigou zouyu falv kunju caizhengbu youdian yuan” (Government procurement faces legal dilemma, the MOF feels bitter), *Xinhua News* (18 July 2007), online: Xinhua News <http://news.xinhuanet.com/legal/2007-07/18/content_6391248.htm>.

administrative suit at the People's Court as administrative litigation.¹⁹¹ This is the final step in the *GPL*'s bid challenge mechanism.

Many scholarly works have already pointed out that the major source of criticism against China's *GPL* concerns its bid challenge mechanism but not the method and process of the procurement.¹⁹² This is in fact not directly related to the procurement regime, but rather, it is closely tied to the country's political system and the issue of judicial independence. This will be discussed in detail with a proposed solution in Chapter 5.

2.2.3. Criminal Law: Provisions Concerning Bribery and Corruption

Corruption in government procurement is considered a criminal offence, and this is also the case in China. Corruption in government procurement always involves bribery payment to procurement officials or their superiors, and this is punishable under the Article 385 of the *Criminal Law of the PRC*, which concerns the crime of bribery to "State Employees" (Guo jia Gong zuo Ren yuan).¹⁹³ What needs to be noted is that, according to the Article 93 of the *Criminal Law*, the definition of "State Employees" does not only include those working in "government agencies", "public institutions", and "public funded organizations"

¹⁹¹ See *GPL*, Art. 56-58.

¹⁹² See Wang, *supra* note 167; Cao, *supra* note 169 at 61-84.

¹⁹³ See *Criminal Law of the PRC*, Art. 385.

that are defined in the same way as the definition of procuring entities in the Article 2 of the *GPL*,¹⁹⁴ but it also includes employees of the State-owned Enterprises (SOEs). This creates a discrepancy between the *GPL* and the *Criminal Law*, because the SOEs are not covered as procuring entities according to the *GPL*. Many cases have already revealed that corruption in procurement by SOEs is even rampant than that in government agencies, because SOEs have an even bigger procurement market than government agencies. This is proven by many reports from the U.S. Department of Justice (DOJ) and the Securities Exchange Commission (SEC) on the cases concerning violations of the Foreign Corruption Prevention Act (FCPA). Another solution to be proposed in Chapter 5 is about the inclusion of SOEs into the *GPL* coverage. However, this is a complicated question as it is in conflict with China's WTO commitment.

2.2.4. Proposed Administrative Regulations

As previously mentioned, national laws adopted by the NPCSC always tend to be vague and implicit, as they only provide general principles. More detailed rules are always provided by the State Council in the form of Administrative Regulations or by the ministries or commissions that were involved in the initial drafting process and appear as "Administrative Rules". However, unlike other laws that have their "Implementing Regulations" as supplements to provide

¹⁹⁴ *Criminal Law of the PRC*, Art. 93; *GPL*, Art. 15.

detail guidance for implementation, the drafting work of the Administrative Regulations for the *GPL* and the *TBL* have not yet been completed. The *TBL* and the *GPL* were adopted by the NPCSC in 1999 and 2002 respectively, but, as stated earlier, it took quite a long time for the State Council to draft the implementing rules for these two major laws governing government procurement. The “Draft for Comment” version of the *TBL* was released by the State Council in October 2009 for comments from the public,¹⁹⁵ and the “Draft for Comment” version of the *GPL* was not made public until January 12, 2010.¹⁹⁶

According to the draft of the *GPL* Implementing Regulations released by the Legal Affairs Office of the State Council, there are a few improvements to the *GPL*, such as a clear definition of “domestic products”, an approval procedure from the supervisory authority required for single source procurement, and publicity of the information of the single supplier and procuring entity before the single source procurement is conducted. These provisions will improve the

¹⁹⁵ See “Guowuyuan fazhiban jiu zhaobiao toubiao fa shishi tiaoli zhengqiuyijian” (The Legal Affairs Office of the State Council invites for comments on the *Implementing Regulations of the Tendering and Bidding Law*), *Xinhua News* (30 September 2009), online: Xinhua News <http://news.xinhuanet.com/legal/2009-09/30/content_12136233.htm>.

¹⁹⁶ See “Guowuyuan fazhiban jiu zhengfu caigou fa shishi tiaoli zhengqiuyijian” (The Legal Affairs Office of the State Council invites for comments on the *Implementing Regulations of the Government Procurement Law*), *Xinhua News* (11 January 2010), online: Xinhua News <http://news.xinhuanet.com/legal/2010-01/11/content_12790900.htm>.

transparency of the *GPL*, although some critical issues, such as the conflict between the *GPL* and the *TBL*, remain unchanged.¹⁹⁷

2.2.5. Administrative Rules on Public Procurement

As stated earlier, since the *TBL* and the *GPL* came into effect in 1999 and 2002 respectively, China's public procurement has been regulated with the absence of *Administrative Regulations*. Instead, *Administrative Rules* made by the Ministry of Finance (MOF) and the National Development & Reform Commission (NDRC) serve as detailed guidelines in public procurement to supplement the *GPL* and *TBL*. There are three major rules made by the MOF that are considered as major supplements to the *GPL*, these include: *Administrative Rules on Tendering and Bidding in Government Procurement of Goods and Services*, *Administrative Rules on Publicity of Government Procurement Information*, and the *Administrative Rules on Complaints by Suppliers in Government Procurement*. It should be noted is that all these three rules were adopted by the MOF on the same day in 2004.

As previously mentioned, the *TBL* only applies to tendering and bidding in procurement of construction works. Therefore, tendering and bidding in

¹⁹⁷ Lv Hanyang, "Zhengfu caigou fa shishi tiaoli zhengqiu yijian gao jiedu" (Interpretations of the draft for comments of the *Implementing Regulations of the Government Procurement Law*), *Xinhua News* (21 January 2010), online: Xinhua News <http://news.xinhuanet.com/legal/2010-01/21/content_12848644.htm>.

procurement of goods and services are governed by the *GPL*. The *Administrative Rules on Tendering and Bidding in Government Procurement of Goods and Services* is a very detailed guideline on the tendering and bidding procedures for both procuring entities and suppliers to follow in conducting government procurement.¹⁹⁸ The legal text of the rules is much longer and more explicit than that of the *GPL*.

Administrative Rules on Publicity of Government Procurement Information provides the details and contents that need to be included in the tendering notice, the requirement and type of media where procurement information can be published, and legal obligations imposed on procuring entities and procuring agencies for not following it.¹⁹⁹ These sets of rules are really “supplementary provisions” rather than the “detailed interpretation” of the *GPL*.

In contrast to the *Administrative Rules on Tendering and Bidding in Government Procurement of Goods and Services* which provide very detailed guidelines on the tendering and bidding procedures, the *Administrative Rules on Complaints by Suppliers in Government Procurement* was made very simple and general which

¹⁹⁸ Ministry of Finance of PRC, *Administrative Rules on Tendering and Bidding in Government Procurement of Goods and Services* (Beijing: Minister of Finance’s Order No.18, 11 August 2004), online: Ministry of Finance <<http://www.ccg.gov.cn/zcfg/gjfg/25203.shtml>>.

¹⁹⁹ Ministry of Finance of PRC, *Administrative Rules on Publicity of Government Procurement Information* (Beijing: Minister of Finance’s Order No.19, 11 August 2004), online: Ministry of Finance <<http://www.ccg.gov.cn/zcfg/gjfg/25204.shtml>>.

only consist of some twenty articles.²⁰⁰ However, even if rules had been made perfectly, it would not change the big picture because of the vital defect in the *GPL* and the institutional conflicts between the different authorities.

2.2.6. Local Regulations and Rules on Public Procurement

According to the *Legislation Law*, *Local Regulations* are made by Provincial People's Congress for the purpose of facilitating local implementation of *Laws* and *Administrative Regulations*. In the field of government procurement, most of the provinces in China have promulgated their own *Local Regulations* on government procurement, although according to the *Legislation Law*, it can not be in conflict with the *GPL*, *TBL*, or other national laws and administrative regulations.²⁰¹ Moreover, the Provincial governments are also very active in making local rules to regulate some specific issues that are related to government procurement.

²⁰⁰ Ministry of Finance of PRC, *Administrative Rules on Complaints by Suppliers in Government Procurement* (Beijing: Minister of Finance's Order No.19, 11 August 2004), online: Ministry of Finance <<http://www.ccg.gov.cn/zcfg/gjfg/25205.shtml>>.

²⁰¹ For a list of local regulations and rules governing government procurement, see China Government Procurement <<http://www.ccg.gov.cn/zcfg/dffg/>>.

Chapter 3:

Public Procurement in China: Issues and Cases

There are quite a few issues in China's government procurement that can be identified but not easily addressed because it is closely tied to the country's political and bureaucratic system. In this chapter, the author will attempt to point out these issues and provide some examples by doing some case studies.

According to the author, there are six major issues in China's public procurement:

- 1) Conflict between different laws, regulations, rules, and supervisory authorities;
- 2) Secondary Policy Objectives;
- 3) Corruption in Government agencies;
- 4) Corruption in SOEs: Exclusion of SOEs from China Government Procurement Law;
- 5) Inability of the Court in tackling corruption cases in government procurement: Judicial Independence and Administrative Dominance;
- 6) Transparency of budget requests and Justification of Planned Expenses prior to the procurement process.

From the author's point of view, most of these issues, if not all, can be examined by reference to the theory of Institutional Capacity that was mentioned in Section 1.4.4. Therefore, it will be analyzed by reference to this theory.

3.1. Conflicts between Different Laws, Regulations, Rules, and Supervisory

Authorities: Issue of Institutional Purpose

The long drafting process of the Implementing Regulations for the *GPL* and *TBL* reveals the toughness of coordinating among different government departments in China, because government procurement concerns the interests of these various government agencies.²⁰² As mentioned earlier, the *GPL* and the *TBL* were drafted by different government departments. According to the *GPL* that was drafted by the MOF, the supervisory authority for government procurement is the MOF at the central level and DOFs at the local level.²⁰³ However, on the other hand, according to the *TBL* that was initially drafted by the then National Development and Planning Commission (NDPC) (now the National Development & Reform Commission (NDRC)), big infrastructure projects must be approved by the then NDPC, now the NDRC at the central level and the local DPC or DRC at local level, and therefore, the NDRC is responsible for handling

²⁰² For discussions on the conflicts between administrative rules, see e.g., Yuan Jianyong, "Xingzheng gizhang xuyao mingque de jige wenti" (Several issues on administrative edits that require clarification), in Li Buyun, ed., *Lifa fa yanjiu* (A Study of the Legislation Law) (Changsha: Hunan People's Press, 1998) at 119-130. On the issue of relationships and conflicts between laws, rules, regulations in general, see Li Buyun's book generally.

²⁰³ *GPL* Art. 13.

matters and disputes related to these infrastructure projects to which the *TBL* is applied. This causes lots of confusions and conflicts. A notable case is the one so called the “First Case in Government Procurement”.²⁰⁴

3.1.1. Case Summary: Beijing WEAL (WEAL) v. MOF

In September 2003, after tackling the epidemic of SARS in the country, a proposal called “Contingency Plan for the Construction of the Medical Treatment System for Public Health Events” (“Contingency Plan”) was drafted by the NDRC and the Ministry of Public Health (MPH) and was duly approved by the State Council. According to this plan, in October 2003, the NDRC and the MPH assigned two procuring agencies to conduct tendering and bidding procedures to procure equipments for the projects that run under the “Contingency Plan”.

Beijing WEAL Trade and Development Co. (WEAL) submitted its bid to the procuring agencies but failed to win the bid. As a result, WEAL filed a complaint to the Ministry of Finance (MOF) on December 2003 and the MOF forwarded the case to the NDRC and asked the latter to handle this complaint and copy the settlement result to the MOF. However, the MOF did not receive any reply from the NDRC, and consequently the MOF could not reply to WEAL. As a result, the WEAL filed an administrative suit against the MOF and requested the MOF to

²⁰⁴ See “Caizhengbu shexian jianguan quewei, zhengfu caigou diyi an baisu” (The Ministry of Finance Lost in the First Case in Government Procurement” *Xinhua News* (11 December 2006), online: Xinhua News <http://news.xinhuanet.com/lianzheng/2006-12/11/content_5468280.htm>.

make specific decisions on its complaint. Since it is the first case after the adoption of the *GPL*, this is so called the “First Case in Government Procurement”.²⁰⁵

3.1.2. Who Is the Supervisory Authority and Which Law Should Prevail in the Conflicts between *GPL* and *TBL*: “Fragmented Authoritarianism”, Institutional Purpose, and Power Relations

According to the *GPL*, the complaints over the government procurement cases should be directed to the MOF at the central level or DOFs at the local level. However, on the other hand, as the MOF asserted, according to the *TBL*, the “Opinions on the Separation of Responsibilities of Administrative Supervision on Tendering and Bidding Activities Conducted by Certain Departments of the State Council” that was issued by the State Council General Office,²⁰⁶ and the “Interim Measures on the Supervision of Tendering and Bidding in Important

²⁰⁵ For details of the case, see also, “Zhengfu caigou diyi an kaisheng” (The trial for the first case in government procurement started), *Xinhua News* (23 May 2005), online: Xinhua News <http://news.xinhuanet.com/legal/2005-05/23/content_2989343.htm>; “Zhengfu caigou diyi an kaisheng, shui jianguan zhengfu huaqian cheng jiaodian” (Who supervises government expenditure becomes a key issue in the first case of government procurement), *Xinhua News* (21 May 2005), online: Xinhua News <http://news.xinhuanet.com/legal/2005-05/21/content_2982531.htm>.

²⁰⁶ General Office of the State Council, *Guanyu guowuyuan youguan bumen shishi zhaobiao toubiao huodong xingzheng jian du de zhize fengong de yijian* (Opinions on the Separation of Responsibilities of Administrative Supervision on Tendering and Bidding Activities Conducted by Certain Departments of the State Council) (Beijing: General Office of the State Council, 2000), online: Government of the PRC <http://www.gov.cn/gongbao/content/2000/content_60239.htm>.

National Construction Projects” that was issued by the then NDPC”,²⁰⁷ the supervision authority for such projects is the NDRC, not the MOF. Therefore, it was not the responsibility of the MOF to handle this complaint and the MOF had already duly forwarded the case to the NDRC. However, the Court held that although important construction projects should be supervised by the NDRC, the procurement of goods and services in such projects should be handled by the MOF, because the NDRC is understood only to handle tendering and bidding of construction works in these projects.²⁰⁸ In sum, the issue in this case is about who is the supervisory authority in the procurement of goods and services in infrastructure and other big state-funded construction projects, because in these projects, the procurement of construction works always coincided with the procurement of goods and services.

As we can see, the *GPL* and the *TBL* give their respective drafters the supervisory authority over different type of procurement. Moreover, aside from the two major national laws, other administrative rules were also issued by various government agencies, including the MOF and the NDRC but not limited to these two, and these also constitute the regulatory framework of China’s government

²⁰⁷ State Development & Planning Commission (SDPC, now the State Development and Reform Commission (SDRC)), *Guojia zhongda jianshe xiangmu zhaobiao toubiao jiandu zanxing banfa* (Interim Measures on the Supervision of Tendering and Bidding in Important National Construction Projects) (Beijing: SDPC, 2000), online: Government of the PRC <http://www.sdpc.gov.cn/zcfb/zcfbl/zcfbl2003pro/t20050707_27426.htm>.

²⁰⁸ See Xinhua News, *supra* note 197.

procurement.²⁰⁹ Thus, the function of the state procurement regulatory framework depends on the power relations among these government agencies and this is so called a “Fragmented Authoritarianism”, a term made by Kenneth G. Lieberthal to describe that “authority below the very peak of the Chinese political system is fragmented and disjointed”,²¹⁰ because “functional division of authority among bureaucracies” always tend to be “self-supporting” and protect their own interests.²¹¹ The “Fragmented Authoritarianism” suggested the diverse institutional purposes of different government departments. According to Potter,

“Institutional purpose concerns the way in which the goals of institutions reflect material and ideological contexts, the availability and nature of financial, human and other resources, and various limitations that attend institutional performance”.²¹²

In terms of government procurement, the element of institutional purpose informs the function, performance and responsibilities of different government departments that serve as procuring entities, procurement agencies, or

²⁰⁹ See Tian, *supra* note 173 at 85-102.

²¹⁰ Lieberthal, *supra* note 82 at 8-9.

²¹¹ *Ibid.* However, conflicts of interest among different departments within the government are not unique in China. Similar situations also happen in other countries. For a useful explanation that examines the relationship between public procurement and organizational conflicts of interest in the United States, see: Daniel I. Gordon, “Organizational Conflicts of Interest: A Growing Integrity Challenge” (2005) 35:1 *Public Contract Law Journal* 25-41.

²¹² See Potter, *supra* note 2 at 476.

procurement monitoring/supervisory authorities. In the case of the WEAL v. MOF, the issue of the conflicts between the MOF and the NDRC suggests the importance of institutional purpose to the interpretation of the statutory requirements. On one hand, the MOF and the NDRC always tend to retain their respective decision-making power in the procurement of goods, services, and construction works. As mentioned earlier, the MOF and DOFs are responsible for supervising procurement activities because in China the budget and the government funds used in public procurement are prepared, provided, and controlled by the MOF at the central level and DOFs at local level. For that reason, MOF and DOFs are prescribed in the *GPL* as the government agency responsible for monitoring and supervising the government procurement activities at central and local level. However, on the other hand, infrastructure and other big government-funded projects, all of which require a big deal of government funds, must be approved by the NDRC at the central level and the DRCs at local level who are responsible for the planning of economic and infrastructure development. As a result of this, it is prescribed in the *TBL* that procurement of construction works and infrastructure projects must be subject to this law and the NDRC is responsible for procurement activities conducted according to the *TBL*.²¹³

²¹³ *TBL* Art. 3.

MOF, NDRC, and other government departments often tend to retain their power and interests in procurement activities. However, on the other hand, both the MOF and the NDRC are sometimes reluctant to be responsible as a procurement supervisory body when it may put them in the position of being sued in administrative litigations. The case of the WEAL vs. MOF is self-evident.

Institutional purpose is a determining factor that causes the confusion and conflicts between different procurement laws such as the *GPL* and the *TBL*. Moreover, it also explains other issues in China government procurement.

3.2. Secondary Policy Objectives in China's Public Procurement

As mentioned earlier, government procurement is a huge market that provides enterprises with numerous business opportunities. Therefore, governments often tend to use this power to achieve secondary policy objectives that are commercially unrelated to the primary purpose of the procurement.²¹⁴ China, like other countries, also uses government procurement as an important tool to achieve other secondary social and economic goals,²¹⁵ such as supporting

²¹⁴ See Arrowsmith, McCrudden, & Trionfetti, *supra* note 53.

²¹⁵ *GPL*, Art. 9.

domestic industries,²¹⁶ especially those “infant” or disadvantaged sectors (like the high technology industry)²¹⁷ and small & medium size enterprises.²¹⁸ As environmental concerns become more and more important in China’s development agenda, government procurement is also used to promote environmental protection.²¹⁹ Moreover, like that in other countries, government procurement is also used to assist underdeveloped or ethnic minority areas.²²⁰ Naturally, these domestic or local secondary policy objectives in government procurement raised great concerns over issues of non-discrimination and efficiency.

3.2.1. Case Summary: Shanghai Metro Case

Shanghai Metro refers to the urban rapid transit system of Shanghai. It includes both subway system and light railway lines and so far runs 13 lines in Shanghai.²²¹ At the end of 2007, the line 6 and 8 were newly launched and these two lines operate within the most populous area in Shanghai. However, the railcars used for these two lines are even shorter and smaller than other existing

²¹⁶ GPL, Art. 10.

²¹⁷ See National Development and Reform Commission (SDRC), *China's Economic and Social Development Plan* (Beijing: SDRC, 2006), online: People’s Daily <http://english.people.com.cn/200603/15/eng20060315_250831.html>

²¹⁸ *Law of the People’s Republic of China on Promotion of Small and Medium-sized Enterprises*, 2002, Art. 16. See also, GPL, Art. 9.

²¹⁹ *Law of the People’s Republic of China on Promotion of Cleaner Production*, 2002, Art. 16.

²²⁰ GPL, Article 9.

²²¹ For details about the Shanghai Metro, see Shanghai Metro <<http://www.shmetro.com/>>.

lines that are less crowded. According to the information released by the media and the Shanghai Metro, the railcars used in these two lines are Alstom Metropolis made by a joint-venture between Shanghai Electric and its French Partner Alstom.²²² Shanghai Electric is an extra-large local SOE owned by the Shanghai Municipal Government.²²³ In 1999, the Shanghai Electric formed a joint-venture with Alstom to produce railcars in Shanghai. However, such a joint-venture must be approved by the NDRC, and the NDRC only gave permission to the JV to produce smaller railcars so that it will not compete with other major railcar makers in China. In order to support local railcar makers in Shanghai, Shanghai Metro, which is also owned by the Municipal Government, made a report on the selection of the railcars to be tailored for the products of the Shanghai Alstom.²²⁴ The low capacity of this type of railcars caused many controversies and criticism as they were purchased without following the tendering and bidding procedures as prescribed in the *TBL* that should be applied to in this case.

²²² For details of the case, see “Shanghai ditie xinxian caiyong xiao chexiang neimu” (The inside story of the use of small size rail cars in Shanghai subway lines) *Xinmin News* (15 February 2008), online: Xinmin News <<http://sh.xinmin.cn/shizheng/2008/02/15/1052619.html>>.

²²³ For details about the Shanghai Electric, see Shanghai Electric <<http://www.shanghai-electric.com/cn/index.asp>>.

²²⁴ See *Xinmin News*, *supra* note 215.

3.2.2. Case Summary: Wuhan Taxi Case

In 2006, two independent taxi drivers in the city of Wuhan replaced their old cars with two brand-new ones made by a joint-venture of Volkswagen in Northeast China. However, they were rejected for renewing the licence because the new taxi cars they bought were not Citroën that is produced by the Wuhan based joint-venture of China Dongfeng Automobile Group and its French partner Citroën. The two drivers brought an administrative suit to the local court in Wuhan, but they lost. The court upheld the decision of the government agency that deals with the renewal of taxi licenses and rejected the claim from the two taxi drivers. According to the court, the government is entitled to decide whether or not the renewal of the license shall be granted. To respond to this case, in 2007, the Ministry of Transportation of the Central Government issued a notice to the local government in Wuhan and pointed out that "...the rule that only locally-made Citroën may be purchased as taxi cars in Wuhan is not consistent with national policy".²²⁵ However, the situation remains unchanged and in Wuhan even until now Citroën is the only brand for taxi cars. Furthermore, the Wuhan local government is not alone in doing so. In Beijing, most of the taxi cars on the road are made by Beijing-based Beijing Hyundai, while in Shanghai, the taxi cars come from Shanghai Volkswagen, another JV of Volkswagen in China.

²²⁵ "Wuhan chuzu buyong fukang buzhun yingyun beizhi shi longduan xingzheng lanquan" (Wuhan Taxi's Case: The government was accused of abuse of administrative power), *People's Daily* (15 July 2005), online: *People's Daily* <<http://unn.people.com.cn/GB/14777/21747/9657061.html>>.

3.2.3. Discrimination, Efficiency and Secondary Policy Objectives: Institutional Purpose, Location, and Orientation

Supporting local industries is always of critical importance to China's government procurement. China is not a member of WTO's Agreement on Government Procurement, and the *GPL* of China explicitly provides that domestic goods, services, and construction works should be given preference in government procurement. Therefore, it is legitimate for the government to favour domestic suppliers in contract awarding against foreign competitors. However, the reality of government procurement in China goes far beyond what is legally prescribed. In the Shanghai Metro Case, the procuring entity awarded the contract to the Shanghai Alstom without a tendering and bidding process, and thus other domestic major manufacturers from other provinces in China who can produce bigger-size railcars, were excluded from competition.

Furthermore, in the case of Wuhan Taxi, what the local government did has even crossed the boundary of government procurement and interfered with the business operation of private sectors. This is without question a violation of China's WTO obligation on national treatment.

Whereas favouring local suppliers in these two cases revealed the institutional purpose of the local government to support local industries that could in turn increase local revenues, discriminating other domestic suppliers that are not

locally based in the geographical location of procurement suggested the institutional location as a key factor in examining the implementation of state procurement laws.²²⁶

Moreover, both of the cases in Wuhan and in Shanghai also indicated the fact that local governments still tend to use informal ways in their daily operation instead of following formal rules, such as the requirement of an open tendering process. This is so called the “Institutional orientation” that also affects the institutional capacity.²²⁷ According to Potter, institutional orientation refers to “the priorities and habitual practices that inform institutional performance”.²²⁸ In China, personal connections, which is so called “Guanxi”, plays a critical role in the government’s daily operation and decision-making.

Further to the discussion of the above two cases that involve institutional performance of the local government, we can also find similar cases at the central level where institutional purpose and orientation strongly inform the performance of the government.

Again, take the railcar system for example. In November 2009, the multinational American conglomerate General Electric (GE) signed a Memorandum of Understanding (MOU) with the Chinese Ministry of Railway (MOR) to “jointly

²²⁶ For Potter’s theory of institutional capacity, see Potter, *supra* note 2.

²²⁷ *Ibid.*

²²⁸ *Ibid.*

advance high-speed rail (HSR) opportunities in the United States”.²²⁹ According to this MOU, “China currently is a leader in high-speed rail technology for speed of 220 miles per hour. Working together, both parties could develop the best solutions faster to serve America’s high-speed rail needs for many years to come.” This signals a milestone of success of China’s policy of “Market for Technology”, and the fact that ““China currently is a leader in high-speed rail technology for speed of 220 miles per hour” is a result of the country’s persistent efforts in technology acquisition. China’s high speed railway system has long been a huge market for established Western suppliers, such as the German Siemens, the French Alstom, the Canadian Bombardier, and the Japanese Shinkansen. In order to compete in this huge market, all of these foreign suppliers have agreed to the requirements set by the Chinese government. These foreign suppliers seeking access to the Chinese high-speed railway market must form joint-venture with a designated Chinese company and agree to transfer the technology to their Chinese partners. As a result, the aforementioned four international major suppliers formed JVs with China South Locomotive & Rolling Stock Corporation Limited (CSR) and China North Locomotive and Rolling Stock Industry (Group) Corporation (CNR) respectively, the two major domestic manufacturers in China. As a result of technology transfer, these two major Chinese companies have gained most of the technologies for high-speed

²²⁹ General Electric (GE), “GE and China MOR Sign Strategic MOU to Advance High-Speed Rail Opportunities in the U.S.”, (17 November 2009), online: GE <http://www.ge.com/news/chinanews/get_mor_hsr_pr.pdf>.

railways, and they are now even capable of competing with international suppliers in high-speed railway market abroad.²³⁰ This is a perfect example of secondary policy objective in government procurement that suggests institutional purpose, such as supporting domestic industries, as a determinant factor that informs institutional performance.

In terms of the institutional orientation, we can still take the Wuhan based DongFeng Automobile Company as an example. To respond to the growing demand for development of cars with clean energy, the Chinese government has arranged an amount of RMB 20 billion to support the development of this sector. As a result, the Ministry of Industry and Information Technology (MIIT) and the Ministry of Science and Technology (MOST) have both developed their own plans to support domestic car industries in this field and to facilitate international cooperation with foreign companies. On one hand, both of the two ministries are competing for the dominance in the implementation of this national policy, and on the other hand, both ministries have their own priorities and agenda in doing so. Whereas the MOST prefers such clean energy cars development plan mainly be carried out by domestic companies and provide most of the funds to the latter, the MIIT is more enthusiastic about international cooperation with foreign companies. Such differential policy priorities can be

²³⁰ See Robert Wright, "China on Track to Join Ranks of Train Manufacturers", *Financial Times* (1 March 1 2010), online: Financial Times <<http://www.ft.com/cms/s/0/7b05504c-255a-11df-9cdb-00144feab49a.html>>.

understood as a conflict of institutional purpose where the MOST and the MIIT are competing for the dominance role in allocating the RMB 20 billion state funds. However, media reports have shown that such conflicts between the MOST and the MIIT have even greater implications.²³¹ According to the media report from the official Xinhua New Agency, The Vice-Minister of the MIIT, who is the most active advocator for international cooperation and signed the agreement with the Japanese Auto maker Nissan granting the latter with a big government contract to run for a pilot project on clean energy car, used to be the Head of the DongFeng Automobile Company (Dongfeng) that is based in Wuhan. The Dongfeng is the holding company of a number of JVs with foreign auto makers, such as the aforementioned Citroën and the Japanese Nissan. Therefore, it is doubted by the media that the awarding of such a big contract by the MIIT to Nissan is a result of the personal connections between the Vice-Minister of MIIT and Nissan. On the other hand, the MOST is also under fire for favouring those domestic enterprises that are close to the MOST.²³²

Another example of institutional orientation, however, concerns discrimination against domestic suppliers in government procurement, although it is virtually unrelated to the issue of secondary policy objective. As a matter of fact, both the

²³¹ “Kejibu yu gongxinbu shangyan zhuli xin nengyuan qiche luxian zhizheng” (The Ministry of Science and Technology (MOST) and the Ministry of Industry & Information Technology (MIIT) are fighting over the strategy on the development of innovative energy cars), *Xinhua News* (5 February 2010), online: Xinhua News <http://www.cq.xinhuanet.com/2010-02/05/content_18968137_1.htm>.

²³² *Ibid.*

general public and government officials in China are more confident with foreign products, especially those reputation brands, than domestic ones. Therefore, in many cases that have been disclosed, government officials sometimes would choose much more expensive foreign products over the cheaper local brand.²³³ This is de facto another type of violation of China's state procurement law because it does not follow the principle of cost-efficiency.²³⁴

Secondary policy objectives are used by many countries to promote their domestic industries. Even in the United States, President Barack Obama also attempted to push for a "Buy American" plan that will not be in violation of the country's GPA obligations but will discriminate against products and services from all the non GPA countries, and this proposed plan was widely criticized as protectionism.²³⁵ Secondary policy objectives can be legitimate to a certain extent, especially for developing countries, and even WTO's GPA provides special

²³³ See e.g., "Bianwei de zhngfu caigou" (Mischaracterized government procurement) *Xinhua News* (5 March 2007), online: Xinhua News <http://news.xinhuanet.com/focus/2007-03/05/content_5800572.htm>; "Guochan pinpai weihe shou zhengfu caigou lengyu?" (Why domestic brands are not favored in government procurement?) *Xinhua News* (28 February 2007), online: Xinhua News <http://news.xinhuanet.com/fortune/2007-02/28/content_5782908.htm>; "Zhenfu caigou chongyang, hangye zhuguan bumen youze" (Foreign products are preferred in government procurement, the government should be responsible) *Xinhua News* (7 March 2007), online: Xinhua News <http://news.xinhuanet.com/mrdx/2007-03/07/content_5812835.htm>; "Jiangsu bufen zhengfu kongtiao caigou qishi mingzu pinpai" (Domestic suppliers were discriminated in the government procurement of air conditioning equipment by government agencies in Jiangsu province) *Xinhua News* (27 March 2007), online: Xinhua News <http://news.xinhuanet.com/local/2007-03/27/content_5900865.htm>.

²³⁴ GPL Art. 1.

²³⁵ See e.g., "Mandelson condemns Obama 'Buy American' call as protectionism", *The Times* (31 January 31 2009), online: The Times <<http://business.timesonline.co.uk/tol/business/economics/article5622438.ece>>.

clause that allows derogation from the agreement by developing country members to meet their domestic development agenda. China is not yet a member of the GPA, and thus it is legitimate for the country to integrate its social, economic, and environmental policy goals into their procurement activities. The issue of secondary policy objectives suggests that the element of institutional purpose, location, and orientation in government procurement that attend the institutional performance in the implementation of China's state procurement laws. The secondary policy objective in China's government procurement is successful to a certain extent, as proved by the fact that the country is now capable of competing with other established international companies in the field of high speed railway system due to the "Market for Technology" policy, but it also caused many controversies over the issue of efficiency such as in the Shanghai Metro Case where bigger railcars should be used rather than smaller sized ones and the issue of local protectionism that involves discrimination against non-local companies regardless of whether they are domestic or foreign, as shown in the Wuhan Taxi case. These practices of secondary policy objectives in government procurement are without question even prohibited by China's *GPL*. In the Shanghai Metro case, the procurement of small sized railcars without a required tendering process is a violation of the *GPL*'s principles of cost efficiency and protection of public interest²³⁶ and the requirement of open

²³⁶ *GPL*, Art. 1.

tendering.²³⁷ Furthermore, in the Wuhan Taxi Case, it has become not merely an issue of government procurement, but even concerns the violation of China's WTO commitment on national treatment due to the government's interference to private sectors.

3.3. Corruption and Nepotism in Government Agencies

Corruption is the most common issue in government procurement worldwide.²³⁸ In the case of China, as mentioned in the first chapter, government procurement is the most susceptible to corruption.²³⁹ Furthermore, an undemocratic political system defined as a "patrimonial sovereignty" where government officials are not accountable to the public makes the corruption issue even worse.²⁴⁰ Due to its political nature, corruption in China is a pervasive problem,²⁴¹ and government procurement as a hotbed for rent-seeking in China is totally understandable. There are numerous cases concerning corruption in China's government procurement, and according to a list of all the corrupted senior officials who were at the level of vice-minister and above and were arrested in

²³⁷ GPL, Art. 27.

²³⁸ See OECD, *supra* note 8 & 9; ADB/OECD, *supra* note 116.

²³⁹ See Zhu, *supra* note 15. Many cases released by the United States Department of Justice concerning the violation of the Foreign Corrupt Practices Act (FCPA) also involved bribes to Chinese government officials in exchange for government procurement contracts. This will be discussed in detail later.

²⁴⁰ See Potter, *supra* note 84 at 124-125.

²⁴¹ See generally, Julia Kwong, *Political Economy of Corruption in China* (New York: M.E. Sharpe, 1997).

the year of 2009, all of them were involved in briberies in government procurement and other fields.²⁴²

Although a huge number of cases can be cited here, in this section only one typical case is selected for detailed analysis, although a number of other cases will also be mentioned.

3.3.1. Case Summary: Zha Keming's Case

In 2003, Zha Keming, the former Vice-minister of the Ministry of Electricity of China, was charged for receiving briberies from two large Japanese companies, Marubeni and Mitsui, and in return Zha revealed the pre-tender estimate to the Marubeni and as a result the Marubeni won the contract in a big power plant project. In another case Zha forced a SOE to award another power plant construction contract to Mitsui without any tendering process. In these two cases, another important feature worthy of being noted is a former government official named Fang Fuming who immigrated to the United States and acted as an agent in many infrastructure projects, including those in the above mentioned two cases. According to the media report, the commissions Fang received in those

²⁴² "Pandian qu'nian luoma tanguan" (An overview of the corrupted officials under investigation last year), *People's Daily* (3 January 2010), online: People's Daily <<http://opinion.people.com.cn/BIG5/10693896.html>>.

projects exceeded USD 20 million, and thus the total size of this construction market can be inferred.²⁴³

3.3.2. Cases Disclosed by the National Audit Office (NAO)

Every year, the National Audit Office (NAO), upon the completion of their annual auditing, provides a report of violations of the *GPL* by central ministries in government procurement.²⁴⁴ Every year, almost every central ministry always has more or less problems in implementing the *GPL* in their procurement activities, and many of the cases disclosed in the report are serious enough to be major government scandals according to standards of Western countries. Just to give a few examples as released in the report,

1. 22 out of the total 27 departments within the Ministry of Education did not report the budget on planned expenses for government procurement.

Moreover, the several departments of the MOE paid a total amount of RMB 25 million as printing costs without any approved budget and the tendering process that are required by the *GPL*. Some other departments under the

²⁴³ “Beijing pingchu fanfu shida an, yuan dianlibu fubuzhang beicha jushou” (The Case of the Former vice Minister of Electricity Ranks Number One among the Top Ten Corruption Cases in Beijing Last Year), *Xinhua News* (2 January 2003), online: Xinhua News <http://news.xinhuanet.com/newscenter/2003-01/02/content_677432.htm>.

²⁴⁴ National Audit Office, “Shenjishu gongbu 2008nian 54 ge bumen danwei yusuan zhixing shenji jieguo” (Annual Audit Report on the Implementation by 54 Central Units of the Budget of 2008) (Beijing: National Audit Office, 2009), online: Government of China <http://www.gov.cn/gzdt/2009-09/01/content_1406693.htm>.

MOE completed several construction projects that total over another RMB 25 million without a required open tendering process.²⁴⁵

2. Seven other departments of the MOE spent RMB 9.5 million in procuring cars, electrical equipments, and office furniture without preparation of government procurement budget and required tendering process.²⁴⁶
3. The project of the website “China Education Economy Information Net” that was built by the MOE cost RMB 84 million without a required open tendering process.²⁴⁷
4. The National Library spent RMB 115 million in procuring books, but the supplier was not selected through any open tendering process.²⁴⁸

3.3.3. Pervasive Corruption and Nepotism in Chinese Government

Procurement: Institutional Coherence and Orientation

Whereas the Zha Keming’s case explained a typical corrupt practice in government procurement, the cases released by the National Audit Office

²⁴⁵ “Yifeng chumujingxin de zhengfu caigou weigui xingdan” (A shocking list of violations in government procurement), *Xinhua News* (18 September 2006), online: Xinhua News <http://news.xinhuanet.com/politics/2006-09/18/content_5103691.htm>.

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

revealed a pervasive problem of nepotism and patronage, in which procurement contracts were awarded based on personal connections instead of formal legal process, although the NAO's report did not mention whether any bribery or other form of corrupt practices were involved in these cases. While those informal arrangements such as nepotism and patronage can be seen as an issue of institutional orientation, corruption in government procurement concerns the element of institutional coherence, which refers to the "willingness of individuals within institutions to comply with edicts from organizational and extraorganizational leaders and to enforce institutional goals".²⁴⁹

Chapter 4 of the *GPL* provides due procedures that need to be followed in government procurement, and the first step is the preparation of budgets on planned expenses. In terms of the method of procurement, Chapter 3 of the *GPL* provides that detailed threshold for open tendering should be prescribed by the State Council,²⁵⁰ and according to the "Catalogue and Standards for Procurement by Central Government Unit" that is published and updated annually by the Ministry of Finance (MOF) and duly adopted by the State Council, procurement in the NAO disclosed cases should all be subject to open tendering procedures.²⁵¹ Moreover, there is even a detailed guideline prepared

²⁴⁹ See Potter, *supra* note 2 at 474.

²⁵⁰ *GPL*, Art. 27.

²⁵¹ For the Catalogue of 2009-2010 fiscal year, see State Council General Office, *Zhongyang yusuan danwei 2009-2010 nian zhengfu jizhong caigou mulu ji biao zhun* (Catalogue and Standards for Procurement by Central Government Unit in 2009-2010), (Beijing: State

by the MOF on the procurement and tendering procedures for central government unit to supplement the *GPL* and facilitate the implementation of the *GPL*.²⁵² However, the rules were not followed by most of these central ministries, in cases disclosed by NAO, most of the contracts were awarded to enterprises that were either directly affiliated with the concerned ministries or personally connected to the head of the procurement unit,²⁵³ and this can be understood as a matter of nepotism or patronage.

Corruption, nepotism, and patronage suggest factors of institutional coherence and orientation in China's government procurement. These issues represent the political nature of the country in a big picture, and are closely tied to the country's social, historical, and cultural background.²⁵⁴ China's regulatory culture, which, as mentioned in the first chapter, can be described as a "patrimonial sovereignty" where regulators and officials are only accountable to their superiors within the government but not to the subjects of rule,²⁵⁵ makes the issue of corruption and nepotism to be even more difficult to be addressed due to the absence of a system of check and balance.

Council General Office, 17 December 2008), online: Government of China <http://www.gov.cn/zwgk/2008-12/19/content_1182942.htm>.

²⁵² Ministry of Finance, Implementing Rules on the Collective Procurement by Central Government Unit (Beijing: Ministry of Finance, 2007), online: National Bureau of Corruption Prevention <<http://files.nbc.gov.cn/www/200902/20090217135225518.pdf>>.

²⁵³ See Xinhua News, *supra* note 238.

²⁵⁴ See e.g., Yang Jiejun & Zhuang Han, "WTO yu zhongguo xingzheng falv wenhua de jiangou" (The WTO and the Construction of China's Administrative Legal Culture) (2004) 18:5 *Dangdai Faxue* (Contemporary Law Review) 125-131.

²⁵⁵ *Ibid.*

3.4. Corruption in State-Owned Enterprises (SOEs)

Although it has been widely recognized that China is now becoming an economic super power in the world, ideologically the ruling communist party of the country still defines its economic system as a “socialist market economy”.²⁵⁶ As such, the most important feature of a “socialist market economy” is the dominance of the State-Owned Enterprises (SOEs) in the country’s economy. According to official media reports, China’s SOEs, as mentioned earlier in the first chapter, have monopolized many important sectors, such as energy, telecommunication, and transportation.²⁵⁷

On the other hand, upon its accession to the WTO in 2001, China has committed that its SOEs are explicitly excluded from the coverage of Government Procurement, and thus they are subject to all the obligations as set in WTO’s multilateral agreements, including the rules on non-discrimination:

“China would ensure that all state-owned and state-invested enterprises would make purchases and sales based solely on commercial considerations, e.g., price, quality, marketability and availability, and that the enterprises of other WTO Members would have an adequate opportunity to compete for sales to and purchases from these enterprises on non-discriminatory terms and conditions. In

²⁵⁶ *The Constitution of the People’s Republic of China*, Art. 15.

²⁵⁷ *People’s Daily*, *supra* note 21.

addition, the Government of China would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises, including on the quantity, value or country of origin of any goods purchased or sold, except in a manner consistent with the WTO Agreement. The Working Party took note of these commitments.

The representative of China confirmed that, without prejudice to China's rights in future negotiations in the Government Procurement Agreement, all laws, regulations and measures relating to the procurement by state-owned and state-invested enterprises of goods and services for commercial sale, production of goods or supply of services for commercial sale, or for non-governmental purposes would not be considered to be laws, regulations and measures relating to government procurement. Thus, such purchases or sales would be subject to the provisions of Articles II, XVI and XVII of the GATS and Article III of the GATT 1994. The Working Party took note of this commitment.”²⁵⁸

However, as a matter of fact, corruption and nepotism in purchases by China's SOEs are even more common than those in government procurement.²⁵⁹

²⁵⁸ See, World Trade Organization (WTO), *Report of the Working Party on the Accession of China*, WTO Doc. WT/MIN(01)/3 (2001), p9-10, online: WTO <http://www.wto.org/english/thewto_e/acc_e/wp_acc_china_e.doc>.

²⁵⁹ “Yangqi fanfu bixu dapo yibashou jizhi” (For anti-corruption in central SOEs, the dominance by the head must be curbed), *People's Daily* (17 February 2009), online: People's Daily <<http://theory.people.com.cn/BIG5/49150/49151/8814752.html>>.

3.4.1. Cases Concerning FCPA Violations

It is an “inconvenient truth” to the Chinese government that many cases that concern corruption and nepotism in procurement by the Chinese government and SOEs, especially those monopolistic huge SOEs, are always first disclosed by the United States Department of Justice (DOJ) as violations of the U.S. Foreign Corrupt Practices Act of 1977 ("FCPA") before any investigation were initiated by the Chinese government.²⁶⁰

The FCPA prohibits payments by U.S. companies, citizens, residents, and also foreign companies listed on a U.S. stock exchange to foreign officials for the purpose of obtaining or keeping business. In the legal text the term “foreign officials” here only refers to

“any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization”.²⁶¹

²⁶⁰ “Guoqi shouhui’an zuizao xinxi laizi guowai, fanfu weihe zong houzhi houjue?” (Bribery cases in domestic SOEs are always firstly disclosed in foreign countries: Why anti-corruption actions are always lagging), *People’s Daily* (17 August 2009), online: People’s Daily <<http://fanfu.people.com.cn/BIG5/9864596.html>>.

²⁶¹ *Foreign Corrupt Practices Act*, 15 U.S.C. § 78dd-1(f)(1)(A) (1977).

However, as revealed in a few cases, the FCPA enforcement agencies – the DOJ and the Securities Exchange Commission (SEC) always tend to interpret the term “foreign official” in a broad sense by defining state-owned or state-controlled entities as “instrumentality” of the government.²⁶² As a result, many cases that involved corruption in procurement by China’s SOEs were charged and disclosed by the DOJ for violation of the FCPA, and in most of the cases such corrupt payments were paid by multinational corporations (MNC) to Chinese monopolistic SOEs in return for awarding of big contracts. Those MNCs include Siemens AG,²⁶³ Lucent Technologies Inc.,²⁶⁴ and Avery Dennison Corporation,²⁶⁵ and in the most recent case the Control Components Inc. (CCI).²⁶⁶

²⁶² See e.g., U.S. Securities & Exchange Commission, News Release, “SEC Charges Former Officer of Pride International with Violating the Foreign Corrupt Practices Act” (Washington, D.C.: SEC, 11 December 2009), online: SEC <<http://www.sec.gov/litigation/litreleases/2009/lr21335.htm>>.

²⁶³ U.S. Department of Justice, News Release, “Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines” (15 December 2005), online: DOJ <<http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>>.

²⁶⁴ U.S. Department of Justice, News Release, “Lucent Technologies Inc. Agrees to Pay \$1 Million Fine to Resolve FCPA Allegations” (21 December 2007), online: DOJ <http://www.justice.gov/opa/pr/2007/December/07_crm_1028.html>.

²⁶⁵ U.S. Securities & Exchange Commission, News Release, “SEC Files Settled Charges against Avery Dennison Corporation for Violating the Books and Records and Internal Controls Provisions of the FCPA” (28 July 2009), online: SEC <<http://www.sec.gov/litigation/litreleases/2009/lr21156.htm>>.

²⁶⁶ U.S. Department of Justice, News Release, “Control Components Inc. Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$18.2 Million Criminal Fine”, (31 July 2009), online: DOJ <<http://www.justice.gov/opa/pr/2009/July/09-crm-754.html>>.

Take the CCI case for example. CCI was charged for paying bribes that exceeded USD 6.9 million to foreign companies, especially several big Chinese SOEs, in order to win their contracts “which resulted in net profits to the CCI of approximately \$46.5 million from sales related to those corrupt payments”.²⁶⁷ Those Chinese SOEs that are on the CCI’s bribe list include those monopolistic companies such as Guohua Electric Power, China Petroleum Materials and Equipment Corp., Petro China, and China National Offshore Oil Corporation.²⁶⁸

3.4.2. Exclusion of SOEs from Chinese Government Procurement Law: Institutional Purpose, Orientation, and Coherence

As previously mentioned, according to China’s commitment to the WTO upon its accession, China’s SOEs are covered by WTO’s multilateral agreement such as the GATT and GATS,²⁶⁹ and hence its procurement for commercial resale is not seen as “government procurement” and is not covered by the WTO’s GPA.²⁷⁰ This is due to two reasons. Firstly, the procurement by the SOEs is conducted for commercial use but not for governmental purpose; secondly, there is a presumption that such procurement is made in a full competitive market, and the decisions of procurement is made solely based on commercial

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ See WTO, *supra* note 258.

²⁷⁰ See Arrowsmith, *supra* note 7 at 58-60.

considerations.²⁷¹ Therefore, in China, procurement by SOEs are not subject to the *GPL*, and is seen exactly the same as purchases by non-SOEs.

However, in the Chinese context, procurement by SOEs does not truly operate under the above presumption of full market competition and commercial considerations and have more “public” implications than SOEs in other countries, and it is arguable that whether SOEs in China should be regulated not only differently from government entities, but also distinguishable from non-SOEs.

Firstly, China’s SOEs are always greatly influenced by government decisions, and hence the decision of procurement can not be made merely based on commercial considerations. All SOEs have their political ranking, such as ministry level, vice-ministry level, bureau level enterprises. Officers in SOEs have their own political and administrative ranking, and they must obey the edicts from their political superiors.²⁷²

Secondly, China’s Criminal Law differentiates between commercial bribery that applies to private entities²⁷³ and individuals and official bribery that applies to “state employees”.²⁷⁴ As mentioned in Section 2.2.3 of this chapter, according to the Criminal Law of the PRC, employees of SOEs are defined as “state

²⁷¹ *Ibid.*

²⁷² See *People’s Daily*, *supra* note 259.

²⁷³ See *Criminal Law of the PRC*, Art. 163.

²⁷⁴ See *Criminal Law of the PRC*, Art. 385 & 386.

employees”,²⁷⁵ and thus bribery cases that involve employees of the SOEs are subject to the same provision that applies to government officials.²⁷⁶ Therefore, bribery to employees of both SOEs and government entities are regulated in the same way. Moreover, in terms of cases involving behaviours such as nepotism and patronage in procurement, the PRC Criminal Law provides specific provisions for employees of SOEs who committed such practices in the procurement by their SOEs,²⁷⁷ although no similar provisions exist for private enterprises. Therefore, SOEs are regulated in the same way as government entities in government procurement, but it is differentiated from commercial bribery that applies to private firms.

Thirdly, China’s SOEs are supposed to operate commercially in the market as the same as other private or foreign companies, SOE procurement are conducted for commercial reasons, but not for governmental purpose, and the assets of SOEs are seen as same as those of non-public companies, However, as mentioned in the first Chapter, 10% of the shares in newly listed SOEs should be owned by National Council of Social Security Fund for to supplement the shortage of the latter. Therefore, commercial bribery makes SOE procurement become less efficient and causes loss of state assets, which means the loss of social security fund.

²⁷⁵ See *Criminal Law of the PRC*, Art. 93.

²⁷⁶ See *Criminal Law of the PRC*, Art. 385 & 386.

²⁷⁷ See *Criminal Law of the PRC*, Art. 166.

Lastly, many SOEs, such as those on the CCI's corruption list, are legally entitled to monopolize some key sectors in China. Therefore, the decision to favour certain suppliers in the procurement by those SOEs, as a result of commercial bribery, means that other suppliers are disadvantaged to access the Chinese domestic market, and it is also possible to affect the interest of the general public, because in many occasions the goods that those monopolistic SOEs acquired, such as those in the utilities sector, are used for services provided to general public, it thus can be seen as using public funds doing procurement for "public" purpose, because the funds used by China's SOEs in its purchases are solely state assets.

Therefore, due to the above mentioned unique feature of China's SOEs, the author suggests that SOEs in China should be regulated in a way that is similar to government procurement, whilst at the same time the WTO's obligations such as non-discrimination should be followed.

3.5. Inability of the Court in Tackling Illegitimate Practices in Government Procurement

China's judicial system has long been criticized for its lack of judicial independence.²⁷⁸ It is widely related to the fact that there is no separation of powers, only separation of functions in the country,²⁷⁹ and the judiciary is highly controlled by the Communist party.²⁸⁰ A weak judiciary and a strong government thus undermine the ability of judicial review of procurement decisions made by the government.

3.5.1. Guangzhou Government Procurement Center Case and the GREE Case

As mentioned in Section 2.2.2.2, according to the *GPL*, all the procurement of goods and services listed on the catalogue prepared by the MOF and DOFS must be conducted through designated procuring agencies instituted under the MOF or local DOFs. Procuring agencies are presumed to be highly efficient and professional, and it is supposed to prevent corruptions in government procurement since suppliers would have no direct contact with procuring entities. However, in reality this makes the procuring agencies a hotbed for bribery. The case of the Guangzhou Municipal Government Procurement Center

²⁷⁸ See generally, Lubman, *supra* note 109 and Peerenboom, *supra* note 110.

²⁷⁹ Sylvia Ostry, "China and the WTO: The Transparency Issue" (1998) 1 *UCLA Journal of International Law and Foreign Affairs* 14.

²⁸⁰ See generally, Lubman, *supra* note 109 and Peerenboom, *supra* note 110.

is a typical corruption case for procuring agencies.²⁸¹ The case itself is rather simple – officials at the Guangzhou Municipal Procurement Center were charged with receiving bribes and awarding procurement contracts to their personal friends, and in this case all senior officials in the procurement center were involved. However, what needs to be noted is that accused officials all received probation instead of limited term imprisonment. However, most of the accused officials were proved to have received bribes over RMB 100,000, which, according to the Criminal Law of the PRC, should be subject to imprisonment of no less than 10 years,²⁸² and the probation should be applied to only in the case where offences are punishable for a maximum of 3-year imprisonment.²⁸³ The accused officials were tried in three different district courts in Guangzhou, but coincidentally the accused were all given probation instead of limited term imprisonment.²⁸⁴

On the other hand, in another government procurement case that also took place in Guangzhou, The Guangzhou Municipal Bureau of Finance was sued by a home appliance manufacturer, GREE, for its decision of granting a contract of RMB 21 million to another supplier while the GREE offered a price of only RMB

²⁸¹ See Xinhua News, *supra* note 175.

²⁸² Criminal Law of the PRC, Art. 383(3).

²⁸³ Criminal Law of the PRC, Art. 72.

²⁸⁴ “Guangzhoushi zhengfu caigou woan zai zhuzhong, qingyise huanxing” (Re-focus on the corruption case of Guangzhou government procurement center, all of the accused received suspension of limited-term sentence), *Xinhua News* (24 March 2009), online: Xinhua News <http://news.xinhuanet.com/legal/2009-03/24/content_11061047_1.htm>.

17 million.²⁸⁵ While being interviewed by the media, the Head of the Finance Bureau responded that “so far in the court we didn’t lose any single case against us concerning government procurement”.²⁸⁶ The reason why the Guangzhou Municipal Bureau of Finance (GZMBF) was sued by the GREE in the court was that it rejected the complaint from GREE to overturn the award decision made by the Panyu District Bureau of Finance (PYDBF). As mentioned earlier in this chapter, there are three-stage remedy procedures that aggrieved suppliers need to follow to seek remedies: *Query*, *Complaint*, and *Litigation*. In the first place, the GREE submitted a query to the PYDBF for an explanation on the ground of the awarding of the contract to another supplier who offered a price that is 4 million more than the GREE. The PYDBF simply responded that the tendering document submitted by the GREE has some “formatting problems”²⁸⁷ and hence its tender was not accepted. However, as a matter of fact, the GREE was shortlisted in the first round but failed in the final selection stage.²⁸⁸ Since the GREE was not satisfied with the response from the PYDBF, it submitted a *complaint* to the GZMBF, but it was also turned down by the latter. However, in the final *litigation* stage, the Panyu district Court also turned down the GREE’s request for the reason that the GZMBF did not change the decision of the PYDBF, and thus

²⁸⁵ “Geli zongcai zhiyi zhengfu caigou bugong” (The CEO of the GREE doubts the fairness of government procurement), Xinhua News (2 February 2010), online: Xinhua News <http://news.xinhuanet.com/fortune/2010-02/02/content_12920140.htm>.

²⁸⁶ “Guangzhou caizhengju juzhang huiying geli an” (The head of the Guangzhou finance bureau responds to the GREE case), People’s Daily (3 February 2010), online: People’s Daily <<http://politics.people.com.cn/BIG5/14562/10921557.html>>.

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

according to the Administrative Reconsideration Law of the PRC (ARL), The GREE should bring the case against the PYDBF, but not the higher level GZMBF. However, although the GZMBF upheld the decision of the PYDBF, it changed the reason upon which the procurement decision was made. According to the ARL, it is arguable that who should be sued. In this case, the focus is not about whether the court will uphold the request by the GREE, but rather it is about the confidence of the government in winning any government procurement cases in administrative litigations.

3.5.2. Judicial Independence and Administrative Dominance: Institutional Purpose

Judicial review, or other remedy procedures such as a bid challenge system, is always seen as a way not only to provide remedies to aggrieved suppliers, but also a method to ensure and monitor the lawful practice of procuring entities:

“(An enforceable right of review for bidders when public entities breach the rules) is particularly important because experience has shown that the most successful procurement systems are those that provide bidders with a legal basis to challenge the actions of procurement officials when they breach the rules.”²⁸⁹

²⁸⁹ Robert R. Hunja, “Obstacles to Public Procurement Reform in Developing Countries”, in Arrowsmith and Trybus, *supra* note 92 at 15.

According to the *GPL*, litigation is the final stage of the three-stage bid challenge system, and the court is the last place where aggrieved suppliers can seek for remedy. However, the above two cases revealed the inability of the judiciary in China to review the decisions, behaviours, and practices of the government officials in government procurement due to “the tradition of judicial deference to administration”,²⁹⁰ which is a result of the conflict between a rule of law and the supremacy of the Communist Party.²⁹¹

It is widely known that judicial independence is always a critical issue in China.²⁹² Due to the country’s political system where the whole state is dominated by the Communist Party, the courts, together with the procuratorate and the police, are all controlled by the Communist Party through its Political and Legal Affairs Committee.²⁹³ Therefore, the judiciary **cannot be politically independent** and therefore, they must follow directives from their superiors at the Political and Legal Affairs Committee of the Communist Party. Moreover, the government always enjoys a higher political ranking than the court, and furthermore, the court is **financially dependent** on the government.²⁹⁴ Therefore, the court can not effectively review government procurement cases against the government and provide remedies to aggrieved suppliers. The role of the weak

²⁹⁰ See Clarke, *supra* note 78 at 113.

²⁹¹ See generally, Lubman, *supra* note 109.

²⁹² See generally, Lubman, *supra* note 109 and Peerenboom, *supra* note 110.

²⁹³ See Clarke, *supra* note 78 at 113.

²⁹⁴ *Ibid.*

judiciary and a strong government and party again suggests the element of institutional purpose in examining the effectiveness of the state procurement regulatory system.

According to Potter, institutional purpose concerns “the way in which the goals of institutions reflect material and ideological contexts”.²⁹⁵ In China, legal institutions are used as “instruments to maintain social discipline rather than to limit the power of the state”,²⁹⁶ and this determines the weak role of the judiciary.

Secondly, institutional purpose concerns “the availability and nature of financial, human and other resources”.²⁹⁷ The fact that the court is financially dependent on the government and that the judges of the court are appointed and selected by the party further reveals the lack of judicial independence in China’s judiciary.

Therefore, judicial review by the court of procurement decisions made by the government, which is provided to aggrieved suppliers as the final remedy, is not an effective way to ensure the fairness and impartiality in China’s government procurement

²⁹⁵ See Potter, *supra* note 2 at 476.

²⁹⁶ See generally, Lubman, *supra* note 109.

²⁹⁷ See Potter, *supra* note 2 at 476.

3.6. Transparency of Budget Requests and Justification of Planned Expenses Prior to the Tendering Process

To the author's point of view, the most critical issues in China's government procurement concern not those technical aspects such as procurement procedures and methods, but rather the first and last stage in the whole procurement process, which is 1) the Transparency of budget requests and Justification of Planned Expenses prior to the tendering process; and 2) the bid challenge mechanism by the court or other review body, which is the last stage in a procurement process and the last resort to remedy for aggrieved suppliers.

As previously mentioned, China's procurement procedures as prescribed in the *GPL*, *TBL*, and other various rules are rather comprehensive. As shown in most of the cases mentioned above, such as those disclosed by the NAO, the issues and problems in procurement mainly came from the implementation and monitoring of the state procurement laws and rules but not from the procurement rules it self.

In China, procurement procedures at tendering and bidding processes and the monitoring and review process have drawn a great deal of attention by scholars

and practitioners.²⁹⁸ However, less effort was made to the issues of the transparency of budget requests and justification of planned expenses prior to the tendering process. In China, although it is required in the *Administrative Rules on Publicity of Government Procurement Information* that procurement information needs to be open to public, this only applies to information concerning the tendering and bidding process and it does not include any information at the stage of budget planning, request, and approval. Moreover, many procuring entities decided to procure even without any approved budget. As mentioned in Section 2.3.3.2, in many cases that were disclosed by the NAO, many central ministries, such as the Ministry of Education (MOE), procured goods, services, and construction works without any required open tendering process and even without any approved budget.²⁹⁹

3.6.1. Chengdu Municipal Government Building Case

Even when the planned expenses on government procurement projects are approved, it does not necessarily mean that they are really legitimate. Take the case of Chengdu Municipal Government Building for example. Chengdu is the

²⁹⁸ See Wang *supra* note 167; Cao, *supra* note 169 at 61-84; Tian, *supra* note 173 at 85-102.

²⁹⁹ See Xinhua News, *supra* note 238. For some other cases of procurement without approved budget, see e.g., “Siqi weigui xiujian loutang guansuo bei tongbao” (Four cases of construction projects without approval were reported publicly”, *People’s Daily* (2 June 2007), online: People’s Daily <<http://politics.people.com.cn/BIG5/1026/5812566.html>>. See also, “Yancha weigui loutang guansuo” (Strictly investigates illegal construction projects) *CCTV* (27 June 2007), online: *CCTV* <<http://big5.cctv.com/gate/big5/news.cctv.com/china/20070627/108556.shtml>>.

capital of Sichuan province, one of the biggest and most populous provinces in China. In 2004, the Chengdu Municipal Government was approved by the Sichuan Provincial Government to spend RMB 1.2 billion to build a new complex as the city's new administration center, and the construction works were completed in 2007.³⁰⁰ The land taken for this construction project was over 17 hectares, and was widely criticized for overspending and wasting taxpayers' money. As a result, after the major earthquake in Sichuan in 2008, the Municipal Government sold this out through open auction to contribute to the reconstruction of the quake area.³⁰¹

3.6.2. Transparency of Budget Requests and Justification of Planned Expenses Prior to the Procurement Process: Institutional Purpose and Orientation

To the author's point of view, the process of expenses planning, budget request, and budget approval are of critical importance in government procurement.

Although it is clearly provided in the *GPL* that "Government procurement shall be conducted strictly in accordance with the budget approved",³⁰² and the items to be procured and the funds required shall be included in the budget for the next fiscal year, which shall be subject to examination and approval by the

³⁰⁰ "Chengdu paimai xin xingzheng zhongxin muhou" (The inside story of the auction of the new administrative center building of Chengdu municipal government) *Xinhua News* (17 July 2008), online: Xinhua News <http://news.xinhuanet.com/local/2008-07/17/content_8558392.htm>.

³⁰¹ *Ibid.*

³⁰² *GPL Art. 6.*

corresponding authority.³⁰³ However, these provisions are more or less ignored by scholars, practitioners, and procurement officials. Nevertheless, this is understandable for the following reasons:

Firstly, in a country that can be described as a “patrimonial sovereignty” where government officials only responsible for the subject of regulation, but not responsible to them,³⁰⁴ the lack of accountability of government officials makes deprives the public from access to information such as the process of budget of budget request and approval, and the officials are not obliged to face any challenge by the public to justify the planned expenses on government procurement. Therefore, the issue of transparency of budget request and approval is closely tied to the country’s political system and can not be solved easily.

Secondly, in terms of procurement without approved budget, although it is a serious violation of the *GPL*, it can not be challenged by the aggrieved suppliers in the court, as it is not directly related to the procurement procedures in the tendering and bidding process, and it can only be reviewed by such government agencies as the NAO.

³⁰³ GPL Art. 33.

³⁰⁴ Potter, *supra* note 84 at 124-125.

Whereas the issue of transparency of budget requests and approvals suggests the institutional purpose, such as material and ideological contexts and the availability and nature of financial, human and other resources, of the government that is not “responsible agency”,³⁰⁵ the issue of procurement without approved budget reveals the role of institutional orientation, such as the long-standing informal arrangement and ignorance of legal requirement, still being used instead of the formal procedures of budget request and approval.

³⁰⁵ *Ibid.*

Chapter 4

International and Comparative Perspectives: WTO's GPA and Japan's Government Procurement

4.1. Government Procurement from International Perspective: China, WTO, and the GPA

4.1.1. WTO, GPA, and Domestic Reform

In 2001, China joined the World Trade Organization (WTO) after a negotiation process that lasted for over 15 years. Upon its accession, China has committed to start the negotiation to become a party to the WTO's plurilateral Agreement on Government Procurement (GPA),³⁰⁶ and as a result it tabled its offer to join the GPA in December 28, 2007 and commenced the negotiation process.³⁰⁷

Based on the economic theory of comparative advantage,³⁰⁸ the WTO is aimed at "raising standards of living" by promoting free trade through "substantial

³⁰⁶ See WTO, *supra* note 258 at 71-72.

³⁰⁷ Ministry of Finance of PRC, News Release, "China has formally initiated the negotiation process to join the WTO's Agreement on Government Procurement" (28 December 2007), online: Ministry of Finance <http://www.mof.gov.cn/news/20071228_1500_30175.htm>.

³⁰⁸ For details of the principle of Comparative Advantage, see Paul R. Krugman & Maurice Obstfeld, *International Economics: Theory and Policy*, 6th ed. (Boston: Addison Wesley, 2002). See also, Arrowsmith, *supra* note 7 at 8.

reduction” of trade barriers and “elimination of discriminatory treatment”.³⁰⁹ To achieve these goals, Transparency and National Treatment are identified as “Core Principles” of the WTO and its agreements.³¹⁰

Same as that of the GATT and other WTO agreements, the GPA is also based on the principles of Transparency and National Treatment.³¹¹ The GPA is aimed at facilitating competition and transparency in government procurement so that the government can achieve the goal of “value for money” in its procurement.³¹²

Extensive literature has probed the GPA, and in this thesis it will not attempt to give more detail on it.³¹³ As a result of the Uruguay round negotiation, the GPA is the most important plurilateral trade agreement that is joined mostly by those developed countries of the WTO. While the multilateral trade agreements, such as the GATT and GATS, are binding to all the WTO “members”, plurilateral agreements, such as the GPA, are only applicable to the “parties” to the agreement. As such, so far the GPA is only joined by 12 parties plus 27 European Union (EU) member states. The GPA came into effect the same time as the

³⁰⁹ WTO, *Pre-amble to the Agreement Establishing the WTO*, (Geneva: WTO, 1994), online: WTO <http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm>.

³¹⁰ The WTO Secretariat, *Guide to the Uruguay Round Agreements* (Hague: Kluwer Law International, 1999), at 39-41.

³¹¹ See generally, Arrowsmith, *supra* note 7.

³¹² *Ibid.*

³¹³ See e.g., Arrowsmith, *supra* note 7; Hoekman & Mavroidis, *supra* note 13; Evenett & Hoekman, *supra* note 49; Arrowsmith & Davies, *supra* note 49; Arrowsmith & Trybus, *supra* note 92.

establishment of the WTO in 1995, and it was revised in December 2006.³¹⁴ A very important feature of the GPA is its binding force. The enforcement of the GPA is, similar as other agreements, facilitated by WTO's Dispute Settlement Mechanism (DSM). This is a distinctive feature of GPA from another major international set of rules – The UNCITRAL Model Law on the Procurement of Goods, Construction and Services, which is designed to “help states reform or develop their national public procurement laws, and also to promote open international markets” while there is no actual obligation created to the states because it is simply a “recommendation”.³¹⁵

As mentioned in the first chapter, China's accession to the WTO not only provides a huge international market for its domestic industries, but it also serves the country's internal reform agenda, because the WTO membership gives “extra leverage to force through difficult changes in the domestic economic system.”³¹⁶

³¹⁴ For an explanation and analysis of the newly revised text of the GPA, see Robert Anderson, “Renewing the WTO Agreement on Government Procurement: Progress to Date and Ongoing Negotiations” (2007) 16 *Public Procurement Law Review* 255. For a revised text of the GPA, see WTO <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/PLURI/GPA/W297.doc>.

³¹⁵ Arrowsmith, *supra* note 7 at 5. For a detailed explanation of the UNCITRAL Model Law, see Robert R. Hunja, “The UNCITRAL Model Law on Procurement of Goods, Construction and Services and Its Impact on Procurement Reform”, in Arrowsmith & Davies, *supra* note 49 at 97-110. For a comparison between the UNCITRAL Model Law & the GPA, see Beviglia-Zampetti, “The UNCITRAL Model Law on Procurement of Goods, Construction and Services”, in Hoekman & Mavroidis, *supra* note 13 at 31-55.

³¹⁶ Clarke, *supra* note 78 at 97.

While the WTO is widely seen as a way to promote good governance through the spread of its core principles of transparency and rule of law, the GPA is even further expected as a driving force to promote good governance, because

“(The GPA) is consistent with and reinforces the objectives of national reforms aimed at promoting competition, transparency, and enhanced value for money in national procurement regimes. In this regard, the GPA should not be seen solely in terms of facilitating international market access, the agreement can also make an important contribution to good governance.”³¹⁷

Good governance, as defined by the World Bank, is “epitomized by predictable, open and enlightened policy-making ...; a bureaucracy imbued with professional ethos; an executive arm of government accountable for its actions; ...and all behaving under the rule of law”.³¹⁸ According to Arrowsmith, “an effective public procurement system has been seen as an important aspect of this good governance”.³¹⁹ Good governance is a particular issue in the Chinese context, where problems in China’s government procurement are seen to be “structural” and “tied stubbornly to the Chinese political and legal system”,³²⁰ which, as previously stated in the first chapter, can be referred to as a “Patrimonial

³¹⁷ Anderson, *supra* note 307 at 256.

³¹⁸ Arrowsmith, *supra* note 7 at 6. See also, World Bank, *Governance: the World Bank’s Experience*, at vii, 1994.

³¹⁹ Arrowsmith, *supra* note 7 at 6.

³²⁰ Kong, *supra* note 81 at 200.

sovereignty” and a “Fragmented authoritarian”.³²¹ Therefore, in many existing Chinese literatures the GPA was always used to be compared with China’s *GPL*,³²² and it is greatly expected by Chinese scholars as a way to improve the country’s procurement system.³²³ However, the prospect of promoting good governance in China by introducing the GPA to the country’s procurement regime is questionable, as it is dependent on a number of normative and institutional issues that involve the dynamics of selective adaptation and institutional capacity.

4.1.2. Economic Globalization, Selective Adaptation, and Institutional Capacity

The WTO is now seen as the most important international institution for international trade, and the development of WTO and international trade is a driving force for economic globalization.³²⁴

Economic Globalization, according to Stiglitz, is:

³²¹ See Potter, *supra* note 84 and Lieberthal, *supra* note 82.

³²² See e.g., Xiao Beigeng, *Zhenfu Caigou zhi Guoji Guizhi* (The International Rule of the Public Procurement), (Beijing: Falv Chubanshe (Law Press of China), 2005). See also, Wang, *supra* note 163. See also, Zhou & Dai, *supra* note 164, Zhang, *supra* note 164.

³²³ See e.g., Xiao *supra* note 322.

³²⁴ Peter Van Den Bossche, *The Law and Policy of the World Trade Organization, Text, Cases, and Materials*, (Cambridge: Cambridge University Press, 2008), ch.1.

“the closer integration of the countries and peoples of the world which has been brought about by the enormous reduction of costs of transportation and communication, and the breaking down of artificial barriers to the flow of goods, services, capital, knowledge, and (to a lesser extent) people across borders.”³²⁵

Moreover, in terms of international trade, such a “closer integration of the countries” in economic globalization is de facto a process of the spread of globalized trade norms as represented by the WTO that was featured with Western (European and North American) liberalized norms of transparency and rule of law.³²⁶ Therefore, promoting good governance in China by borrowing GPA rules to the country’s existing procurement regime is de facto a process of adapting international norms of transparency and rule of law into a Chinese context. However, a simple borrowing of international rules will not help reforming the state procurement system. As Arrowsmith argues,

“One factor that will clearly affect success (of the GPA rules) is the extent to which purchasers actually follow the rules. Relevant to this, in particular, is the political will of the parties, the control which central government can exercise over sub-central or other

³²⁵ Joseph Stiglitz, *Globalization and Its Discontents*, (New York: W. W. Norton, 2002), at 9, See also, Bossche, *supra* note 324.

³²⁶ See generally, Pitman B. Potter, “Selective Adaptation, Institutional Capacity and the Reception of International Law under Conditions of Globalization”, (2007) 66 *Legal Sociology* (Japan).

purchasers, the publicity given to the rules, the training given to purchasers and the effectiveness of the enforcement system.”³²⁷

The above issues pointed out by Arrowsmith can be seen as highly coincided with the cases mentioned in Chapter 2 by reference to the theory of institutional capacity. While “the effectiveness of the enforcement system” clearly concerns the element of institutional purpose, orientation, and coherence, “political will of the parties” suggests the element of institutional purpose that affects the success of local implementation of GPA rules, “the control which central government can exercise over sub-central or other purchasers” reveals the importance of institutional location, and the “publicity given to the rules” and “training given to purchasers” seem to be relevant to the element of institutional orientation. Therefore, the local implementation of GPA rules is dependent on the institutional capacity of domestic political, bureaucratic, and judicial system.

Furthermore, as mentioned in the first chapter, the local adaptation of GPA rules is also dependent on the dynamic of Selective Adaptation which concerns the degree of resonance between local legal culture and norms of governance and international liberal norms of transparency and rule of law that are embedded in the WTO and GPA rules.³²⁸ As explained in the first chapter, “the process of presenting procurement reforms must reflect a consensus of a range of

³²⁷ Arrowsmith, *supra* note 7 at 433.

³²⁸ See generally, Potter, *supra* note 333.

developed and developing countries, rather than as reflecting exclusively U.S. or EU norms”.³²⁹

Whether or not joining the GPA is a way for China to reform its public procurement system and whether or not compliance to the GPA by China’s administrative and judicial system can be expected is a research question of this thesis. In this thesis, the author will take a look at the government procurement regime in Japan in an attempt to shed some lights on the prospect of China’s GPA accession.

4.2. Comparative Perspective: Government Procurement in Japan

4.2.1. Why Japan?

Government procurement law regulates the behaviours of government officials in procurement activities, and it also offers remedy for aggrieved suppliers by putting a bid review system in place. Whereas the behaviours of government officials are determined by political culture, a sound procurement system, as discussed in Section 1.4.4, also depends on the review system that can effectively monitor the enforcement of the procurement law. For that reason, it can be said that there are three elements that determine the effectiveness of the procurement

³²⁹ Schwartz, *supra* note 92 at 45.

system: politicians, bureaucrats, and judiciary. Therefore, government procurement is closely associated with administrative law. As previously stated in Section 1.5.1, Japan is an interesting country to compare with China due to their similar cultural background, but another important reason to compare the state procurement laws of these two countries is that, although Japan has a sound liberal democracy and China does not, “the influence of politicians on the judiciary” is widely recognized by many scholars,³³⁰ because “political leaders maintain their control over the judiciary through their influence on job assignments”.³³¹ On the other hand, the judiciary in Japan is not only influenced by politicians, but is also more or less restricted by the reviewability of administrative cases that could challenge the bureaucracy.³³²

These practical situations in Japan, which are rooted from its political and regulatory culture, are somewhat similar to the problems and issues raised in China. Therefore, it will be useful to examine the situation in Japan to shed a light on the discussion on China’s government procurement.

³³⁰ John Haley, *The Spirit of Japanese Law*, (Athens, Georgia: University of Georgia Press, 1998), at 106-108. See also, Luney, Percy R. Jr., “Judiciary: Its Organization and Status in the Parliamentary System: The Constitution of Japan - The Fifth Decade: II. Government Processes and the Separation of Powers” (1990) 53 *Law and Contemporary Problems* 149.

³³¹ J. Mark Ramseyer & Frances McCall Rosenbluth, *Japan's Political Marketplace*, (Cambridge: Harvard University Press, 1993), at 14-15.

³³² John Haley, “Japanese Administrative Law”, (1986) 19 *Law in Japan* 1.

4.2.1.1. Legal Culture, Political System, and Selective Adaptation

In comparative studies, the first question to set out is to decide “which system to choose to compare.”³³³ In this thesis, Public Contracting laws and cases in Japan are chosen to compare with those of China.

In Postwar Japan, its established liberal parliamentary democracy and good governance are widely seen as a perfect democratic model for all other Asian countries.³³⁴ However, on the other hand, the long time ruling by the Liberal Democratic Party of Japan (LDP) created many controversies.³³⁵

In terms of the legal system, the Modern Japanese Legal system was mainly built during the Meiji Restoration in the late 19th century by borrowing heavily, if not completely, from the German Law, which makes Japan a typical Civil Law country.³³⁶ However, on the other hand, the Japanese legal system was highly influenced by the American Common law system during and after the Allied Occupation Post-World War II and even the current Constitution of Japan was

³³³ Kenneth L. Port & Gerald Paul McAlinn, *Comparative law: Law and the Legal Process in Japan*, 2nd ed, (Durham, NC: Carolina Academic Press, 2003), at 15.

³³⁴ See e.g., Ezra Vogel, *Japan as Number One: Lessons for America*, (Cambridge: Harvard University Press, 1999).

³³⁵ See Frank B. Gibney, “Is Japan’s Democracy a Sham?” *The New York Times* (May 14, 1989), online: The New York Times <<http://www.nytimes.com/1989/05/14/books/is-japan-s-democracy-a-sham.html>>. See also, Ian Neary, “Parliamentary Democracy in Japan” (2004) Vol. 57 No. 3 *Parliamentary Affairs* 666-681.

³³⁶ See Port & McAlinn, *supra* note 333 at 9.

drafted under the influence of the Occupation Forces to replace the militaristic Meiji Constitution.

Thus, the modern, or postwar Japanese legal system can be argued as a German model of Civil law system but significantly influenced by the American common law tradition. Compared to Canada, Japanese legal system is a “hybrid” where two traditions of common law and civil law are mixed and integrated in a single jurisdiction. Moreover, it is also argued that even the Chinese law has a “heavy original influence” to the Japanese law ever back to the Sixth Century.³³⁷ Or in other words, Japanese legal system has a higher degree of mixture of not only two major Western systems of law, but also ancient Chinese law. This makes it extremely suitable as a subject in the comparison of law.

On the other hand, the law in Japan is particularly deeply rooted from and tied to its culture which was also heavily influenced by Chinese Confucianism:

“Law in Japan is extremely cultural based; laws that work their function in Japan do so because they are closely allied with cultural values, values which are as much as two thousand years old. The most effective “law” in Japan is the one that is vague and voluntary. In the debate over whether law structures culture or culture structures law, it is quite clear that in the Japanese setting, the latter holds true.”³³⁸

³³⁷ Port & McAlinn, *supra* note 333 at 14.

³³⁸ Port & McAlinn, *supra* note 333 at 13.

As mentioned in Section 1.4.2 and 3.1.2, local adaptation of international procurement rules into a domestic procurement system involves a dynamic of Selective Adaptation, which concerns the extent to which local legal culture and norms of governance can coexist with international norms of transparency and rule of law as embedded in GPA and other international rules.³³⁹ Selective Adaptation is a perfect example in the context of Japanese legal system. On one hand, Japan has a sound liberal democracy and good governance that are highly comparable with those of western countries. However, conflicts between underlying western and local norms explain why “Japan has confronted problems very similar to those of the West, with very similar Western statutes, and has come to completely distinct results”.³⁴⁰ An example is Japan’s reluctance to enforce the anti-trust laws that were non-Japanese origin and forced by the Americans to enforce,³⁴¹ and as a result the issue of bid rigging by Japanese companies is a major issue in Japan’s public procurement and it is de facto an intersection of procurement laws and anti-trust laws. The non-enforcement of Japan’s Anti-trust Law, as represented by the light penalties for its violation, shows a great contrast to that of the United States and the EU. To take an example, in January 2007, the European Commission has fined eleven groups of companies a total of €750 million for participating in a cartel for gas insulated switchgear projects, in violation of the EC Treaty’s ban on restrictive business

³³⁹ See generally, Potter, *supra* note 2.

³⁴⁰ See Port & McAlinn, *supra* note 333 at 9.

³⁴¹ *Ibid.*

practices. Among these eleven groups of companies, five of them are Japanese firms, including Fuji Electric, Hitachi, Japan AE Power Systems, Mitsubishi Electric Corporation, and Toshiba, and this is “the largest set of fines ever imposed on a single cartel” because the cartel “has cheated public utility companies and consumers for more than 16 years”.³⁴² Although bid rigging is even explicitly prescribed in the Japanese Penal Code as a criminal offense, it is still the most pervasive illegitimate practice in Japan’s public procurement.³⁴³

The contrast between non-enforcement of the Anti-trust laws and functionality of other non-Japanese origin laws in Japan suggests that Selective Adaptation, which concerns resonance between underlying norms of both local and non-local rules, determines the functionality of performance and local implementation of international procurement and other rules.³⁴⁴ Japan is both a liberal democracy and a party to the GPA, and by examining the effectiveness and transparency of Japan’s public procurement system, it will help to explore whether a democratic system matters for a sound and transparent public procurement regime.

³⁴² See, European Commission, Press Release, IP/07/80, “Competition: Commission Fines Members of Gas Insulated Switchgear Cartel over 750 Million Euros”, (24 Jan 2007). Online: Gateway to European Union <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/80&format=HTML&aged=1&language=EN&guiLanguage=en>>.

³⁴³ See Michael L. Beeman, *Public Policy and Economic Competition in Japan: Change and Continuity in Antimonopoly Policy 1973-1995* (London and New York: Routledge, 2002) at 159.

³⁴⁴ See generally Potter, *supra* note 2.

4.2.1.2. WTO, GPA, and Japan

As the world's third largest economic power, Japan's economy depends heavily on international trade. Japan is a long time member of the WTO, and it is also a founding party to the WTO's GPA. As an active member of the WTO, Japan is known for its strict compliance to WTO rules and aggressive uses of WTO's enforcement mechanism, or, in other words, the Dispute Settlement Mechanism (DSM), to defend for its trade policy and interest. And this is described as "Aggressive Legalism".³⁴⁵ However, the approach of "Aggressive Legalism" in the arena of international trade is not the case in Japan's domestic legal system. The role of law and preferences for informal ways to settle disputes is still highly controversial in the domestic context, which is closely tied to its political and social conditions.³⁴⁶

In terms of its role in the GPA, Japan is known for its determination of opening domestic market to foreign suppliers.³⁴⁷ Japan's voluntary measures of

³⁴⁵ Saadia M. Pekkanen, "Aggressive Legalism: The Rules of the WTO and Japan's Emerging Trade Strategy" (2004) 24:5 *World Economy* 707-708. For "Aggressive Legalism", see also, Saadia M. Pekkanen, "Sword and Shield: The WTO Dispute Settlement System and Japan", in Ulrike Schaeede & William Grimes eds., *Japan's Managed Globalization: Adapting to Twenty-first Century*, (New York: M.E. Sharpe, 2003), at 77-100; Ichiro Araki, "The Evolution of Japan's Aggressive Legalism", (2006) 29:6 *World Economy* 783-803; Kobayashi, Hirokazu, "The Future of Japan's Trade Policy Regarding Bilateral Trade Disputes", (Working paper, 2004), online: Research Institute of Economy, Trade, and Industry <http://www.rieti.go.jp/en/columns/a01_0154.html>.

³⁴⁶ See Port & McAlinn, *supra* note 333 at 16-19.

³⁴⁷ See e.g., Jean Heilman Grier, "Japan's Implementation of the WTO Agreement on Government Procurement" (1996) 17 *University of Pennsylvania Journal of International*

liberalizing its public procurement market and lowering the threshold as prescribed by the GPA makes it to be seen as a rule-oriented party to the GPA.³⁴⁸ Nevertheless, Japan is also widely known for its persistent political corruption scandals, most of which are related to government procurement, especially in construction services.³⁴⁹ Therefore, it is useful to examine the government procurement in Japan with a focus on the country's political and bureaucratic system.

4.2.2. Regulatory Framework of Japan's Government Procurement: Brief Introduction

Similar to that of China, the Japanese legal system consists of laws that are adopted by the Diet and cabinet orders made by the central government. As mentioned in the first chapter, the two major laws that govern government procurement are the Accounts Law of Japan that regulates procurement and sale by central government entities and the Local Autonomy Law that governs business activities of local government entities. Chapter 4 of the Accounts Law of Japan is titled "Contract", and it is the major legislation of Japan which regulates

Economic Law 645; Jean Heilman Grier, "An Overview of Japan's Government Procurement System", (1998) 7:6 *Public Procurement Law Review* 131-146. See also, Norio Komuro, "The implementation of the GPA in Japan", in Hoekman & Mavroidis, supra note 13 at 149-168.

³⁴⁸ *Ibid.*

³⁴⁹ See e.g., Steven R. Reed, "Political Corruption in Japan" (1996) 48:3 *International Social Science Journal* 395-405. See also, Brian Woodall, *Japan under Construction: Corruption, Politics, and Public Works*, (Berkeley: University of California Press, 1996).

not only procurement, but also selling by all the central government entities in Japan.³⁵⁰ The Cabinet Order Concerning Budget, Settlement of Account, and Accounting, which serves as the implementing rules of the Accounting Law, also has a same chapter on “Contract” that provides detailed regulations on government contracts.³⁵¹ Similarly, both the procurement and selling by local government entities in Japan are mainly regulated by the Section 6 of the Chapter 9 of the Local Autonomy Law.³⁵² According to both Chapter 4 of the Accounting Law and Section 6 of the Chapter 9 of the Local Autonomy Law, it regulates “the buying and selling, leasing, and undertaking of government contracts”.³⁵³

Moreover, similar to that of China, Japan’s Penal Code also provides specific criminal sanctions for corrupt practice in public procurement,³⁵⁴ in addition to Crimes of Corruption.³⁵⁵ While the crimes of corruption only deals with civil servants, who receive briberies in performing their official duties, Article 96-3 of the Penal Code prohibits anyone “who by the use of fraudulent means or force commits an act which impairs the fairness of a public auction or bid”. It is worthy to be noted here that, first of all, the crime of *Obstruction of Auctions* deals with both “public auction and bid”, and secondly, anyone, but not limited to

³⁵⁰ *Accounts Law of Japan* (Kai-kei Hou), (Law No. 53, June 7, 2006), c.4.

³⁵¹ *The Cabinet Order on Budget, Balance, and Accounting* (Cabinet Order 130, April 30, 2009), c.7.

³⁵² *Local Autonomy of Japan* (Chi-hou Ji-chi Hou), (Law No. 13, March 31, 2009), c.9, s.6.

³⁵³ *Accounting Law of Japan*, Art. 29 and *Local Autonomy Law of Japan*, Art. 234.

³⁵⁴ *Penal Code of Japan*, Art. 96-3, *kyoubai nyuusatsu bougai zai* (Obstruction of Auctions).

³⁵⁵ *Penal Code of Japan*, Chapter XXV, *Oshiyoku zai* (Crimes of Corruption).

public servants, can be charged for this violation. Relevant to this, the Article 96-3 also prohibits the use of bid-rigging (*Dango*) in such “public auction or bid”.³⁵⁶

4.2.3. GPA Specific Measures: GPA Specific Rules, Procuring Entities, and the Institution of Government Procurement Review Board

4.2.3.1. GPA Specific Rules

In addition to the above mentioned national laws and cabinet orders, Japan also adopted a few specific cabinet orders to comply with its international commitment. As a founding member of the Tokyo Round Code of Government procurement,³⁵⁷ which is the predecessor of the GPA, the Government of Japan adopted the Cabinet Order Stipulating Special Procedures for Government Procurement of Products or Specified Services.³⁵⁸ Since local government entities were not covered in the Tokyo round Code but is included in the GPA, in order to be consistent with its obligations to the GPA that came into effect in 1995, Japan promulgated the Cabinet Order Stipulating Special Procedures for Government Procurement Products or Specified Services in Local Government

³⁵⁶ *Penal Code of Japan, supra* note 347.

³⁵⁷ For a detailed discussion on the *Tokyo Round Code of Government Procurement*, see, for example, Annet Blank and Gabrielle Marceau, “The History of the Government Procurement Negotiations Since 1945” (1996) 5 *Public Procurement Law Review* 77-147.

³⁵⁸ *Government Ordinance No. 300* (1980).

Entities.³⁵⁹ Furthermore, the Diet also passed the Act for Promoting Properness of Bidding and Contracting in Public Works in 2000 which can be seen as a part of the country's procurement reform as pushed by its membership in the GPA.³⁶⁰

4.2.3.2. Procuring Entities under Japan's GPA Commitment

According to the Accounts Law, Local Autonomy Law, and the Cabinet Order Concerning Budget, Settlement of Account, and Accounting, only central and local government agencies are defined as procuring entities in government procurement.³⁶¹ However, according to Japan's commitment to the GPA, besides government entities, other "government related entities", such as SOEs and other public organizations, such as those "Independent Administrative Entities" and financial corporations, are also included and applicable to the GPA the same as central government entities.³⁶² What needs to be noted is that,

³⁵⁹ *Government Ordinance No. 372 (1995)*.

³⁶⁰ For a detailed analysis of Japan's procurement reform driven by its GPA accession, see, Taishi Ohno & Yuhei Harada, "A Comparison of Tendering and Contracting Systems for Public Works" (2006) 13 *Government Auditing review* 49, online: Japan Board of Audit <<http://www.jbaudit.go.jp/pr/pdf/e13d04.pdf>>. For the application of the *Act for Promoting Properness of Bidding and Contracting in Public Works*, see, Ministry of Land, Infrastructure, Transport, & Tourism, *Concerning the promotion of proper tendering and contracting for public works* (Tokyo: Ministry of Land, Infrastructure, Transport, & Tourism, 28 December 2004), online: Ministry of Land, Infrastructure, Transport, & Tourism <http://www.mlit.go.jp/sogoseisaku/1_6_hf_000117.html>.

³⁶¹ *Accounts Law of Japan*, Art. 29; *Local Autonomy Law of Japan*, Art. 234; *the Cabinet Order on Budget, Balance, and Accounting*, Art. 68.

³⁶² WTO, *Agreement on Government procurement (GPA), Appendix 1, Japan, Annex 3, All other Entities Which Procure in Accordance with the Provisions of this Agreement*, WTO Doc. WT/Let/643 (May 26, 2009), online: WTO <http://www.wto.org/english/tratop_e/gproc_e/jpn3.doc>.

unlike China, Japan does not have many SOEs, and most of the SOEs in Japan are partially privatized.³⁶³ In terms of those “government related entities” that listed in the Annex 3 of Japan’s GPA package, the purchasing power of these entities are not less than that of those central government entities listed in the Annex 1 or local government entities listed in Annex 2, and more importantly, these organizations are not really independent. They are funded by the Japanese Government, and the management of these organizations are usually former bureaucrats from the central ministries that used to be responsible for overseeing the operation of these entities.³⁶⁴ As a result, with the new ruling DPJ took the power, the government established the “Government Revitalization Unit” and started the work of “screening of government-affiliated entities” (Jigyō shiwake), in order to cut the budget size, reduce some of their activities, or even abolish some of these entities.³⁶⁵ However, these “independent administrative entities”, such as the internationally well known Japan Foundation and JICA, are neither independent from bureaucrats nor from politicians. To take Matsuoka Toshikatsu, the former Minister of Agriculture and Forestry, for example, as to be discussed in detail in Section 4.2.5, he committed suicide during his term after the revelation of his involvement in a series of

³⁶³ See Grier, *supra* note 347 at 624.

³⁶⁴ This is so called “Amakudari”, which literally means “Descent from Heaven”, and it refers to institutionalized practice where Japanese senior bureaucrats retire to high-profile positions in those Independent Administrative Legal Entities they used to oversee or private companies that subject to their administration and support.

³⁶⁵ For details about the Government Revitalization Unit, See Government Revitalization Unit <<http://www.cao.go.jp/sasshin/>>.

bribery cases.³⁶⁶ Among those corruption cases he committed, one notable case that directly leads to his suicide is his relationship with the “Japan Green Resources Agency” (“J-Green”), an independent administrative legal entity that provided political financial contributions to Matsuoka in exchange for its endorsement in J-Green’s tendering and bidding activities.³⁶⁷ The J-Green was transformed to another independent administrative legal entity “Forestry and Forest Product Research Institute” after this scandal and it continues to be funded by the government.³⁶⁸ Therefore, although those “independent administrative legal entities” and other “government related entities” are supposed to be independent and are listed in the Annex 3 of Japan’s GPA commitment, their procurement activities and other operations are suffered from political and governmental intervention.

³⁶⁶ See e.g., “Minister who faced inquiry into series of scandals kills himself”, *Times* (29 May 2007), online: *Times*

<<http://www.timesonline.co.uk/tol/news/world/asia/article1851710.ece>>.

³⁶⁷ See “The J-Green Case: politicians are involve, Matsuoka committed suicide”, *Asahi Shimbun* (28 May 2007), online: *Asahi Shimbun*

<<http://www.asahi.com/special/070528/TKY200705280437.html>>.

³⁶⁸ For details about the J-Green, which is now reformed to Forestry and Forest Product Research Institute, see Forestry and Forest Product Research Institute, online: Forestry and Forest Product Research Institute <<http://www.green.go.jp/>>.

4.2.4. Government Procurement Review Board (GPRB) of Japan

The GPA provides that member countries shall make an independent reviewing body available to aggrieved suppliers. However, it does not specify the type of the review body. Therefore, “there is a great diversity between GPA parties in the types of bodies that have been entrusted with the task of reviewing procurement decisions”.³⁶⁹ While in some civil law countries procurement cases are brought to general administrative courts, in many common law countries, however, procurement decisions made by the government are subject to judicial review by general courts.³⁷⁰ Other members of the GPA, such as Japan and Hong Kong, have established independent reviewing bodies specifically designed for reviewing procurement decisions.

In 1995, the same year when the WTO and the GPA were instituted, Japan established the Office of Government Procurement Review (OGPR) as well as the Government Procurement Review Board (GPRB).

Headed by the Chief Cabinet Secretary, the OGPR consists of vice-ministers and high-level officials of the ministries concerned, such as the finance ministry,

³⁶⁹ See Arrowsmith, *supra* note 7 at 393.

³⁷⁰ *Ibid.*

foreign ministry, and national defense ministry.³⁷¹ The role of the OGPR is mainly to implement the GPA's national challenge procedures and to formulate instructions for the GPRB to follow in order to "enhance the transparency, fairness, and competitiveness of the Japanese government procurement system".³⁷²

On the other hand, the GPRB, which consists of experts with experiences in government procurement, is the reviewing body and its purpose is to examine government procurement decisions. It is not the purpose of this paper to give full details about the operation and procedures, as it has already been given in detail in existing literature.³⁷³ What needs to be noted is the distinction and separation between the OGPR and the GPRB in Japan's government procurement. While the GPRB reviews the procurement decisions and cases as a reviewing body from a technical perspective, the OGPR, which consists of high-ranking politicians and officials, mainly plays a role as a supervisory body that supports the GPRB and monitors the behavior of government agencies involved. The function and effectiveness of the GPRB will be discussed in Section 4.3.1.

³⁷¹ Grier, *supra* note 347 at 645.

³⁷² *Ibid.*

³⁷³ See e.g., Komuro, *supra* note 347.

4.2.5. A Major Issue in Japan's Public Procurement: Political Corruption and Collusion between Politicians and Bureaucrats in Public Procurement

Japan is widely seen as a sound liberal democracy with good governance by a highly efficient, professional, and clean bureaucracy.³⁷⁴ As far as the government procurement is concerned, various existing literatures have shown that Japan's procurement laws and procedures are highly compatible with that of the GPA, such as the tendering procedures, domestic challenge procedures, and procuring entities covered in government procurement.³⁷⁵ However, on the other hand, political corruption in Japan has always been a big issue, and persistent revelations of political scandals show that most of the political corruption cases concerning political bribery are related to collusion in government procurement.³⁷⁶ Therefore, besides the bid rigging issues among Japanese private firms as mentioned in Section 4.2.1.1, political corruption is another key issue in Japan's government procurement.

Political corruption has long been a persistent issue in Japan's political system.³⁷⁷

Japan had been ruled by the Liberal Democratic Party (LDP) for over five

³⁷⁴ See generally, Vogel, *supra* note 327.

³⁷⁵ See e.g., Grier, *supra* note 347.

³⁷⁶ See Steven R. Reed, "Political Corruption in Japan" (1996) 48:3 *International Social Science* 395-405.

³⁷⁷ See e.g., Mamoru Iga and Morton Auerbach, "Political Corruption and Social Structure in Japan" (1977) 17:6 *Asian Survey* 556-564. See also, Brian Woodall, *Japan under Construction: Corruption, Politics, and Public Works*, (Berkeley: University of California Press, 1996).

decades and the latter just stepped down in 2009. LDP has a long tradition of political corruption,³⁷⁸ and a most recent case involved Matsuoka Toshikatsu, a former Minister of Agriculture and Forestry, who during his term committed suicide after the revelation of his involvement in a series of bribery cases.³⁷⁹ Most of the corruption cases that Matsuoka involved are related to political bribery in return for government contracts.³⁸⁰ Matsuoka was a highly influential politician in the then ruling LDP and the diet. Although he was elected only for a few times, he managed to raise a surprisingly big amount of political funds, and “contributions from companies and organizations in construction industry made up a large proportion of donations to Matsuoka’s political funding organizations”,³⁸¹ and these donations were always made in exchange for public constructions works, because Matsuoka not only controlled public construction works in his constituency, Kumamoto Prefecture,³⁸² but also managed to favor his patrons in public works projects in other prefectures, such as the Kyushu bullet train and the Kawabe River dam projects.³⁸³ Matsuoka was not alone, and as a matter of fact, the way that Matsuoka raised his political funds by favoring his political patrons in public works projects was borrowed from another even more influential politician, Suzuki Muneo:

³⁷⁸ *Ibid.*

³⁷⁹ See e.g., Times, *supra* note 359.

³⁸⁰ See generally, Mulgan, *supra* note 40.

³⁸¹ Mulgan, *supra* note 40 at 163.

³⁸² Mulgan, *supra* note 40 at 158.

³⁸³ Mulgan, *supra* note 40 at 163.

“What Matsuoka learned from Suzuki was that a sure-fire way to secure money and votes and to realize his ambitions in politics was to become an influential politician who could deliver public works projects to his local districts.”³⁸⁴

“Matsuoka tapped into a very lucrative vein of political funding by deploying the same kind of methodology as Muneo, that is, blatant influence peddling and exercising influence wherever he could – from obtaining central and local government public works funding to the selection of companies to do the public works.”³⁸⁵

Why politicians are able to interfere with the public procurement decisions that are supposed to be made by bureaucrats in central and local government? The answer is the harassment and threats to bureaucrats by politicians, and Matsuoka is always known for his “political style of yelling at the bureaucrats”.³⁸⁶

What is even worse is Suzuki Muneo’s style:

“An official in the fisheries Agency committed suicide, it is said, because of repeated harassment from Muneo. The official was seen as a hardworking and good man, a law-abiding citizen who did not want to bend the rules for Muneo, but who had to

³⁸⁴ Mulgan, *supra* note 40 at 153.

³⁸⁵ *Ibid.*

³⁸⁶ Mulgan, *supra* note 40 at 155.

endure threats such as “I am going to wreck your life” and “I’ll make sure you don’t get promoted”.³⁸⁷

However, on the other hand, harassment and threats are not the only way that politicians can influence bureaucrats on making procurement decisions. Suzuki Muneo, who got arrested and sentenced for imprisonment for his corruption cases also involve bureaucrats whom Suzuki colluded with in public works projects. Suzuki Muneo’s case, which involves his collusion with bureaucrats in the Ministry of Foreign Affairs (MOFA), is even more remarkable.

Japan’s bureaucrats are always seen as highly efficient and professional.

However, as Reed argues,

“There is a persistent myth in Japanese studies that politicians are dirty but bureaucrats are clean. Though bureaucrats have been involved in all of the major post-war scandals and have been the primary culprits in many, the myth persists.”³⁸⁸

Suzuki Muneo was alleged to have involved in many corruption cases concerning government procurement, most of which were also related to Matsuoka Toshikatsu, and the construction companies and other contractors in government procurement always made political contributions to both of them

³⁸⁷ *Ibid.*

³⁸⁸ Steven R. Reed, Book Review of *Political Bribery in Japan* by Richard H. Mitchell (1999) 2:1 Social Science Japan Journal 126.

who are so called “the Identical Twins of Nagata-Cho”.³⁸⁹ Whereas Matsuoka was very influential in the sector of agriculture and forestry, Suzuki Muneo was not only powerful in these sectors, but also widely known as “the behind-the-scenes foreign minister” in Japanese politics.³⁹⁰ The most remarkable case of Suzuki concerns a construction project funded by the MOFA. In this case, Suzuki Muneo chaired a Cooperation Committee between Japan and Russia, which was an official organ of the MOFA. As pushed by Suzuki, the MOFA, under the direction of the Cooperation Committee, built a Guest House on Kunashiri Island, which is adjacent to Hokkaido but is currently occupied by Russia. Suzuki has dominated the whole process of the construction of this house, including the selection of the contractors,³⁹¹ and thus this house is widely known as “Muneo House”.³⁹²

What needs to be noted in this case is the role of bureaucrats in MOFA. In the case of misusing funds of the Cooperation Committee, Kazuhiko Togo, then the chief of the European Affairs Bureau, and Masaru Sato, former senior analyst in

³⁸⁹ See generally, Mulgan, *supra* note 40 at Chapter 6.

³⁹⁰ Mulgan, *supra* note 40 at 155. See also, Axel Berkofsky, “Corruption and Bribery in Japan’s Ministry of Foreign Affairs: The Case of Muneo Suzuki”, *Japan Policy Research Institute (JPRI) Working Paper No.86* (June 2002), online: Japan Policy Research Institute <<http://www.jpri.org/publications/workingpapers/wp86.html>>.

³⁹¹ Internal Documents were released by the MOFA on the request of Diet Member Sasaki Kensho, online: Diet Member Sasaki Kensho’s Official Website <http://www.sasaki-kensho.jp/giwaku/article/suzuki/suziki_sub05.html>.

³⁹² Berkofsky, *supra* note 383.

MOFA's Intelligence and Analysis Bureau, was also accused of assisting Suzuki in misusing the funds of the cooperation committee.³⁹³

The corruption in procurement by the Cooperation Committee of construction works is not only about the "Muneo House". According to an official report prepared by an independent review body commissioned by the MOFA to investigate the Suzuki's corruption scandal involving MOFA, Suzuki Muneo had dominated a number of big construction works projects funded by the Cooperation Committee under MOFA.³⁹⁴

Therefore, bureaucrats in central and local government agencies in Japan, such as those in the MOFA, or the Forestry Agency, can be very easily influenced by politicians in making their procurement decisions, either by harassment and threats, or through collusive practices. Furthermore, it is also argued that bureaucrats alone are also involved in a number of corruption scandals without any influence from politicians.³⁹⁵

³⁹³ *Ibid.*

³⁹⁴ Ministry of Foreign Affairs of Japan, *Investigation Report on the Activities of the Cooperation Committee* (Tokyo: Ministry of Foreign Affairs, 2002), online: Ministry of Foreign Affairs <http://www.mofa.go.jp/MOFAJ/annai/honsho/kai_genjo/pdfs/shien.pdf>.

³⁹⁵ See e.g., David T. Johnson, "Bureaucratic Corruption in Japan", *Japan Policy Research Institute (JPRI) Working Paper No.76* (April 2001), online: Japan Policy Research Institute <<http://www.jpri.org/publications/workingpapers/wp76.html>>.

4.3. The Implication of Implementation of GPA in Japan

4.3.1. The Limits of Japan's Public Procurement Review System: Government Procurement Review Board

As mentioned in Section 3.2.3, Japan established the Office of Government Procurement Review (OGPR) as well as the Government Procurement Review Board (GPRB) in 1995 to comply with GPA's requirement of an independent review body to be in place for the enforcement of domestic challenge procedures for aggrieved suppliers.³⁹⁶

As mentioned earlier, whereas the OGPR is headed by the Chief Cabinet Secretary and joined by vice-ministers and high-level officials of the ministries concerned in order to implement the GPA's national challenge procedures and to formulate instructions for the GPRB to follow,³⁹⁷ the GPRB, which consists of experts with experiences in government procurement, is the reviewing body and its purpose is to examine government procurement decisions.³⁹⁸ While the GPRB reviews the procurement decisions and cases as a reviewing body from a technical perspective, the OGPR, which consists of high-ranking politicians and

³⁹⁶ GPA Art. XX.

³⁹⁷ Grier, *supra* note 347 at 645.

³⁹⁸ See e.g., Komuro, *supra* note 347.

officials, mainly plays a role as a supervisory body that supports the GPRB and monitors the behavior of government agencies involved.³⁹⁹

However, it is surprising to learn that ever since 1995, there has been only 6 cases submitted to the GPRB from aggrieved suppliers for review.⁴⁰⁰ Among these 6 cases, Case No.1 was dismissed because the procuring entity was not covered in Japan's GPA commitment,⁴⁰¹ while Case No.3 was rejected because of the services procured in this case was not covered.⁴⁰² In Case No.2, the complaint from the supplier regarding the tendering procedures and technical specifications was rejected,⁴⁰³ whereas in Case No.4 the complaint from the supplier was partially upheld by the Board.⁴⁰⁴ In case No.5 the complaint was submitted after the prescribed time period for submission of complaints and thus

³⁹⁹ *Ibid.*

⁴⁰⁰ Secretariat for the Government Procurement Review Board (Office for Government Procurement Challenge System), Cabinet Office, Government of Japan, *A Guide to the System of Complaint Review Procedures for Government Procurement*, online: Secretariat for the Government Procurement Review Board <http://www5.cao.go.jp/access/english/chans_main_e.html>.

⁴⁰¹ Executive Meeting, Office of Government Procurement Review (OGPR), *Complaints Concerning Government procurement Case No.1* (Tokyo: Secretariat for the Government Procurement Review Board, 2 August 1996), online: Secretariat for the Government Procurement Review Board (Secretariat for the GPRB) <<http://www5.cao.go.jp/access/english/chans/shori8.2nd-e.html>>.

⁴⁰² Executive Meeting, OGPR, *Complaints Concerning Government procurement Case No.3* (Tokyo: Secretariat for the GPRB, 5 April 2001), online: Secretariat for the GPRB <<http://www5.cao.go.jp/access/english/chans/shori13.1st-e.html>>.

⁴⁰³ Executive Meeting, OGPR, *Complaints Concerning Government procurement Case No.2* (Tokyo: Secretariat for the GPRB, 6 October 2000), online: Secretariat for the GPRB <<http://www5.cao.go.jp/access/english/chans/shori12.3rd-e.html>>.

⁴⁰⁴ Executive Meeting, OGPR, *Complaints Concerning Government procurement Case No.4* (Tokyo: Secretariat for the GPRB, 4 January 2002), online: Secretariat for the GPRB <<http://www5.cao.go.jp/access/english/chans/shori13-4th-e.html>>.

was dismissed by the Board.⁴⁰⁵ And in the most recent case No.6, which involved the qualification requirement set by the procuring entity for the suppliers, such qualification standards were endorsed by the GPRB.⁴⁰⁶

The small number of cases handled by the GPRB suggests the coverage issue that concerns the effectiveness of the GPA in its domestic implementation. According to Japan's commitment to the GPA, the threshold for government procurement to be subject to the GPA is 130,000 SDRs for goods and services, 450,000 SDRs for architectural, engineering and other technical services, and 4.5 million SDRs for Construction Services. Although Japan has voluntarily lowered the threshold for goods and services from 130,000 SDRs to 100,000 SDRs,⁴⁰⁷ many goods and services are not included in its GPA commitment list, such as the building cleaning services that raised disputes and complaints in Case No.3.⁴⁰⁸

The high threshold, especially in Construction works, makes procurement of public works not only a barrier for foreign contractors, but also a hotbed for bribery and rent-seeking. To take the Suzuki Muneo example, the contract value of those construction projects that Suzuki controlled were near or lower than the

⁴⁰⁵ Executive Meeting, OGPR, *Complaints Concerning Government procurement Case No.5* (Tokyo: Secretariat for the GPRB, 10 July 2002), online: Secretariat for the GPRB <<http://www5.cao.go.jp/access/english/chans/shori14.2nd-e.html>>.

⁴⁰⁶ Executive Meeting, OGPR, *Complaints Concerning Government procurement Case No.6* (Tokyo: Secretariat for the GPRB, 25 January 2006), online: Secretariat for the GPRB <<http://www5.cao.go.jp/access/english/chans/shori17-6th-e.html>>.

⁴⁰⁷ GPA Appendix I, Japan Annex 1.

⁴⁰⁸ Executive Meeting, OGPR, *supra* note 394.

threshold prescribed by the GPA. In the case of “Muneo House”, the contract value was JPY 416,850,000, which was slightly lower than the threshold of 4.5 million SDRs. In some other Cooperation Committee funded projects, the contract value ranged between JPY 77,300,000 and JPY 477,750,000.⁴⁰⁹

Therefore, the coverage issue, such as the high threshold of procurement of construction works, makes it difficult for outside scrutiny by GPA’s challenge procedures, and it thus become a hotbed for corruption in government procurement.

4.3.2. Government Procurement Issues in China and Japan Compared

Although according to scholars and strict observers there are quite a number of corruption issues in Japan’s government procurement, most of which are related to political corruption where contractors provide political finance to politicians in return for public works project, and where politicians can easily influence bureaucrats in procurement decision-making, Japan’s overall performance in good governance and transparency is much better than that of China.⁴¹⁰ Scholars may argue that not only politicians involved in various procurement scandals,

⁴⁰⁹ Ministry of Foreign Affairs of Japan, *supra* note 387.

⁴¹⁰ See e.g., the Transparency International’s Corruption Perception Index 2009, where Japan is ranked the 17th while China is placed at No. 79, online: Transparency international <http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table>.

but bureaucrats are always also involved in many corruption scandals.⁴¹¹

However, many corruption cases in Japanese bureaucracy, such as wine-and-dine scandals, are considered to be almost non-issue in China, and compared to Chinese government officials, bureaucrats in Japan are much more disciplined, efficient, and rule oriented.⁴¹²

To compare China with Japan in government procurement, we can find the two countries share some commonalities and also some differences.

Firstly, it is the corruption problem. In Japan, due to the parliamentary democracy system, public procurement, especially the construction works, are always linked to political corruption where politicians favour their political supporters and patrons in Public Contracting awarding in return for political financial contributions. In the Chinese context, however, although there is no distinction between politicians and bureaucrats in a “patrimonial sovereignty”,⁴¹³ bribes paid by contractors to procurement officials for contract awarding is similar.

⁴¹¹ See e.g., Johnson, *supra* note 388.

⁴¹² See generally, Transparency International, *National Integrity Systems: Country Study Report China* (Berlin: Transparency International, 2006), online: Transparency International <http://www.transparency.org/content/download/12696/125523/file/China_nis_2006.pdf>, and Transparency International, *National Integrity Systems: Country Study Report Japan* (Berlin: Transparency International, 2006), online: Transparency International, online: <http://www.transparency.org/content/download/14728/156321/file/japan_r.pdf>.

⁴¹³ See Potter, *supra* note 84 at 124-125.

Secondly, China and Japan also face another similar problem, which is the justification of planned expenses in the budgeting phase prior to the tendering stage. In an undemocratic regime like China, budget approval is not subject to outside scrutiny through a democratic due process. As we can see from Section 2.3.6.1, the new building of the Chengdu Municipal Government, which costs RMB 1.2 billion, was not subject to any public scrutiny, and it was simply approved by the Sichuan Provincial Government.⁴¹⁴ In the case of Japan, however, politicians such as Suzuki Muneo and Matsuoka Toshikatsu dominated the parliamentary committee and proposed budgets for single projects that they can abuse for their personal political contribution.⁴¹⁵

Thirdly, in terms of the inclusion of SOEs in government procurement, Japan's SOEs are covered in the GPA, although the country does not really have so many SOEs. However, in the case of China, for the huge number of SOEs that counts for the overwhelming majority of the country's national wealth, their procurement activities are not subject to state procurement laws.

Fourthly, in terms of secondary policy objectives, there is also a clear distinction. While Japan is one of the most developed countries in the world with the highest level of creative technology, China, however, as a developing country, is striving

⁴¹⁴ See Xinhua News, *supra* note 293.

⁴¹⁵ See generally, Mulgan, *supra* note 40.

for acquisition of technology through Public Contracting awarding and is also using public procurement to support domestic industries. This makes the public procurement a best way for the Chinese government to realize these secondary policy objectives such as acquisition of technology and local development.

Finally, so far as monitoring and enforcement of procurement laws are concerned, Japan fares better than China. Japan has a comparatively clean judiciary, while in China judicial independence is always an issue. In terms of the supervisory authority, Japan's institutional approach of a unified OGPR and GPRB is more effective than China's "fragmented authoritarianism",⁴¹⁶ where the responsibilities of the MOF and NDRC in supervising public procurement is unclear. However, as limited to the coverage issue relating to Japan's GPA commitment, such as the threshold and covered entities, the effectiveness of the GPRB to monitor government procurement is limited.

4.3.3. Implication to China: Is Entering GPA a Solution for China's Procurement Reform?

Government procurement is not only about value for money and efficiency, it is also an important aspect of governance, including transparency and accountability, since government procurement has been "increasingly recognized

⁴¹⁶ Lieberthal, *supra* note 82 at 8-9.

as a central instrument to ensure efficient and corruption-free management of public resources.”⁴¹⁷As core principles of both WTO and its GPA, transparency and non-discrimination play a key role in ensuring a sound procurement system, and further, good governance. Unlike in other economic activities which the government plays a role solely as a regulator, government procurement is a field where the state or the government is not only a regulator, but also a player. Therefore, transparency, accountability, and non-discrimination in GPA means even more obligations to the government than WTO’s other agreements do.

Upon its accession to the WTO in 2001, China has committed to start the negotiation to join the GPA “as soon as possible”. Although it is argued by many scholars that joining the GPA does not only mean a huge market and business opportunities or simply to meet the international expectation to fulfill its commitment upon accession to the WTO, but more importantly, membership of the GPA also means a push force to reform the national procurement system which in turn promotes good governance and unavoidably affects the country’s political and legal system, and in this sense, joining the GPA serves China’s domestic reform agenda just like the country’s accession to the WTO and it is a further step taken by the country.⁴¹⁸

⁴¹⁷ OECD, *supra* note 9 at 19.

⁴¹⁸ See e.g., Wang, *supra* note 170; Zhou & Dai, *supra* note 171; Zhang, *supra* note 171; Xiao *supra* note 322.

However, from the author's point of view, the prospect for China to join the GPA and comply with the GPA rules is not optimistic. As mentioned above, the reason for China to negotiate to join the GPA is widely seen as two fold. On one hand, the market access to GPA parties determines China's incentive to join the GPA, and on the other hand, GPA is seen as an outside driving force for China's procurement reform aimed at more transparency and good governance.

Firstly, in terms of China's incentive to join the GPA, it is not only about market access, but also about the issue of secondary policy objectives. However, neither of these two concerns will be in favour of China's accession to the GPA. So far as the market access issue is concerned, to the author's point of view, it is not a sufficient reason for China to join the GPA because of market access to GPA parties. As mentioned earlier, the fundamental presumption of the GPA is the principle of value for money. It is believed that a set of GPA rules, such as the tendering and bidding procedures, can ensure that goods, services, and construction works can be procured at the lowest cost. If the government procurement of a GPA party is really based on this principle, it does not really matter whether the supplier is from another GPA party or not. In other words, as long as the Chinese suppliers offer the lowest bidding price, the procuring entity will award the contract to that Chinese supplier anyway, except in one condition where the Chinese supplier's strongest competitor is a domestic supplier of the procuring country. If that is the case, the procuring entity may be in favour of the

domestic supplier. In very few cases in GPA parties, it is clearly mentioned by procuring entities in procurement documents that suppliers from non-GPA parties are not eligible to participate in the bidding process, such as in the case of the subway construction project in Greece where the contract value is about Euro 350,000,000, and thus one potential Chinese supplier from Shanghai was ruled out.⁴¹⁹ However, such cases are very rare. Another disadvantage that Chinese suppliers may face is that they can not seek for remedy under GPA's domestic challenge procedures if they feel the tendering process is not fair.

Secondly, as far as the secondary policy objective is concerned, it will be a big obstacle for China to join the GPA. As mentioned in the second chapter, secondary policy objectives, such as technology acquisition and local development, are always treated as a priority in China's government procurement. However, the GPA prohibits any such kind of "offset" to be used in government procurement. Therefore, the Chinese government will be imposed with a big restriction and limitation to use public procurement as a way to promote secondary policy objectives if the country joins the GPA.

Thirdly, in terms of the effects of the GPA accession to China's procurement reform, it still can not be expected highly. It is argued that joining GPA will give

⁴¹⁹ Ministry of Commerce of China, "Zhengfu caigou: zhongguo qiye yubian gonggou wei tongtu" (Government procurement: Chinese enterprises want to pave the way smoothly), online: Ministry of Commerce
<<http://henan.mofcom.gov.cn/aarticle/sjshangwudt/200605/20060502270264.html>>.

the Chinese government some driving force from outside to check and balance the illegal conducts of procuring entities and officials, because aggrieved foreign suppliers will give international pressures to the Chinese government. However, the FCPA cases released by the U.S.D.O.J suggest that foreign companies are also always involved in corruption cases in China's government procurement.

Therefore, foreign suppliers can not be a sufficient source of international pressure in tackling bribery and other forms of corruption in China's government procurement.

Fourthly, the coverage issue also makes it difficult for the GPA as a driving force for China's domestic reform. As mentioned above, China would not have a very strong incentive to join the GPA, and as a result, in China's initial offer tabled to the GPA in 2007, the Chinese government set a very high threshold which is not even comparable with the current GPA standards. In China's initial offer, the threshold for procurement of goods is 500,000SDRs compared to the 130,000 SDRs of the GPA standards; 4 million SDRs for procurement of services, compared to the GPA standard of 450,000 SDRs for architectural, engineering and other technical services and 130,000 SDRs for other services; 200,000,000 SDRs for construction works, compared to the GPA standard of 4.5 million.⁴²⁰

⁴²⁰ Government of China, "Zhongguo jiaru zhengfu caigou xieyi chubu chujia qingdan" (Initial offer by the Chinese government to WTO's Agreement on Government Procurement), online: Government of China <http://www.gov.cn/gzdt/2008-05/13/content_971032.htm>. See also, Grier, *supra* note 347.

Given such a high threshold, in most government procurement cases the GPA can not be applied to.

Finally, the long standing judicial independence issue in China makes the GPA's national challenge procedures for aggrieved suppliers can not be countable and it will thus greatly affect the effectiveness and functionality of the local implementation of the GPA.

Due to all of the above mentioned reasons, it is the author's view that China's accession to the GPA, its compliance with the GPA, and the effects of the GPA to domestic procurement reform will not be likely.

Chapter 5

Issues and Solution: Transparency and Justification of Planned Expenses, Independent Review Body, Inclusion of SOEs, and Unifying Government Procurement and Selling

5.1. Issues in China's Government Procurement and Proposed Solution

As discussed in Chapter 4, accession to the GPA and compliance with the GPA rules in China's government procurement do not seem to be a feasible approach for China's procurement reform. If so, then what might be the solution for China to promote good governance through a procurement reform? As mentioned in Chapter 2 and 3, the issues in China's government procurement are not about the procurement rules and tendering procedures themselves, but rather they caused at the first and last stage of a procurement process, which is the transparency and justification of planned expenses at the budgeting stage and the monitoring and review procedures for aggrieved suppliers. Unnecessary expenses can be minimized if transparency and justification of planned expenses can be achieved at the budgeting stage, any illegitimate or illegal practice and conduct of procurement officials can be checked and balanced by an effective procurement review body, and if so any abuse of power and misuse of public funds in government procurement can also be corrected. However, as mentioned in the

Chapter 2 and 3, due to the conflicts between China's *GPL* and the *TBL*, the MOF and the NDRC are both supervising and monitoring government procurement, and moreover, due to the issue of judicial independence, the judiciary in China does not seem to be countable as an effective way of last resort for aggrieved suppliers. Therefore, a truly independent procurement review body needs to be established in place of any existing government agencies and judiciary to review procurement decisions and conducts made by procurement officials.

Furthermore, as a country with a "socialist market economy", China has a very strong SOE system which constitutes the majority of the country's economic power. However, as to be explained later in this chapter, SOEs need to be regulated under a unified Public Contracting system as the funds of the SOEs are also public funds that are the same as funds used by government agencies in public procurement. Finally and most importantly, the sale of government assets, both in government agencies and SOEs, should also be regulated and subject to certain tendering and bidding process, because, as mentioned in the first chapter, both the purchasing and selling by the government can be seen as government contract activities, which involve the business activities of the government agencies and SOEs that may cause the gain or loss of public funds. Therefore, both public purchasing and selling need to be regulated under a unified legal framework, just like the laws and practices in Japan.⁴²¹

⁴²¹ As mentioned earlier, in Japan, the Chapter 4 of the Accounts Law of Japan is titled "Contract", and it is the major legislation of Japan which regulates not only procurement,

5.2. Transparency and Justification of Planned Expenses

The first issue that needs to be solved in China's public procurement is the transparency and justification of planned expenses. Although the budgeting process is prescribed in the *GPL*,⁴²² it is always ignored by scholars and practitioners. However, according to the author, the budgeting stage is a very important aspect of public procurement, and, since the goal of a sound public procurement system is "value for money", transparency and justification of planned expenses can significantly reduce the waste of public funds to minimum. However, this issue is not easy to solve under a "patrimonial sovereignty" where the regulators are only responsible for their political superiors but not accountable to the subject of their regulation.

Although, as shown in the cases of Suzuki Muneo and Matsuoka Toshikatsu discussed in Chapter 4, in a parliamentary democracy such as Japan, the budgeting process for planned expenses can also always be manipulated and dominated by politicians for their personal purpose, the recent reform aiming at budget cut by the new government led by Prime Minister Hatoyama Yukio's

but also selling by all the central government entities in Japan. And so is the case in the Local Autonomy Law and the Cabinet Order Concerning Budget, Settlement of Account, and Accounting. See *Accounts Law of Japan* (Kai-kei Hou), Law No. 53 (June 7, 2006), Chapter 4. *The Cabinet Order on Budget, Balance, and Accounting*, Chapter 7, *Cabinet Order 130* (April 30, 2009). *Local Autonomy of Japan* (Chi-hou Ji-chi Hou), Law No. 13 (March 31, 2009), Chapter 9, Section 6.

⁴²² *GPL* Art. 33.

Democratic Party of Japan (DPJ) seems to tackle this problem through strict scrutiny of planned expenses by groups of assigned diet members.⁴²³

The case of Hong Kong may shed some lights on the prospect of solving this issue. Hong Kong has a very sound government system with one of the cleanest bureaucracy in the world. In terms of the government procurement, it established an independent review body to review all the procurement decisions of the government. The judiciary in Hong Kong, which follows the British common law tradition, is widely recognized as a sound system with judicial independence. In addition to that, people in Hong Kong also widely enjoy press freedom. In terms of the legislative branch, half of the seats in the Legislative Council are elected through direct election with popular votes. However, the most recent case of the High Speed railway project between Hong Kong and Guangzhou, the capital city of Guangdong Province, was at the heart of great controversy.⁴²⁴ It is hard to judge whether such project should be in favour of or be turned down. However, the persistent debates in the Legislative Council, in

⁴²³ For more details of the budget reform, see e.g., Prime Minister of Japan and His Cabinet, News Release, "Press Conference by Prime Minister Yukio Hatoyama" (25 December 2009), online: Prime Minister of Japan and His Cabinet

<http://www.kantei.go.jp/foreign/hatoyama/statement/200912/25kaiken_e.html>.

⁴²⁴ For more details on this high speed rail project, see, Legislative Council Panel on Transport Subcommittee on Matters Relating to Railways, *Guangzhou-Shenzhen-Hong Kong Express Rail Link (Hong Kong Section)* (Hong Kong: The LegCo Panel, 2 May 2008), online: <http://www.legco.gov.hk/yr07-08/chinese/panels/tp/tp_rdp/papers/tp_rdp0502cb1-1439-1-ec.pdf>.

the media, and even on the streets, provide opportunities for such procurement decisions to be subject to public scrutiny.

However, in the case of Mainland China, it is somewhat different. In a “patrimonial sovereignty” with “fragmented authoritarianism”, all the administrative, legislative, and judicial branches are controlled by the Communist Party, and the use of internet and freedom of expression are strictly limited.

The cases of Japan and Hong Kong suggest that, since the approval of budget is closely tied to the power of the legislative branch, the transparency and justification of planned expenses of public funds in the budgeting process are determined by two factors: a democratic political system and a society with press freedom. However, neither of these two is in place in China. Therefore, it is the author’s point of view that the issue of transparency and justification of planned expenses in public procurement can not be solved without a liberal democracy and freedom of expression.

5.3. Unified Independent Review Body

Whereas the transparency and justification of planned expenses is the first stage in public procurement, supervision and review of procurement decisions is the

last stage in public procurement and last resort for aggrieved suppliers to seek remedy and correct wrongdoings of procurement officials. However, the conflicts between the *GPL* and the *TBL* over the supervisory and review body in government procurement, the inability of the judiciary to balance and check the government, and the integrity and professionalism of the procurement review body, make it a critical issue to establish an independent review body for government procurement. To discuss this issue, we need to take a look at the current situation and the practices in Japan and Hong Kong.

5.3.1. Bid Challenge Procedures in China's Government Procurement by Reference to the GPA

In the context of international law regime, settlement of government procurement disputes always refers to WTO's GPA, which is usually two fold: the intergovernmental dispute settlement mechanism and the national challenge procedures both of which were set forth in the GPA. In China's local context, China is not a member of the GPA yet, therefore, the intergovernmental approach under the WTO's GPA is not applicable. However, the content of China's domestic procurement laws has heavily borrowed from international instruments, especially from the GPA and the UNCITRAL Model Law, including

its dispute settlement procedures.⁴²⁵ Bid challenge procedures in China's government procurement law can be viewed by reference to the national challenge procedures set forth in the GPA.

5.3.1.1. Challenge Procedures in China's Government Procurement

China's Government Procurement Law provides three steps in dispute resolution for suppliers to follow: *queries*, *complaints*, and *litigations*.⁴²⁶

According to the *GPL*, if suppliers have questions about, or believe that their rights and interests have been infringed upon in procurement documents, the procurement process, or the result of bid-winning, or the completion of a transaction any government procurement activities, the suppliers may submit *queries* to the procuring entities or its procurement agency (both are defined as procuring entities in WTO's GPA), and the procuring entities shall reply in a timely manner.⁴²⁷ This *Query* procedure is, to a certain extent, similar to the Consultation stage in WTO's GPA, which encourages the supplier to consult with the procuring entities directly about the bid.

If the supplier is not satisfied with the reply from the procuring entity, or if the

⁴²⁵ See generally, Wang, *supra* note 167.

⁴²⁶ *GPL*, Art. 51-58.

⁴²⁷ *GPL*, Art. 51-54.

procuring entity fails to give a reply within the prescribed time limit, the supplier may appeal to government procurement supervisory authorities in the corresponding level of government. This is defined in the *GPL* as a *complaint*.⁴²⁸ According to the *GPL*, the Department of Finance, in both the central and local governments, is in charge of supervision and administration of government procurement activities. The government procurement supervisory authorities shall make a decision on the complaint and inform the supplier within 30 days after receiving the complaint. The supervisory authorities may also inform procuring entities to suspend the procurement activities, if necessary.⁴²⁹ The *complaint* procedures in China's *GPL* can be compared to the bid review process by an independent review body under WTO's GPA.

However, in the same article of the *GPL*, it also provides that other departments in the government may perform certain duties in supervision and administration of government procurement activities as well,⁴³⁰ and more importantly, procurement of construction services are subject to the *TBL* that is beyond the control of the finance department.⁴³¹ And this thus causes confusions and disputes over the identifying of supervisory authority.⁴³²

⁴²⁸ *GPL*, Art. 55.

⁴²⁹ *GPL*, Art. 55.

⁴³⁰ *GPL*, Art. 13.

⁴³¹ *GPL*, Art. 4.

⁴³² Xinhua News, *supra* note 190.

If the complainant refuses to accept the decision made by the supervisory authority, or if the supervisory authority fails to make a decision in a prescribed time period, litigation is the last step: the supplier may appeal for administrative reconsideration according to legal provisions or lodge an administrative suit at the People's Court.⁴³³ This *litigation* procedure in China's *GPL* can be compared to the judicial review process under WTO's GPA as a national challenge procedure.

5.3.1.2. *GPL* and GPA Compared

As mentioned earlier, both the WTO's GPA and the UNCITRAL Model Law have been referred to during the drafting of China's Government Procurement Law. Therefore, the bid challenge procedures can be better understood by reference to that of the WTO's GPA.

The GPA provides interested suppliers with challenge procedures against procuring entities. At the same time, consultation procedures are also provided to suppliers through which they can "seek resolution of their complaint in consultation with the procuring entity".⁴³⁴

⁴³³ *GPL*, Art. 56-58.

⁴³⁴ *GPA*, Art. XX.

As we may find, the consultation procedures provided in the GPA are similar to the “Query” process prescribed in the *GPL*.

However, the “complaint” and the “litigation” procedures provided in the *GPL* do have distinctive disparities from the challenge procedures in the GPA.

Under China’s *GPL*, a “complaint” can only be submitted after the “Query” process has gone through, and it must be submitted to a government procurement supervisory authority, which is the Department of Finance, but not to the court. An administrative litigation can only be initiated after the “complaint” process has gone through. In other words, the court can only provide remedies to complainants in the form of judicial review after the case has been reviewed by both the procuring entity and the Department of Finance. The process of “Query” is a prerequisite for submitting a “complaint”, and the process of “complaint” is a prerequisite for initiating litigation. However, it is provided in the GPA that, “challenges shall be heard by a court OR by an impartial and independent review body”, and a consultation procedure is not necessary (although it is recommended) before initiating the challenge procedure. In addition, the supplier can choose to initiate challenge procedures either to the court or to an independent review body. In other words, bringing the case to an independent review body under GPA’s national challenge procedures is not a prerequisite for appealing to the court.

Therefore, the “three-step” dispute resolution procedure provided in China’s *Government Procurement Law* has at least two shortcomings. First, it can make the dispute resolution process very lengthy, and thus, it may result in delay and infringement of supplier’s rights and interests. According to the *GPL*, the supplier has to submit query to the procuring entity, which may take up to 7 days to reply,⁴³⁵ and after the query process has gone through, the government procurement supervisory body can take up to 30 days to make the decision on the case.⁴³⁶ As we can see, the whole process can be very lengthy which may affect supplier’s interests. Secondly, and more importantly, at the “complaint” stage in the *GPL*, the review body, the Department of Finance, is not an independent review body, and there is no specific organization within the finance department to handle procurement cases.

5.3.2. Analysis of the Review Procedures in the *GPL*

According to the comparison drawn above, the key characters of the bid challenge procedures in China’s *GPL* can be briefly identified as follows:

1. “Query” is a prerequisite in the *GPL* for complainants to go through before they can really start the “complaint” procedures while the

⁴³⁵ *GPL*, Art. 53.

⁴³⁶ *GPL*, Art. 56.

consultation stage in WTO's GPA is not necessarily a prerequisite before bringing the case to the reviewing body.

2. While the GPA challenge procedures do allow the suppliers to choose where to initiate the challenge procedures (either a court or a reviewing body), the "complaints" under the *GPL* can only be handled by the administrative reviewing body but not by the court. In other words, an administrative review by the finance department is a prerequisite to the judicial review process.⁴³⁷
3. The Finance Ministry at the central level or the Finance Department at local levels that serve as reviewing body handling "complaints" is not independent.

All of the characteristics in the *GPL* bid challenge procedures can be discussed and analyzed by reference to Potter's theory of "Selective Adaptation" as set forth in the introduction of this volume, in which he identified *Perception*, *Complementarity*, and *Legitimacy* as three key factors affecting the process of interpretation and adaptation of international rules and norms in the context of economic globalization.⁴³⁸ The perspective of selective adaptation can assist us in

⁴³⁷ *Ibid.*

⁴³⁸ See Potter, *supra* note 2 at 476; Potter, *supra* note 84 at 124-25. For existing literatures on transplants and adaptations of international procurement rules to developing and transitional economies, See, Schwartz, *supra* note 92.

understanding the purpose of local rules, such as the *GPL*, by considering these three factors. For example, the disparities between China's *GPL* and WTO's GPA that concern prerequisite requirements for judicial review reveal the intention of the state to keep the power for handling procuring disputes under the control of the administrative system rather than allowing it to be vested to the judicial system. That is the reason why the first two steps, Query and Complaints, through which disputes are handled within the administrative system, are prescribed as prerequisites for judicial review by the court. These arrangements reflect the perception of the purpose and content of the GPA rules and the local political conditions in China. The purpose of the consultation stage under WTO's GPA is to facilitate the settlements of procurement disputes and make it solved in a more efficient way, while China's three-stage procedure is an approach to retain the power for the government. The GPA rules are adapted to the *GPL* with adjustments by local rule-makers.

5.3.3. Issues in China's Bid Challenge System

The bid challenge procedures in China's government procurement need to be changed – not only because the process can be lengthy, but also due to concerns over the fairness of the reviewing body.

Firstly, as the reviewing body that handles complaints from suppliers, the Ministry of Finance does not even have a permanent and specific organization to handle these cases. Moreover, it is not an independent reviewing body by any means.

Second, China's judiciary has long been criticized for its lack of judicial independence due to the nature of its political institution.⁴³⁹ The power of the government is much stronger than that of the judiciary. Thus, the judiciary power can not really serve as a counter-balance power to the government. An article written by a judge in China's Supreme People's Court has pointed out that "the administrative power is far stronger than the judicial power, and this is the reality which leads to the administrative litigation system being weak in nature".⁴⁴⁰

Therefore, while the current administrative review of procurement disputes by the Finance Department can not be considered as a process by an independent reviewing body, the weakness of the judicial power in reviewing government decisions also raises the issue of judicial independence of the courts in judicial review of government procurement cases. Thus, the bid challenge procedures in China's government procurement need to be reformed.

⁴³⁹ See generally, Peerenboom, *supra* note 110.

⁴⁴⁰ See Wang, *supra* note 114.

5.3.4. Hong Kong's Experience

As another member of the GPA, Hong Kong has also established an independent procurement review body that consists of lawyers, scholars, and experts from construction, engineering or architect firms.⁴⁴¹ Since the members of the reviewing body are completely selected through a strict process from outside of the government, the government procurement reviewing body in Hong Kong is a truly independent reviewing body. Similar to the requirement of the high threshold as set by Japan's GPRB, the independent review body for government procurement in Hong Kong only reviews GPA related ones.⁴⁴² Due to the high threshold, so far only 6 cases have been accepted by the board.⁴⁴³

The Review Body of Hong Kong is established in a similar manner of that in Japan, as both of them were founded to meet the requirements of the GPA's provisions on domestic challenge procedures.⁴⁴⁴ The composition of both bodies

⁴⁴¹ Henry Gao, "The Bid Challenge Procedures Under the WTO Government Procurement Agreement: a Critical Study of the Hong Kong Experience" (2007) 16 *Public Procurement Law Review* 211.

⁴⁴² See Trade & Industry Department, the Government of Hong Kong SAR, "Review Body on Bid Challenges", online: Trade & Industry Department, the Government of Hong Kong SAR <http://www.tid.gov.hk/english/trade_relations/tradefora/reviewbody/reviewbody.html>.

⁴⁴³ Ibid.

⁴⁴⁴ GPA Art. XX.

are similar, which includes scholars, lawyers, experts in construction and other related fields, and other professionals.⁴⁴⁵

However, what needs to be noted in Hong Kong's experience is the eligibility of the board members. According to the rules of the Review Body, it is not required that the members appointed to the Review Body must be residents of Hong Kong, which implies that foreigners may also be appointed to the Body. As a matter of fact, it is noted that at least one member of the 2006 Review Body is not a Hong Kong resident.⁴⁴⁶

On the other hand, it is also noteworthy that a discouraging feature about the Review Body is the non-binding force of the decision it makes. It was held by the High Court of Hong Kong in one case that,

"The Review Body is therefore no more than an advisory body, independent as it may be, created by the government to oversee its own compliance with the WTO GPA and to advise by way of recommendations to the procuring entities within the Government against whom complaints of breaches of the WTO GPA have been made. 'Recommendations' as the word suggests, are no more than recommendations binding on the conscience only, like a gentleman's agreement."⁴⁴⁷

⁴⁴⁵ Gao, *supra* note 441 at 218-221.

⁴⁴⁶ *Ibid.*

⁴⁴⁷ *Ibid.*

Such a “recommendation approach”, however, is also used in Japan’s Government Procurement Review Board that was discussed in Chapter 4. However, although the decisions made by Japan’s GPRB are also recommendations, their implementation is supported and endorsed by the high profile OPGR.⁴⁴⁸ Whereas in Japan the “recommendations” made by the GPRB are usually followed by the procuring entities, in Hong Kong sometimes the procuring entities fail to follow the decisions made by the Review Body on Bid Challenges.⁴⁴⁹

Despite the non-binding issue of the Review Body, the bid challenge system can be considered as a sound one which facilitates the Hong Kong’s compliance with the GPA.⁴⁵⁰ To the author’s point of view, Hong Kong’s experience sheds some light on China’s procurement reform.

5.3.5. Proposed Reform: A Unified Independent Review Body

So how should the Bid challenge system be reformed? A comparative approach by reference to the experiences and practices in Hong Kong and Japan will be used here to propose solutions.

⁴⁴⁸ Grier, *supra* note 347 at 624.

⁴⁴⁹ Gao, *supra* note 441 at 253.

⁴⁵⁰ *Ibid.*

According to the author, the Chinese government established an independent government procurement review body to handle the procurement cases by reference to the experiences and practices in Japan and Hong Kong, and that is to establish a Government Procurement Review Board (GPRB) and a National Commission of Supervisory and Administration of Government Procurement (NCSAGP).

The GPRB, established at both central and local level, will consist of lawyers, scholars, and experts in architecture, construction, and other relevant sectors. The board will review procurement decisions and provide technical opinions on the procurement cases, and the enforcement of the ruling made by the GPRB will be supported and endorsed by the NCSAGP at the central level.

As mentioned earlier, the OGPR in Japan, which consists of leaders of central ministries, plays a key role in supporting the decisions made by the GPRB. It is suggested that China institute a similar organization, which could be called the “National Commission of Supervisory and Administration of Government Procurement”, as a cross-ministry organization which consists of ministers or vice-ministers of various departments in the state council, and coordinates with these ministries on the procurement issues. It will play a supervisory role by forwarding cases to the GPRB and ensures the implementation and enforcement

of the GPRB rulings or recommendations. To ensure the authority of this organization, it should be headed by the Premier or a Vice-premier.

From the author's view, administrative review by an independent review body should be used as a feasible approach in place of judicial review, and the establishment of a GPRB as well as the NCSAGP will be a more effective way to ensure fairness and independence of the procurement review body for the following reasons:

First, since Chinese government is a system where regulators and officials are only accountable to their superiors within the government but not to the subjects of rule,⁴⁵¹ and given the fact that there is even no specific reviewing body in the Ministry of Finance to handle procurement "complaints", an independent reviewing body with members selected from outside of the government will make it more effective in reviewing cases.

Second, as mentioned above, due to the issues of judicial independence in China's judicial system which is stubbornly tied with the country's political system, an approach of judicial review may not be the best option to ensure remedies to aggrieved suppliers. Rather, a procurement review board consists of lawyers, scholars, and experts in architecture and construction, who are selected

⁴⁵¹ See Potter, *supra* note 84 at 124-125.

completely from outside the government, may better achieve the goal of “fairness and transparency”.

Thirdly, and more importantly, there is a question on how to ensure the independence, impartiality, and the effectiveness of the proposed review body.

The issue of independence concerns to what extent members of the GPRB can be immune from outside pressures. The presence of the high political profile NCSAGP may help to play a strongly supportive role to endorse and protect the GPRB members from being interfered by outside pressures.

In terms of the issue of impartiality, it can be learned from the experience of Hong Kong that all the members of the GPRB are required to report any conflict of interests every time in every case. The strict selection criteria for choosing GPRB members also ensure the impartiality of the board. Furthermore, the GPRB members may even face criminal charges if they abuse their power.

Effectiveness, or in other words, the enforcement of the decisions made by GPRB is also critical to the success of the GPRB approach. As mentioned earlier, the enforcement of judicial rulings made by law courts in China is always a big problem, especially in administrative litigations, because it is hard to force the government to implement the rulings against the interest of the government. In

the GPRB approach, with the presence of the NCSAGP, the latter is supposed to facilitate the enforcement and implementation of the decisions made by the board. Of course in order to do that, decisions made by the GPRB must be explicitly prescribed as legally binding in the procurement laws.

Furthermore, what is considered to be most important by the author in Hong Kong's experience are the eligibility criteria for selection of GPRB members. Foreign members in the GPRB may effectively ensure the independence of the board.

Hong Kong is a rule of law region with a limited democracy, because the Chief Executive is not elected by popular votes and only half of the seats in the Legislative Council are directly elected. However, the independent review body for public procurement in Hong Kong is quite successful. Although in very few cases the government would appeal to the court against the "recommendations" by the GPRB, the GPRB decisions are generally followed and respected.

Therefore, it can be expected that such an independent review system can be brought to China's government procurement.

5.4. Inclusion of SOEs and a Unified Public Contracting Law

The last major issue in China's government procurement, however, is even more complicated and ambitious, and it can be divided into two steps: firstly is the inclusion of SOEs in China's government procurement, and secondly is to unify all the contract activities of government agencies and SOEs. It does not only mean a unification of the *GPL* and the *TBL*, but also unifies purchasing and selling to a single regulatory framework of a "Unified Public Contracting Law".

5.4.1. Inclusion of SOEs in Public Procurement

In this thesis, "government procurement" is used as synonymous to "public procurement". However, government procurement and public procurement are somewhat different. Whereas government procurement only includes procurement made by government agencies, public procurement, however, can embrace procurement by any public institutions that use public funds, but not only government agencies. Funds used by SOEs in their procurement are also public funds and state assets, and it is widely accepted that SOEs should be included in government procurement, just like in Japan and Canada where SOEs are included in the countries' list of government entities that the GPA should be applied to. There are two major reasons why SOEs in China should be regulated under the public procurement legal framework.

Firstly, as discussed in Chapter 2, funds used by the SOEs are all state assets that are the same as public funds used by government agencies in public procurement. In addition, the procurement volume by SOEs is even bigger than that of government agencies, and in many cases, such as the FCPA violation cases disclosed by the U.S. DOJ, many Chinese major SOEs are involved in bribery in their procurement activities. Therefore, corruptions in SOEs became a more and more serious concern.

Secondly, an arguably more convincing reason for inclusion of SOEs in the government procurement regulatory framework is that, besides the conflicts over the supervisory and review body in the *TBL* and the *GPL*, there is also different treatment of SOEs under the two laws. While SOEs are regulated by the *TBL*, they are not subject to regulation by the *GPL*.

“Given the fact that public works in China are ordinarily undertaken by establishing an independent agency or by entrusting the work to a separate entity, usually taking the form of a SOE, and the approach the Bidding Law takes in embracing such entities, it is safe to say that the majority of procuring entities under the Bidding Law are SOEs.

However, government procurement law makes it clear as we have seen that SOEs are not within their coverage. This applies regardless of whether these SOEs are using budgetary funds to conduct their procurement or their own funds, or whether these SOEs are

operating in a competitive sector or monopolistic sector, or whether these SOEs are utilities in nature.”⁴⁵²

It is believed that the reasons why SOEs are not included in the *GPL* are that, first of all, “regulating procurement of SOEs will interfere with autonomy of enterprise”;⁴⁵³ secondly, government procurement are “concerned mainly with budgetary matters”;⁴⁵⁴ thirdly, the finance department “have little direct control over SOEs”,⁴⁵⁵ and finally, to the author’s point of view and as mentioned in Section 3.4, upon its accession to the WTO, China has committed that all the SOEs will be subject to GATT and other multilateral trade agreements of the WTO, and therefore, SOEs are not subject to be regulated as a matter of government procurement.⁴⁵⁶

However, to the author’s point of view, the above mentioned rationales for excluding SOEs from government procurement are not totally convincing. Firstly, the nature of the SOEs determines that it is different from other private enterprises. Just like in other countries, such as in Japan and Canada, SOEs are all regulated under the government procurement framework. Secondly, government procurement is usually about the use of budgetary funds, and procurement by

⁴⁵² *Ibid.*

⁴⁵³ *Ibid.*

⁴⁵⁴ *Ibid.*

⁴⁵⁵ *Ibid.*

⁴⁵⁶ See WTO, *supra* note 258.

SOEs does not necessarily involve such funds. However, the funds used in procurement by both government agencies and SOEs are public funds and state assets, regardless of whether these are budget funds or not. Thirdly, if a unified independent review body can be established, it can be in place of the MOF and local finance department to supervise and review procurement decisions made by SOEs. Finally, procurement by SOEs should be subject to the tendering and bidding procedures set forth in the *GPL* and the *TBL*, but some procurement rules that are in conflict with China's WTO commitment, such as those discriminative rules in favour of local suppliers, can be explicitly excluded of its application to the SOEs so that the SOEs can be included in government procurement without any inconsistencies with the country's treaty obligations. In other words, at the very least, procurement by SOEs should be subject to some transparency rules and follow more stringent tendering and bidding procedures to ensure its integrity.

5.4.2. Unification of *GPL* and *TBL*

It is argued by many scholars in existing literatures that the *GPL* and the *TBL* should be unified as a single legislation.⁴⁵⁷ As mentioned in Chapter 2, before the "Draft for Comments" Implementing Regulations for the *GPL* and *TBL* were published, it is widely expected that such administrative regulations can be

⁴⁵⁷ ⁴⁵⁷ See e.g., Wang, *supra* note 167.

unified as a single one. However, the two laws still remain separate from each other. As we have seen, this has caused many inconsistency and conflicts, such as the procurement review authority and the status of SOEs in procurement activities. The case of Beijing WEAL Trade & Development Co., Ltd (WEAL) v. MOF mentioned in Section 2.3.1 is an evident example where the aggrieved supplier did not even know who should be sued in an administrative suit. However, the unification of the *GPL* and the *TBL* is not easy because for the latter, it does not only apply to tendering and bidding procedures in government procurement, but also apply to privatisation of public natural resources and any other form of business activities where tendering and bidding procedures are involved. Therefore, in order to unify the *GPL* with the *TBL*, both purchasing and selling by the government should also be included in a single “Unified Public Contracting law”.

5.4.3. Unification of Public Purchasing and Selling

As mentioned in the first chapter, the term “Government Procurement”, or public procurement, is a synonym to “Public Contracting”. “Public Contracting” means “an agreement to perform a particular task to benefit the community at large that is financed by government funds”.⁴⁵⁸ Although “Public Contracting” is always understood as a synonym to “Public Purchasing” or “public

⁴⁵⁸ See *West's Encyclopedia of American Law*, *supra* note 11.

Procurement”, there is another form of “Public Contracting” that is the activity of government to sell or lease its property, such as public lands, natural resources, state-owned enterprises, and other state-owned assets, to private sectors. From the author’s view, *Government Selling* may also include another two types: 1) selling of goods, properties, or assets confiscated by the government; and 2) bankruptcy liquidation auction executed by the Courts for enforcement of judicial rulings. Although these two other forms of government selling do not involve the use of public funds, it can also cause many rent-seeking activities if they are not regulated under certain tendering and bidding process. Government Selling seems opposite to Government Purchasing, but a sound government selling system also involves similar due procedures as that in Government Purchasing, such as bidding and competition.

In countries such as China where the government owns a large state sector, regulating *government selling* is as critical as regulating government procurement. As mentioned in Chapter 1, in the case of China, “Lease of Lands for Commercial Use”, “Construction Works”, “Government Procurement”, and “Transfer of Assets Ownership” are the “Four Major Fields of Corruption”.⁴⁵⁹ “Lease of Lands for Commercial Use” refers to the lease of land from government to private sectors, and the “Lands for Commercial Use” not only refers to the “Commercial Lands”, but also includes all types of other “non-public use”,

⁴⁵⁹ See Zhu, *supra* note 15.

especially the development of condominium buildings, which is one of the hottest beds of bribery in China. “Construction Works” refers to the Government Procurement of Construction works. “Transfer of Assets Ownership” means the selling of the assets of the State-owned enterprises to the private sectors.

Therefore, according to the above explanation, it is not difficult to understand that all the “Four Major Fields of Corruption” can be divided to two Categories, Government Procurement and Privatization Policies (Government Selling).

Whereas “Government Procurement” and “Construction Works” falls into the category of former, the “Lease of Lands for Commercial Use” and “Transfer of Assets Ownership” belongs to Privatization Policy (Government Selling).

According to Zhu Rongji, the then Premier of China, “transparent rules” and “bidding and tendering procedures” must be imposed to all of these four fields to tackle corruptions.⁴⁶⁰

As mentioned earlier, since SOEs are not subject to government procurement rules, procurement by SOEs becomes a hotbed for corruption.⁴⁶¹ SOEs should not only be included in China’s government procurement, but also in a big picture of “Public Contracting”, which means that no matter SOEs are buying products/services or are selling their assets to private sectors within or outside

⁴⁶⁰ *Ibid.*

⁴⁶¹ See U.S. Department of Justice, *supra* note 24.

the country, their contracting activities must be regulated as same as those of the government entities.

Unifying public procurement with public selling is not unique. In the case of Japan, all the major laws and regulations, such as the Accounts Law, Local autonomy Law, and the Cabinet Order Concerning Budget, Settlement of Account, and Accounting unify the purchasing with selling in a same chapter titled “Contract”.⁴⁶²

Therefore, since the nature of both buying and selling by the government and SOEs are contracts between publicly funded entities (Government /SOEs) and private sectors or other non-governmental sectors, by considering all of the commonalities between Public Procurement and Privatization Policy, the author redefines the “Public Contracting”, as a combination of *Public Procurement* (Government Procurement) and *Privatization Policy* (Government Selling), which includes all the business activities of the Government Entities and State-Owned Enterprises, such as buying, selling, and leasing from or to the private sector.

⁴⁶² See *Accounts Law of Japan* (Kai-kei Hou), Law No. 53 (June 7, 2006), Chapter 4. *The Cabinet Order on Budget, Balance, and Accounting*, Chapter 7, *Cabinet Order 130* (April 30, 2009). *Local Autonomy of Japan* (Chi-hou Ji-chi Hou), Law No. 13 (March 31, 2009), Chapter 9, Section 6.

Chapter 6

Conclusion

As noted in the first chapter, the major research question of this thesis is to explore, in an authoritarian state such as China, whether the country's Public Contracting law and its implementation can be improved to a high level of transparency that in turn achieves the goal of good governance of the government without fundamental changes to the country's political and judicial system.

To deal with this major research question, there are a few points that need to be considered. Firstly, what is the issue in China's government procurement? Secondly, from an international perspective, can treaty obligations, such as membership of WTO's GPA, help China improve its procurement system? Thirdly, from a comparative perspective, such as from the experiences and practices in Japan and Hong Kong, whether or not a sound procurement system is dependent on the country's political and judicial system, or in other words, is liberal democracy and rule of law (or judicial independence) a necessary and fundamental prerequisite for a sound, transparent, and effective procurement system. Finally, what can be borrowed from international and foreign

experiences to reform China's Public Contracting? If some issues are unique to China's local context, what is a coping strategy or solution to solve the problem?

6.1. Issues in China's Government Procurement

As mentioned in Chapters 2 and 4, there are a number of critical issues in China's current government procurement system. These include:

1. Transparency and Justification of Planned Expenses at the Budgeting Stage
2. Corruption in Government Procurement and Procurement by SOEs
3. Inability of the Judiciary to check and balance administrative power in government procurement
4. Procurement by State-Owned Enterprises (SOEs) is not included in Government Procurement
5. The Conflicts between the Government Procurement Law (*GPL*) and the Tendering and Bidding Law (*TBL*)

6.2. Is GPA Membership a Solution for China's Procurement Reform?

Upon its accession to the WTO in 2001, China has committed to table an offer to join the GPA "as soon as possible", and a GPA membership is widely seen as a way to contribute to China's government procurement reform. On one hand, the market access to GPA parties provides China with a great incentive to join the

GPA, and on the other hand, GPA is seen as an outside driving force for China's procurement reform aimed at more transparency and good governance.

However, the initial offer brought by China to the GPA for negotiation, as mentioned earlier, reveals that China does not have any strong intention to join the GPA, and according to the author, the reasons are as follows:

Firstly, so far as the market access issue is concerned, to the author's point of view, it is not a sufficient reason for China to join the GPA because of the market access to GPA parties. If the government procurement of a GPA party is really based on this principle, it does not really matter whether the supplier is from another GPA party or not. In other words, as long as the Chinese suppliers offer the lowest bidding price, the procuring entity will award the contract to that Chinese supplier anyway, unless the only competitor is a domestic supplier of the procuring country, and the only disadvantage Chinese suppliers may face is that they can not seek for remedy under GPA's domestic challenge procedures if they feel the tendering process is not fair.

Secondly, as far as the secondary policy objective is concerned, it will be a big obstacle for China to join the GPA. Secondary policy objectives, such as technology acquisition and local development, always receive priority status in China's government procurement. However, the GPA prohibits any kind of "offset" to be used in government procurement. Therefore, the Chinese

government will be imposed with a big restriction and limitation to use public procurement as a way to promote secondary policy objectives if the country joins the GPA.

Thirdly, in terms of the effects of the GPA accession to China's procurement reform, it still cannot be expected to be significant. It is argued that joining GPA will give the Chinese government some driving force from outside to check and balance the illegal conducts of procuring entities and officials, because aggrieved foreign suppliers will give international pressures to the Chinese government. However, the FCPA cases released by the U.S. DOJ suggest that foreign companies are also always involved in corruption cases in China's government procurement. Therefore, foreign suppliers can not be a source of international pressure in tackling bribery and other forms of corruption in China's government procurement.

Fourthly, the high thresholds of the GPA cause most government procurement cases to be outside the purview of the GPA. Therefore, just like that in Japan, although the GPRB is in place, there have been only 6 cases submitted to the GPRB in the past 15 years.

Finally, the long standing judicial independence issue in China makes the GPA's national challenge procedures for aggrieved suppliers to be non-countable and it

will thus greatly affect the effectiveness and functionality of the local implementation of the GPA.

Therefore, China's accession to GPA and the implementation of GPA in China is not a feasible solution for China's procurement reform.

6.3. Complementarity Issue: Is Liberal Democracy and Judicial Independence a Necessary and Fundamental Prerequisite for a Sound Procurement System?

Japan is a liberal democracy with a sound rule of law system. However, constant scandals concerning political corruption in government procurement, especially in procurement of construction works, reveal that liberal democracy and rule of law do not necessarily mean a sound procurement system. On the other hand, the government procurement in Hong Kong, which is a region with rule of law but a limited democracy, is proved to have much less corruption cases in government procurement. The independent review body for government procurement established in Hong Kong operates in the same effective way as that in Japan, if not more effective. A unified independent review body can check and balance the abuse of administrative power by procurement officials, and it can be used in place of the weak judiciary in China that is totally controlled by the Communist Party. In that way, a fundamental judicial and administrative reform is not necessary, and the power of a unified independent review body can

not only check and balance, but also prevent illegal conduct of procurement officials. Inspired by the experience in Hong Kong, the author believes that such an independent review body for Public Contracting can be possible without a fundamental political and judicial reform.

To see it in a big picture, government procurement is a field where the government's behaviors can be truly presented to the public because of the huge monetary interests it involves. A reform in the bid challenge system through establishment of the independent review board can not directly change the behavior of the government, but rather it is an effective approach to check and balance in the context of a weak judiciary. More importantly, establishing such a GPRB can also be seen as a pilot project for similar approaches to be taken in the future, such as the establishment of an International Trade Tribunal to handle international trade disputes as envisaged by practice in the United States, as a way to comply with the WTO's requirements of uniform enforcement of laws. To establish the GPRB can also be an attempt for the state as part of its administrative law reform.

Given the complexity of the local regulatory culture as described as "Patrimonial sovereignty" and its sharp contrast to the GPA that is generally derived from a Western liberal tradition of transparency and rule of law, it is natural to see incompatibilities between GPA and China's domestic procurement system and

such problems of incompatibilities are hard to tackle because of their deep roots from the local culture. However, an independent review body as provided in the GPA being borrowed to China in its local context suggests the complementarity of international and local rules, or in other words, the resonance between international rules rooted from the Western tradition of transparency and rule of law and China's local regulatory culture as described as a "patrimonial sovereignty".

However, in terms of transparency and justification of planned expenses in the budgeting stage, as noted earlier, this issue can not be solved without a democratic political system that is subject to public scrutiny. If independent review body can be replicated in China successfully, it is an example of local adaptation of international rules. On the other hand, the issue of transparency and justification of planned expenses can not be solved without a fundamental political reform also means the local "non-adaptation" of international rules of transparency.

6.4. What are the Solutions for China's Public Contracting Reform?

If we revisit the five major issues in China's government procurement as mentioned earlier,

Transparency and Justification of Planned Expenses at the Budgeting Stage can not be solved without a fundamental political reform;

Corruption in Government Procurement and Procurement by SOEs and Inability of the Judiciary to check and balance administrative power in government procurement maybe solved by establishment of a unified independent review body to check, balance, and correct procurement decisions made by procurement officials;

Procurement by SOEs is not included in Government Procurement and the Conflicts between the GPL and TBL should be tackled by unifying the GPL and TBL, inclusion of SOEs in Public Contracting system, and unifying government purchasing and selling to a “Unified Public Contracting Law” .

6.5. Conclusion: Selective Adaptation as a Way to Examine and Understand Realities and Prospects of Local Conditions

Selective Adaptation, especially the element of “Complementarity”, as mentioned in Chapter 1, “describes a circumstance by which apparently contradictory phenomena can be combined in ways that preserve essential characteristics of each component and yet allow for them to operate together in a mutually reinforcing and effective manner”, according to which local and non

local norms and rules may be “mutually sustaining”.⁴⁶³ The procurement laws and practices in Japan and Hong Kong show the extent to which international procurement rules of transparency and rule of law are mediated in local context. In Japan, political corruption concerning public procurement of construction works and persistent bid rigging practices in business arena implies the inability of the GPA in ensuring transparency and accountability of procuring agencies and the ineffectiveness of the GPA in regulating the behaviors and conducts of firms, although Japan is generally considered as a highly rule-oriented WTO member,⁴⁶⁴ and the Japanese government was seen as having paid lots of efforts in government procurement, such as voluntarily reducing the procurement threshold.⁴⁶⁵ However, the above mentioned inability and ineffectiveness indicate the dynamic of Selective Adaptation of international procurement rules (GPA) in Japan. On the other hand, although Hong Kong is not considered as a democracy, the effectiveness of its Review Body on Bid Challenge is no less effective of that in Japan. This also shows the “Complementarity” between local conditions and Western liberal norms of transparency.

By reference to the “Selective Adaptation” theory, it may help to examine the prospect of China’s procurement reform as proposed in the previous chapter.

Public Contracting system in China might be partially improved to a higher level

⁴⁶³ Potter, *supra* note 2 at 479.

⁴⁶⁴ Pekkanen, “Aggressive Legalism: The Rules of the WTO and Japan's Emerging Trade Strategy”, *supra* note 338 at 707-708.

⁴⁶⁵ See Grier, *supra* note 347.

of transparency and rule of law without a fundamental change in the country's political and judicial system by solutions such as instituting a unified review body to check, balance, review, and correct decisions and conducts of government officials in government purchasing and selling. However, without a fundamental political reform, some issues in government procurement, such as transparency and justification of planned expenses at the budgeting stage, can not be resolved.

Bibliography

Legislation

China:

Laws:

The Constitution of the People's Republic of China.

Legislation Law of the People's Republic of China, 2000.

Property Rights Law of the PRC, 2007.

Criminal Law of the PRC

Government Procurement Law of PRC, 2002.

Tendering & Bidding Law of the People's Republic of China, 1999.

Law of the People's Republic of China on Promotion of Cleaner Production, 2002.

Law of the People's Republic of China on Promotion of Small and Medium-sized Enterprises, 2002.

Administrative Rules:

Ministry of Finance of PRC, *Administrative Rules on Tendering and Bidding in Government Procurement of Goods and Services* (Beijing: Minister of Finance's Order No.18, 11 August 2004), online: Ministry of Finance <<http://www.ccg.gov.cn/zcfg/gjfg/25203.shtml>>.

Ministry of Finance of PRC, *Administrative Rules on Publicity of Government Procurement Information* (Beijing: Minister of Finance's Order No.19, 11 August 2004), online: Ministry of Finance <<http://www.ccg.gov.cn/zcfg/gjfg/25204.shtml>>.

Ministry of Finance of PRC, *Administrative Rules on Complaints by Suppliers in Government Procurement* (Beijing: Minister of Finance's Order No.19, 11 August 2004), online: Ministry of Finance <<http://www.ccg.gov.cn/zcfg/gjfg/25205.shtml>>.

General Office of the State Council, *Guanyu guowuyuan youguan bumen shishi zhaobiao toubiao huodong xingzheng jiandu de zhize fengong de yijian* (Opinions on the Separation of Responsibilities of Administrative Supervision on Tendering and Bidding Activities Conducted by Certain Departments of the State Council) (Beijing: General Office of the State Council, 2000), online: Government of the PRC <http://www.gov.cn/gongbao/content/2000/content_60239.htm>.

Ministry of Finance, Implementing Rules on the Collective Procurement by Central Government Unit (Beijing: Ministry of Finance, 2007), online: National Bureau of Corruption Prevention <<http://files.nbc.gov.cn/www/200902/20090217135225518.pdf>>

State Development & Planning Commission (SDPC, now the State Development and Reform Commission (SDRC)), *Guojia zhongda jianshe xiangmu zhaobiao toubiao jiandu zanxing banfa* (Interim Measures on the Supervision of Tendering and Bidding in Important National Construction Projects) (Beijing: SDPC, 2000), online: Government of the PRC <http://www.sdpc.gov.cn/zcfb/zcfbl/zcfbl2003pro/t20050707_27426.htm>.

Other Normative and Policy Documents:

State Council, *the Supporting Policies for the Guidelines on National Medium- and Long-term Program for Science and Technology Development* (2006-2020).

Government of China, "Initial Offer by the Chinese Government to WTO's Agreement on Government Procurement", online: Government of China <http://www.gov.cn/gzdt/2008-05/13/content_971032.htm>.

Hong Kong, China

Legislative Council Panel on Transport Subcommittee on Matters Relating to Railways, *Guangzhou-Shenzhen-Hong Kong Express Rail Link (Hong Kong Section)* (Hong Kong: The LegCo Panel, 2 May 2008), online: <http://www.legco.gov.hk/yr07-08/chinese/panels/tp/tp_rdp/papers/tp_rdp_0502cb1-1439-1-ec.pdf>.

Trade & Industry Department, the Government of Hong Kong SAR, "Review Body on Bid Challenges", online: Trade & Industry Department, the Government of Hong Kong SAR <http://www.tid.gov.hk/english/trade_relations/tradefora/reviewbody/reviewbody.html>.

Japan:

Accounts Law of Japan (Kai-kei Hou), Law No. 53, 2006.

Local Autonomy of Japan (Chi-hou Ji-chi Hou), Law No. 13, 2009.

The Cabinet Order on Budget, Balance, and Accounting, Cabinet Order 130, April 30, 2009.

Penal Code of Japan(Act No. 45 of 1907)

United States:

Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(f)(1)(A) (1977).

Government Documents

China:

National Development and Reform Commission (SDRC), *China's Economic and Social Development Plan* (Beijing: SDRC, 2006), online: People's Daily
<http://english.people.com.cn/200603/15/eng20060315_250831.html>

National Audit Office, *Shenjishu gongbu 2008nian 54 ge bumen danwei yusuan zhixing shenji jieguo* (Annual Audit Report on the Implementation by 54 Central Units of the Budget of 2008) (Beijing: National Audit Office, 2009), online: Government of China
<http://www.gov.cn/gzdt/2009-09/01/content_1406693.htm>.

State Council General Office, "Zhongyang yusuan danwei 2009-2010 nian zhengfu jizhong caigou mulu ji biao zhun" (Catalogue and Standards for Procurement by Central Government Unit in 2009-2010), (Beijing: State Council General Office, 17 December 2008), online: Government of China
<http://www.gov.cn/zwgk/2008-12/19/content_1182942.htm>.

Japan:

Ministry of Land, Infrastructure, Transport, & Tourism, *Concerning the promotion of proper tendering and contracting for public works* (Tokyo: Ministry of Land, Infrastructure, Transport, & Tourism, 28 December 2004), online: Ministry of Land, Infrastructure, Transport, & Tourism
<http://www.mlit.go.jp/sogoseisaku/1_6_hf_000117.html>.

Ministry of Foreign Affairs of Japan, *Investigation Report on the Activities of the Cooperation Committee* (Tokyo: Ministry of Foreign Affairs, 2002), online: Ministry of Foreign Affairs
<http://www.mofa.go.jp/MOFAJ/annai/honsho/kai_genjo/pdfs/shien.pdf>.

Executive Meeting, Office of Government Procurement Review (OGPR), *Complaints Concerning Government procurement Case No.1* (Tokyo: Secretariat for the Government Procurement Review Board, 2 August 1996), online: Secretariat for the Government Procurement Review Board (Secretariat for the GPRB)
<<http://www5.cao.go.jp/access/english/chans/shori8.2nd-e.html>>.

Executive Meeting, OGPR, *Complaints Concerning Government procurement Case No.3* (Tokyo: Secretariat for the GPRB, 5 April 2001), online: Secretariat for the GPRB <<http://www5.cao.go.jp/access/english/chans/shori13.1st-e.html>>.

Executive Meeting, OGPR, *Complaints Concerning Government procurement Case No.2* (Tokyo: Secretariat for the GPRB, 6 October 2000), online: Secretariat for the GPRB <<http://www5.cao.go.jp/access/english/chans/shori12.3rd-e.html>>.

Executive Meeting, OGPR, *Complaints Concerning Government procurement Case No.4* (Tokyo: Secretariat for the GPRB, 4 January 2002), online: Secretariat for the GPRB <<http://www5.cao.go.jp/access/english/chans/shori13-4th-e.html>>.

Executive Meeting, OGPR, *Complaints Concerning Government procurement Case No.5* (Tokyo: Secretariat for the GPRB, 10 July 2002), online: Secretariat for the GPRB <<http://www5.cao.go.jp/access/english/chans/shori14.2nd-e.html>>.

Executive Meeting, OGPR, *Complaints Concerning Government procurement Case No.6* (Tokyo: Secretariat for the GPRB, 25 January 2006), online: Secretariat for the GPRB <<http://www5.cao.go.jp/access/english/chans/shori17-6th-e.html>>.

United States:

Lubman, Stanley B. "Statement submitted to the Congressional-Executive Commission (CECC) on China", online: CECC
<<http://www.cecc.gov/pages/hearings/020702/lubman.php>>.

International Materials

Asian Development Bank (ADB), *Governance: Sound Development Management*, (Manila: Asian Development Bank, 1999).

ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, *Curbing Corruptions in Public Procurement in Asia and the Pacific: Progress and Challenges in 25 Countries*, (Manila: Asian Development Bank, 2006).

ADB, *Technical Assistance Completion Report PRC: Formulation of the Government Procurement Law*, ADB TA No.: 3631, online: ADB <<http://www.adb.org/Documents/TACRs/PRC/tacr-prc-3631.pdf>>.

ADB, *Technical Assistance Report: Technical Assistance to the People's Republic of China for the Formulation of the Government Procurement Law*, TAR: PRC 34607, online: ADB <<http://www.adb.org/Documents/TARs/PRC/R41-01.pdf>>.

European Commission, Press Release, IP/07/80, "Competition: Commission Fines Members of Gas Insulated Switchgear Cartel over 750 Million Euros", (24 Jan 2007). Online: Gateway to European Union <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/80&format=HTML&aged=1&language=EN&guiLanguage=en>>.

OECD, *Regulatory Policies in OECD Countries: From Intervention to Regulatory Governance* (Paris: OECD, 2002).

OECD, Committee on International Investment and Multinational Enterprises, *Public Sector Transparency and International Investment Policy* (Paris: OECD 2003).

OECD, *Fighting Corruption and Promoting Integrity in Public Procurement* (Paris: OECD, 2005).

OECD, *Bribery in Public Procurement: Methods, Actors, and Counter-Measures*, (Paris: OECD, 2007).

OECD, *Integrity in Public Procurement: Good Practice from A to Z*, (Paris: OECD, 2007).

OECD, *Glossary of Statistical Terms*, online: OECD <<http://stats.oecd.org/glossary/detail.asp?ID=4474>>.

Transparency International, *Corruption Perception Index 2009*, online: Transparency international

<http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table>.

Transparency International, *National Integrity Systems: Country Study Report China* (Berlin: Transparency International, 2006), online: Transparency International <http://www.transparency.org/content/download/12696/125523/file/China_nis_2006.pdf>

Transparency International, *National Integrity Systems: Country Study Report Japan* (Berlin: Transparency International, 2006), online: Transparency International, online: <http://www.transparency.org/content/download/14728/156321/file/japan_r.pdf>.

WTO, *Communication from the European Committees, Ensuring the Transparency in Procurement Policies and Practices*, WT/WGTGP/W/17 (May 25, 1998).

WTO, *Report of the Working Party on the Accession of China*, WTO Doc. WT/MIN(01)/3 (2001), p9-10, online: WTO <http://www.wto.org/english/thewto_e/acc_e/wp_acc_china_e.doc>

WTO, *Pre-ambule to the Agreement Establishing the WTO*, (Geneva: WTO, 1994), online: WTO <http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm>

WTO, *Agreement on Government Procurement*, online: WTO <<http://docsonline.wto.org/imrd/directdoc.asp?DDFDdocuments/t/PLURI/GPA/W297.doc>>.

WTO, *Agreement on Government procurement (GPA), Appendix 1, Japan, Annex 3, All other Entities Which Procure in Accordance with the Provisions of this Agreement*, WTO Doc. WT/Let/643 (May 26, 2009), online: WTO <http://www.wto.org/english/tratop_e/gproc_e/jpn3.doc>.

World Bank, *Governance: the World Bank's Experience*, (Washington, D.C.: The World Bank, 1994).

Secondary Materials: Monographs

English:

Arrowsmith, Sue. *Government Procurement in the WTO*, (Hague: Kluwer Law International, 2003).

Atiyah, Patrick S. *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979). See also, Ewan McKendrick, *Contract Law - Text, Cases and Materials* (Oxford: Oxford University Press, 2005).

Beeman, [Michael](#) L. *Public Policy and Economic Competition in Japan: Change and Continuity in Antimonopoly Policy 1973-1995* (London and New York: Routledge, 2002)

Bossche, Peter Van Den. *The Law and Policy of the World Trade Organization, Text, Cases, and Materials*, (Cambridge: Cambridge University Press, 2008)

Bull, Hedley. *The Anarchical Society: A Study of Order in World Politics*, (New York: Columbia University Press, 1980).

Chen, Kenneth Kuan Sheng, *Buddhism in China: A historical survey*, (Princeton, NJ: Princeton University Press, 1964).

Glendon, Mary Ann., Carozza, Paolo G., & Picker, Colin B., *Comparative Legal Traditions: Text, Materials and Cases on Western Law*, 3rd ed. (St. Paul, MN: West Group, 2006).

Hoekman, Bernard M. & Mavroidis, Petros C. eds, *Law and Policy in Public Purchasing: The WTO Agreement on Government Procurement*, (Ann Arbor, MI: University of Michigan Press, 1997).

Huntington, Samuel P. *Political Order in Changing Societies*, (New Haven and London: Yale University Press, 1967).

James, Benjamin W. "Expanding the Gap: How the Rural Property System Exacerbates China's Urban-Rural Gap" (2007) 20:2 *Columbia Journal of Asian Law* 451-491.

Haley, John. *The Spirit of Japanese Law*, (Athens, Georgia: University of Georgia Press, 1998)

Haley, John. "Japanese Administrative Law", (1986) 19 *Law in Japan* 1.

- Kong Qingjiang, *China and the World Trade Organization* (Singapore: World Scientific, 2002).
- Krugman, Paul R. & Obstfeld, Maurice. *International Economics: Theory and Policy*, 6th ed. (Boston: Addison Wesley, 2002)
- Kwong, Julia. *Political Economy of Corruption in China* (New York: M.E. Sharpe, 1997).
- Lubman, Stanley. *Bird in a Cage: Legal Reform in China after Mao*, (Stanford: Stanford University Press, 2000).
- McCrudden, Christopher. *Buying Social Justice: Equality, Government Procurement, & Legal Change*, (Oxford: Oxford University Press, 2007).
- Mulgan, Aurelia George. *Power and Pork; A Japanese Political Life* (Canberra: Asia Pacific Press, 2006).
- Port, Kenneth L. & McAlinn, Gerald Paul, *Comparative law: Law and the Legal Process in Japan*, 2nd ed, (Durham, NC: Carolina Academic Press, 2003)
- Peerenboom, Randall. *China's Long March toward Rule of Law*, (New York: Cambridge University Press, 2002).
- Ramseyer, J. Mark. & Rosenbluth, Frances McCall. *Japan's Political Marketplace*, (Cambridge: Harvard University Press, 1993)
- Stiglitz, Joseph. *Globalization and Its Discontents*, (New York: W. W. Norton, 2002)
- Vogel, Ezra. *Japan as Number One: Lessons for America*, (Cambridge: Harvard University Press, 1999).
- Weber, Max. *The Religion of China: Confucianism and Taoism*, (Macmillan, 1951).
- Woodall, Brian. *Japan under Construction: Corruption, Politics, and Public Works*, (Berkeley: University of California Press, 1996).
- The WTO Secretariat, *Guide to the Uruguay Round Agreements* (Hague: Kluwer Law International, 1999).

Chinese:

Chen Jiagui & Wang Yanzhong, *Zhongguo shehui baozhang fazhan yanjiu* (Report on China's Social Security Development 2001-2004), vol. 2 (Beijing: Social Sciences Academic Press, 2004).

Xiao Beigeng, *Zhenfu Caigou zhi Guoji Guizhi* (The International Rule of the Public Procurement), (Beijing: Falv Chubanshe (Law Press of China), 2005).

Secondary Materials: Articles

English:

Abbott, Kenneth W. "Rule-Making in the WTO, Lessons from Cases of Bribery and Corruption", in Simon J. Evenett & Bernard Hoekman eds, *The WTO and Government Procurement*, (Northampton, MA: Edward Elgar Publishing 2006).

Anderson, Robert. "Renewing the WTO Agreement on Government Procurement: Progress to Date and Ongoing Negotiations" (2007) 16 *Public Procurement Law Review* 255.

Araki, Ichiro. "The Evolution of Japan's Aggressive Legalism", (2006) 29:6 *World Economy* 783-803

Arrowsmith, Sue. "Towards an Agreement on Transparency in Government Procurement" (1998) 47 *International & Comparative Law Quarterly* 796.

Berkofsky, Axel. "Corruption and Bribery in Japan's Ministry of Foreign Affairs: The Case of Muneo Suzuki", *Japan Policy Research Institute (JPRI) Working Paper No.86* (June 2002), online: Japan Policy Research Institute <<http://www.jpri.org/publications/workingpapers/wp86.html>>.

Biukovic, Ljiljana. "Selective Adaptation of WTO Transparency Norms and Local Practices in China and Japan" (2008) 11:4 *Journal of International Economic Law* 803-825.

Blank, Annet. & Marceau, Gabrielle. "The History of the Government Procurement Negotiations since 1945" (1996) 5 *Public Procurement Law Review* 77-147.

Cao, Fuguo. "China's Government Procurement Reform: From the *Bidding Law* to the *Government Procurement Law*", in Arrowsmith & Trybus, *supra* note 91 at 61-84.

Clarke, Donald C. "China's Legal System and the WTO: Prospects for Compliance" (2003) 2 *Washington University Global Studies Law Review* 97.

Gao, Henry. "The Bid Challenge Procedures Under the WTO Government Procurement Agreement: a Critical Study of the Hong Kong Experience" (2007) 16 *Public Procurement Law Review* 211.

Gordon, Daniel I. "Organizational Conflicts of Interest: A Growing Integrity Challenge" (2005) 35:1 *Public Contract Law Journal* 25-41.

Grier, Jean Heilman. "Japan's Implementation of the WTO Agreement on Government Procurement" (1996) 17 *University of Pennsylvania Journal of International Economic Law* 645;

Grier, Jean Heilman. "An Overview of Japan's Government Procurement System", (1998) 7:6 *Public Procurement Law Review* 131-146.

Hamano, Sylvia Brown. "Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights" (1999) 1 *University of Pennsylvania Journal of Constitutional Law* 415.

Hunja, Robert R. "Obstacles to Public Procurement Reform in Developing Countries", in Sue Arrowsmith and Martin Trybus eds, *Public Procurement: The Continuing Revolution*, (Hague: Kluwer Law International, 2003)

Hunja, Robert R. "The UNCITRAL Model Law on Procurement of Goods, Construction and Services and Its Impact on Procurement Reform", in Sue Arrowsmith & Arwel Davies eds, *Public Procurement: Global Revolution*, (Hague: Kluwer Law International, 1998).

Iga, Mamoru. & Auerbach, Morton. "Political Corruption and Social Structure in Japan" (1977) 17:6 *Asian Survey* 556-564.

Jackson, Sukhan., *et al*, "Health Finance in Rural Henan: Low Premium Insurance Compared to the Out-of-Pocket System" (2005) 181 *The China Quarterly* 137-157.

Johnson, David T. "Bureaucratic Corruption in Japan", *Japan Policy Research Institute (JPRI) Working Paper No.76* (April 2001), online: Japan Policy Research Institute <<http://www.jpri.org/publications/workingpapers/wp76.html>>.

Komuro, Norio. "The implementation of the GPA in Japan", in Bernard M. Hoekman & Petros C. Mavroidis eds, *Law and Policy in Public Purchasing: The WTO Agreement on Government Procurement*, (Ann Arbor, MI: University of Michigan Press, 1997).

Kobayashi, Hirokazu. "The Future of Japan's Trade Policy Regarding Bilateral Trade Disputes", (Working paper, 2004), online: Research Institute of Economy, Trade, and Industry <http://www.rieti.go.jp/en/columns/a01_0154.html>.

Kong Qingjiang, "Conflict of Normative Documents and Its Management in China" (2009) 4:4 *Frontiers of Law in China* 633-646.

Lee, Liming. "The Current State of Public Health in China" (2004) 26 *Annual Review of Public Health* 327.

Lieberthal, Kenneth G. "The Fragmented Authoritarianism Model and its limitations", in Kenneth G. Lieberthal & David M. Lampton, eds., *Bureaucracy, Politics, and Decision Making in Post-Mao China* (Berkeley & Los Angeles: University of California Press, 1992).

Linarelli, John. "Corruption in Developing Countries and in Countries in Transition: Legal and Economic Perspectives", in Sue Arrowsmith & Arwel Davies eds, *Public Procurement: Global Revolution*, (Hague: Kluwer Law International, 1998).

Linarelli, John. "The WTO Transparency Agenda: Law, Economics, and International Relations Theory", in Sue Arrowsmith and Martin Trybus eds, *Public Procurement: The Continuing Revolution*, (Hague: Kluwer Law International, 2003)

Lipset, Seymour M. & Lenz, Gabriel S. "Corruption, Culture, and Markets", in Lawrence E. Harrison & Samuel Huntington eds., *Culture Matters: How Value Shape Human Progress*, (New York: Basic Books, 2000), at 112-124.

Luney, Percy R. Jr., "Judiciary: Its Organization and Status in the Parliamentary System: The Constitution of Japan - The Fifth Decade: II. Government Processes and the Separation of Powers" (1990) 53 *Law and Contemporary Problems* 149.

McCrudden, Christopher. "Social Policies in Public Procurement: A Legal Overview", in Sue Arrowsmith & Arwel Davies eds, *Public Procurement: Global Revolution*, (Hague: Kluwer Law International, 1998).

Neary, Ian. "Parliamentary Democracy in Japan" (2004) Vol. 57 No. 3 *Parliamentary Affairs* 666-681.

Taishi Ohno & Yuhei Harada, "A Comparison of Tendering and Contracting Systems for Public Works" (2006) 13 *Government Auditing review* 49, online: Japan Board of Audit <<http://www.jbaudit.go.jp/pr/pdf/e13d04.pdf>>.

Ostry, Sylvia. "China and the WTO: The Transparency Issue" (1998) 1 *UCLA Journal of International Law and Foreign Affairs* 14.

Pekkanen, Saadia M. "Aggressive Legalism: The Rules of the WTO and Japan's Emerging Trade Strategy" (2004) 24:5 *World Economy* 707-708.

Pekkanen, Saadia M. "Sword and Shield: The WTO Dispute Settlement System and Japan", in Ulrike Schaede & William Grimes eds., *Japan's Managed Globalization: Adapting to Twenty-first Century*, (New York: M.E. Sharpe, 2003), at 77-100

Pils, Eva. "Chinese Property Law as an Image of PRC History" (2009) 39:3 *Hong Kong Law Journal* 595-611.

Pils, Eva. "Land Disputes, Rights Assertion, and Social Unrest in China: A Case from Sichuan," in (2005) 19:1 *Columbia Journal of Asian Law* at 235-292.

Port, Kenneth L. "The Case for Teaching Japanese Law at American Law Schools" (1994) 43 *DePaul Law Review* 643.

Potter, Pitman B. "Selective Adaptation, Institutional Capacity and the Reception of International Law under Conditions of Globalization", (2007) 66 *Legal Sociology (Japan)*.

Potter, Pitman B. "Legal Reform in China: Institutions, Culture, and Selective Adaptation" (2004) 29:2 *Law & Social Inquiry* 476.

Potter, Pitman B. "Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices", (2003) 1 *Washington University Global Studies Law Review* 124-25.

Reed, Steven R. "Political Corruption in Japan" (1996) 48:3 *International Social Science Journal* 395-405.

Reed, Steven R. Book Review of *Political Bribery in Japan* by Richard H. Mitchell (1999) 2:1 *Social Science Japan Journal* 126.

Solinger, Dorothy J. "Globalization and Human Rights for Workers in China", in Mahmood Monshipouri, *et al* eds., *Constructing Human Rights in the Age of Globalization*, (Armonk, N.Y.: M.E. Sharp, 2003).

Subrahmanyam, Arjun. "Land Use in China: The Impact of the Economic Revolution" [November 2004] *China Law & Practice*.

Simmons, Beth A. "Compliance with International Agreements" (1998) 1 *Annual Review of Political Sciences* 84.

Schwartz, Joshua I. "On Globalization and Government Procurement", in Sue Arrowsmith and Martin Trybus eds, *Public Procurement: The Continuing Revolution*, (Hague: Kluwer Law International, 2003), at 23.

Tian Jingbin "Enforcement of Public Procurement Rules in China", in Sue Arrowsmith and Martin Trybus eds.

Upham, Frank. "Chinese Property Rights and Property Theory" (2009) 39:3 *Hong Kong Law Journal* 611.

Wang, Ping "China's Evolving Legal Framework on Public Procurement" (2004) 13:6 *Public Procurement Law Review* 285-318.

Wang, Ping "China's New Government Procurement Law" (2002) 11:6 *Public Procurement Law Review*, NA133-139.

Westring, Gosta. & Jadoun, George. *Public Procurement: Manual for Central and Eastern Europe* (Paris/Turin: SIGMA/International Training Centre of the ILO, 1996) at 6.

Zampetti, Beviglia. "The UNCITRAL Model Law on Procurement of Goods, Construction and Services", in Bernard M. Hoekman & Petros C. Mavroidis eds, *Law and Policy in Public Purchasing: The WTO Agreement on Government Procurement*, (Ann Arbor, MI: University of Michigan Press, 1997).

Chinese:

Cai Chunhong, "Zhengfu caigou fa zhong de lifa jishu xiaci" (The Technical defects in the making of the Government Procurement Law) [2004] 2 *Faxue* (Legal Science) 28-33.

Liu Xiaoxue & Chen Xinggen, "Some Reflections on the Transferring State-owned Assets to the National Social Security Fund" (2006) 5 *Journal of Shanghai Finance University* 49-53.

Luo Haocai, "Our Country's Administrative Law System in Social Transition" (Shehui zhuanxing zhong de woguo xingzheng fazhi) (2003) 1 *Guojia xingzheng xueyuan xuebao* (Academic Journal of the State Academy of Administration) 4.

Unirule Institute of Economics, "Chengshi hua Beijing xia tudi chanquan de shishi he baohu" (Realization and protection of land rights under the background of urbanization), online: Unirule Institute of Economics <<http://www.unirule.org.cn/xiazai/20071/35.pdf>>.

Wang Yaqin, "Woguo zhengfu caigou de zhiyi yu tousu zhidu" (The Query and Complaint System in China's Government Procurement) [May 2004] *Xingzheng yu Fa* (Administration & Law) 79-82.

Wang Yong, "WTO Zhenfu Caigou Xieyi yu Woguo Zhenfu Caigou Fa zhi Bijiao" (The Comparison between WTO's GPA and China's Government Procurement Law) [2002] 6 *Zhenzhi yu Falv* (Politics and Law) 75.

Wang Yuanzhi and Cao Keqi, (2008) 31:6 "Wuquanfa dui nongmin tudi quanyi zhi baohu" (On the protection of peasant's land rights in Property Right Law), in *Shanxi daxue xuebao* (zhexue shehui kexue ban) (*Journal of Shanxi University* (Philosophy and Social Science) 98-103.

Yang Jiejun & Zhuang Han, "WTO yu zhongguo xingzheng falv wenhua de jiangou" (The WTO and the Construction of China's Administrative Legal Culture) (2004) 18:5 *Dangdai Faxue* (Contemporary Law Review) 125-131.

Ying Songnian & Wang Xixin, "WTO yu zhongguo xingzheng fa zhidu gaige de jige guanjian wenti" (WTO and Several Key Issues in China's Administrative Law Reform) (2001) 5 *Zhongguo Faxue* (Chinese Legal Sciences) 5-15.

Yuan Jianyong, "Xingzheng gizhang xuyao mingque de jige wenti" (Several issues on administrative edits that require clarification), in Li Buyun, ed., *Lifa fa yanjiu* (A study of the Legislation Law) (Changsha: Hunan People's Press, 1998) at 119-130.

Zhang Zhiqian, "WTO yu Woguo Zhenfu Caigou Lifa" (WTO and China's Government Procurement Law Making) [2002] 7 *Dangdai Faxue* (Contemporary Law Review) 67.

Zhou Hongjun & Dai Zhongxian, "WTO Zhenfu Caigou Xieyi yu Woguo Zhenfu Caigou Fa" (WTO's GPA and China's Government Procurement Law) [2003] 5 *Bulletin of East China University of Politics and Law* (Huadong Zhengfa Xueyuan Xuebao) 42.

Secondary Materials: News Releases

China:

Ministry of Commerce of China, News Release, "Zhengfu caigou: zhongguo qiye yubian honggou wei tongtu" (Government procurement: Chinese enterprises want to pave the way smoothly), online: Ministry of Commerce <<http://henan.mofcom.gov.cn/aarticle/sjshangwudt/200605/20060502270264.html>>.

Ministry of Finance of PRC, News Release, "Zhengfu caigou guimo chaoguo siqian yi yuan" (The size of government procurement exceeds RMB 400 billion), online: Ministry of Finance of PRC <http://www.mof.gov.cn/news/20080221_2113_31631.htm>.

Ministry of Finance of PRC, News Release, "China has formally initiated the negotiation process to join the WTO's Agreement on Government Procurement" (28 December 2007), online: Ministry of Finance <http://www.mof.gov.cn/news/20071228_1500_30175.htm>

National Development and Reform Commission (NDRC), News Release, "Guojia fagaiwei zhuren makai zai jinian zhaobiao toubiao fa shishi wuzhounian huiyi shang de jianghua" (Remarks by Ma Kai, Director of the National Development and Reform Commission, at the ceremony for the fifth anniversary of the promulgation of the *Tendering and Bidding Law*) (March 25, 2005), online: NDRC <<http://wwwold.spdc.gov.cn/b/b200507131.htm>>.

National Development & Reform Commission (NDRC), News Release, "Woguo yiliao qixie shichang he jiage qingkuang de diaoyan baogao" (*Research Report on the Domestic Medical Equipment Market and Price Situation*) (2006), online: NDRC <<http://www.sdpc.gov.cn/yjq/W020060711533235210478.doc>>.

United States:

General Electric (GE), News Release, "GE and China MOR Sign Strategic MOU to Advance High-Speed Rail Opportunities in the U.S.", (17 November 2009), online: GE <http://www.ge.com/news/chinanews/get_mor_hsr_pr.pdf>.

U.S. Department of Justice (DOJ), News Release, "Control Components Inc. Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$18.2 Million Criminal Fine" (31 July 2009), online: Department of Justice <<http://www.usdoj.gov/opa/pr/2009/July/09-crm-754.html>>.

U.S. Department of Justice, News Release, "Lucent Technologies Inc. Agrees to Pay \$1 Million Fine to Resolve FCPA Allegations" (21 December 2007), online: DOJ <http://www.justice.gov/opa/pr/2007/December/07_crm_1028.html>.

U.S. Department of Justice, News Release, "Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines" (15 December 2005), online: DOJ <<http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>>

U.S. Securities & Exchange Commission, News Release, "SEC Charges Former Officer of Pride International with Violating the Foreign Corrupt Practices Act" (Washington, D.C.: SEC, 11 December 2009), online: SEC <<http://www.sec.gov/litigation/litreleases/2009/lr21335.htm>>.

U.S. Securities & Exchange Commission, News Release, "SEC Files Settled Charges against Avery Dennison Corporation for Violating the Books and Records and Internal Controls Provisions of the FCPA" (28 July 2009), online: SEC <<http://www.sec.gov/litigation/litreleases/2009/lr21156.htm>>

U.S., Securities and Exchange Commission (SEC), News Release, "SEC Charges Siemens AG for Engaging in Worldwide Bribery" (15 December 2008), online: SEC <<http://www.sec.gov/news/press/2008/2008-294.htm>>.

Japan:

Prime Minister of Japan and His Cabinet, News Release, "Press Conference by Prime Minister Yukio Hatoyama" (25 December 2009), online: Prime Minister of Japan and His Cabinet <http://www.kantei.go.jp/foreign/hatoyama/statement/200912/25kaiken_e.html>.

Secondary Materials: Newspapers and Other News Sources

Chinese:

People's Daily:

"20 qi gongcheng jianshe lingyu fabai dianxing anjian, pingjun mei an sheji jin'e wubai wushi wan yuan" (20 typical cases concerning corruption in construction works), *People's Daily* (21 May 2010) online: People's Daily <<http://fanfu.people.com.cn/BIG5/11655296.html>>.

"Guangzhou caizhengju juzhang huiying geli an" (The head of the Guangzhou finance bureau responds to the GREE case), *People's Daily* (3 February 2010), online: People's Daily <<http://politics.people.com.cn/BIG5/14562/10921557.html>>.

"Pandian qu'nian luoma tanguan" (An overview of the corrupted officials under investigation last year), *People's Daily* (3 January 2010), online: People's Daily <<http://opinion.people.com.cn/BIG5/10693896.html>>.

"Guoqi shouhui'an zuizao xinxi laizi guowai, fanfu weihe zong houzhi houjue?" (Bribery cases in domestic SOEs are always firstly disclosed in foreign countries: Why Anti-corruption Actions Are always lagging), *People's Daily* (17 August 2009), online: People's Daily <<http://fanfu.people.com.cn/BIG5/9864596.html>>.

"Gu chujun an zhongshen weichi yuanpan" (Gu Chujun's case was upheld at the final instance), *People's Daily* (10 April 2009) online: People's Daily <<http://finance.people.com.cn/GB/9108643.html>>.

"Yangqi fanfu bixu dapao yibashou jizhi" (For anti-corruption in central SOEs, the dominance by the head must be curbed), *People's Daily* (17 February 2009), online: People's Daily <<http://theory.people.com.cn/BIG5/49150/49151/8814752.html>>.

Development Research Center of the State Council, "Zhengfu caigou cai jingji fazhan zhong de zuoyong yu diwei" (The role and importance of government procurement in economic development) *People's Daily* (January 21, 2008) online: People's Daily <<http://theory.people.com.cn/GB/49154/49155/6800155.html>>.

"Government Procurement Requires Transparent Business", *People's Daily* (6 November, 2007), online: People's Daily <<http://society.people.com.cn/GB/41165/6486644.html>>.

“Siqi weigui xiujian loutang guansuo bei tongbao” (Four cases of Construction Projects without Approval were Reported Publicly”, *People’s Daily* (2 June 2007), online: *People’s Daily*

<<http://politics.people.com.cn/BIG5/1026/5812566.html>>.

“Yuan hunansheng renmin yiyuan yuanzhang shouhui an zhenxiang” (The truth of the corruption case of the former head of the Hunan Provincial People’s Hospital), *People’s Daily* (29 December 2006), online:

<<http://legal.people.com.cn/GB/42733/5231799.html>>.

“Guoyou qiye jituan zongzichan 20 wanyi, xiang longduan hangye jizhong” (The assets in State owned group companies totals about 20 trillion, increasingly involved in monopolized sectors), *People’s Daily* (6 September 2006), online:

People’s Daily <<http://finance.people.com.cn/GB/1045/4783887.html>>.

“Gongche xiaofei, gongkuan chihe yinian chaoguo liuqian yi” (Government expenses on officials cars, dining & meals exceed 600 billion last year) *People’s Daily* (17 March 2006), online: *People’s Daily*

<<http://finance.people.com.cn/GB/1047/4212272.html>>.

“Wuhan chuzu buyong fukang buzhun yingyun beizhi shi longduan xingzheng lanquan” (Wuhan taxi’s case: the government was accused of abuse of administrative power), *People’s Daily* (15 July 2005), online: *People’s Daily*

<<http://unn.people.com.cn/GB/14777/21747/9657061.html>>.

Zhu Rongji, “Zhu rongji tichu jinnian lianzheng gongzuo sanxiangyaoqiu” (Zhu Rong’s remarks on the State Council working conference on anti-corruption”, *People’s Daily* (21 February 2002), online: *People’s Daily*

<<http://www.people.com.cn/GB/shizheng/16/20020221/671044.html>>.

Xinhua News:

“Guotu guanyuan fubai gaofa” (Corruption becomes pervasive among land officials), *Xinhua News* (1 June 2010), online: *Xinhua News*

<http://news.xinhuanet.com/local/2010-06/01/c_12163995.htm>.

“The Ministry of Science and Technology (MOST) and the Ministry of Industry & Information Technology (MIIT) are fighting over the strategy on the development of innovative energy cars”, *Xinhua News* (5 February 2010), online: *Xinhua News*

<http://www.cq.xinhuanet.com/2010-02/05/content_18968137_1.htm>.

“Geli zongcai zhiyi zhengfu caigou bugong” (The CEO of the GREE doubts the fairness of government procurement), *Xinhua News* (2 February 2010), online: Xinhua News

<http://news.xinhuanet.com/fortune/2010-02/02/content_12920140.htm>.

Lv Hanyang, “Zhengfu caigou fa shishi tiaoli zhengqiu yijian gao jiedu” (Interpretations of the Draft for Comments of the Implementing Regulations of the Government Procurement Law), *Xinhua News* (21 January 2010), online: Xinhua News

<http://news.xinhuanet.com/legal/2010-01/21/content_12848644.htm>.

“Guowuyuan fazhiban jiu zhengfu caigou fa shishi tiaoli zhengqiu yijian” (The Legal Affairs Office of the State Council invites for comments on the Implementing Regulations of the Government Procurement Law), *Xinhua News* (11 January 2010), online: Xinhua News

<http://news.xinhuanet.com/legal/2010-01/11/content_12790900.htm>.

“Guowuyuan fazhiban jiu zhaobiao toubiao fa shishi tiaoli zhengqiu yijian” (The Legal Affairs Office of the State Council invites for comments on the Implementing Regulations of the Tendering and Bidding Law), *Xinhua News* (30 September 2009), online: Xinhua News

<http://news.xinhuanet.com/legal/2009-09/30/content_12136233.htm>.

“Zhi qu’niandi zhongyang qiye zichan yi jiejin 18 wan yi yuan” (By the end of last year, the assets of central SOEs total about 18 billion), *Xinhua News* (23 June 2009), online: Xinhua News

<http://news.xinhuanet.com/fortune/2009-06/29/content_11621278.htm>.

“Qidong guoyougu zhuanchi zhengce yizai chongshi shebao jijin” (The launch of the policy on transferring of state-owned shares is aimed at consolidating the Social Security Fund), *Xinhua News* (19 June 2009), online: Xinhua News

<http://news.xinhuanet.com/fortune//2009-06/19/content_11569960.htm>.

“Guangzhoushi zhengfu caigou woan zai zhuizong, qingyise huanxing” (Re-focus on the corruption case of Guangzhou government procurement center, all of the accused received suspension of limited-term sentence), *Xinhua News* (24 March 2009), online: Xinhua News

<http://news.xinhuanet.com/legal/2009-03/24/content_11061047_1.htm>.

“Chengdu paimai xin xingzheng zhongxin muhou” (The inside story of the auction of the new administrative center building of Chengdu municipal government) *Xinhua News* (17 July 2008), online: Xinhua News

<http://news.xinhuanet.com/local/2008-07/17/content_8558392.htm>

“Guangzhoushi zhengfu caigou zhongxin woan kaishen yuan zhuren chengren shouhui” (The case of the Guangzhou municipal government procurement centre is tried in the court, the former head pleaded guilty), *Xinhua News* (5 March 2008), online: Xinhua News
<http://news.xinhuanet.com/local/2008-03/05/content_7718549.htm>.

“Zhongguo GDP zengzhang 11.4%” (China’s GDP increased by 11.7% in 2007) *Xinhua News* (24 January 2008), online: Xinhua News
<http://news.xinhuanet.com/fortune/2008-01/24/content_7485380.htm>.

“Zhengfu caigou zouyu falv kunju caizhengbu youdian yuan” (Government procurement faces legal dilemma, the MOF feels bitter), *Xinhua News* (18 July 2007), online: Xinhua News
<http://news.xinhuanet.com/legal/2007-07/18/content_6391248.htm>.

“Jiangsu bufen zhengfu kongtiao caigou qishi mingzu pinpai” (Domestic suppliers were discriminated in the government procurement of air conditioning equipment by government agencies in Jiangsu province) *Xinhua News* (27 March 2007), online: Xinhua News
<http://news.xinhuanet.com/local/2007-03/27/content_5900865.htm>.

“Zhenfu caigou chongyang, hangye zhuguan bumen youze” (Foreign products are preferred in government procurement, the government should be responsible) *Xinhua News* (7 March 2007), online: Xinhua News
<http://news.xinhuanet.com/mrdx/2007-03/07/content_5812835.htm>

“Bianwei de zhngfu caigou” (Mischaracterized government procurement) *Xinhua News* (5 March 2007), online: Xinhua News
<http://news.xinhuanet.com/focus/2007-03/05/content_5800572.htm>

“Guochan pinpai weihe shou zhengfu caigou lengyu?” (Why domestic brands are not favored in government procurement?) *Xinhua News* (28 February 2007), online: Xinhua News
<http://news.xinhuanet.com/fortune/2007-02/28/content_5782908.htm>.

“Caizhengbu shexian jianguan quewei, zhengfu caigou diyi an baisu” (The Ministry of Finance lost in the first case in government procurement) *Xinhua News* (11 December 2006), online: Xinhua News
<http://news.xinhuanet.com/lianzheng/2006-12/11/content_5468280.htm>.

“Yifeng chumujingxin de zhengfu caigou weigui xingdan” (A shocking list of violations in government procurement), *Xinhua News* (18 September 2006), online:

Xinhua News

<http://news.xinhuanet.com/politics/2006-09/18/content_5103691.htm>.

“Tongxi guoyou zichan liushi” (Critical analysis on the loss of state assets), *Xinhua News* (7 March 2006), online: Xinhua News

<http://news.xinhuanet.com/fortune/2006-03/07/content_4267355.htm>.

“Zhengfu caigou diyi an kaisheng” (The trial for the first case in government procurement started), *Xinhua News* (23 May 2005), online: Xinhua News

<http://news.xinhuanet.com/legal/2005-05/23/content_2989343.htm>.

“Zhengfu caigou diyi an kaisheng, shui jianguan zhengfu huaqian cheng jiaodian” (Who supervises government expenditure becomes a key issue in the first case in government procurement), *Xinhua News* (21 May 2005), online: Xinhua News

<http://news.xinhuanet.com/legal/2005-05/21/content_2982531.htm>.

“Beijing pingchu fanfu shida an, yuan dianlibu fubuzhang beicha jushou” (The case of the former vice minister of electricity ranks number one among the top ten corruption cases in Beijing last year), *Xinhua News* (2 January 2003), online: Xinhua News

<http://news.xinhuanet.com/newscenter/2003-01/02/content_677432.htm>.

Other News Sources:

“Yancha weigui loutang guansuo” (Strictly investigates illegal construction projects) CCTV (27 June 2007), online: CCTV

<<http://big5.cctv.com/gate/big5/news.cctv.com/china/20070627/108556.shtml>>.

“Shanghai ditie xinxian caiyong xiao chexiang neimu” (The inside Story of the Use of Small Size Rail Cars in Shanghai Subway lines), *Xinmin News* (15 February 2008), online: Xinmin News

<<http://sh.xinmin.cn/shizheng/2008/02/15/1052619.html>>.

Wang Zhenyu, “Zhengdi guansi weihe ling fayuan touteng?” (Why litigations on land expropriation become a headache for the court?) *Nanfang Daily* (20 October 2008) online: <<http://news.163.com/08/1020/08/4OMF8MIP00012Q9L.html>>.

Japanese:

“Minister of Internal Affairs & Communication Investigation on the Assets Evaluation is not transparent” *Sankei ShimBun* (13 January 2009), online: Sankei ShimBun <<http://sankei.jp.msn.com/topics/politics/11115/pl11115-t.htm>>.

“The J-Green Case: politicians are involve, Matsuoka committed suicide”, *Asahi Shimbun* (28 May 2007), online: Asahi Shimbun <<http://www.asahi.com/special/070528/TKY200705280437.html>>.

English:

Robert Wright, “China on Track to Join Ranks of Train Manufacturers”, *Financial Times* (1 March 1 2010), online: Financial Times <<http://www.ft.com/cms/s/0/7b05504c-255a-11df-9cdb-00144feab49a.html>>.

“Mandelson condemns Obama 'Buy American' call as protectionism”, *The Times* (31 January 31 2009), online: The Times <<http://business.timesonline.co.uk/tol/business/economics/article5622438.ece>>.

“Minister who faced inquiry into series of scandals kills himself”, *Times* (29 May 2007), online: *Times* <<http://www.timesonline.co.uk/tol/news/world/asia/article1851710.ece>>.

Gibney, Frank B. “Is Japan’s Democracy a Sham?” *The New York Times* (14 May 14 1989), online: The New York Times <<http://www.nytimes.com/1989/05/14/books/is-japan-s-democracy-a-sham.html>>

Stokes, Henry Scott. “Tanaka Suffers Setback in the Lockheed Case”, *The New York Times* (1 November 1981), online: The New York Times <<http://www.nytimes.com/1981/11/01/world/tanaka-suffers-setback-in-the-lockheed-case.html>>.

Dictionaries

West's Encyclopedia of American Law, 2nd ed., (St. Paul, MN: West Group Publishing, 1998).

Internet Sites

Diet Member Sasaki Kensho's Official Website

<http://www.sasaki-kensho.jp/giwaku/article/suzuki/suziki_sub05.html>.

Forestry and Forest Product Research Institute <<http://www.green.go.jp/>>.

Government Revitalization Unit <<http://www.cao.go.jp/sasshin/>>.

Secretariat for the Government Procurement Review Board (Office for Government Procurement Challenge System), Cabinet Office, Government of Japan, *A Guide to the System of Complaint Review Procedures for Government Procurement*, online: Secretariat for the Government Procurement Review Board <http://www5.cao.go.jp/access/english/chans_main_e.html>.

Shanghai Electric <<http://www.shanghai-electric.com/cn/index.asp>>.

Shanghai Metro <<http://www.shmetro.com/>>.