The Government Procurement Agreement and Economic Partnership Agreement (EPA): Lessons from Japan's experience

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Abstract *This article explores the effects of MFN clauses on the procedural and transparency rules set out in the 1994 GPA, the Revised GPA and government procurement chapters of FTAs and how procedural and transparency rules are expanded to countries that are parties to FTAs containing MFN clauses relating to government procurement, by analyzing the effects of the two most recent FTAs concluded by Japan (i.e. Japan-EU EPA and the CPTPP). This article then proposes how other countries, including India, should take careful note of the effects of the procedural rules and the MFN clauses regarding government procurement, and consider which procedural rules may be expanded to other countries beyond the parties to the FTA in question and which will not, when considering whether to enter into new FTAs containing government procurement provisions.*

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I. INTRODUCTION

Government procurement is the purchase, lease, or rental of goods, services, and construction works by government entities, such as national government agencies and local cities. The World Trade Organization's ("**WTO**") Agreement on Government Procurement ("**GPA**" or the "**Revised GPA**"[1]) promotes market opening, good governance, transparency, and integrity. The GPA sets out rules that the parties to the GPA (hereinafter, "**GPA Parties**" or in the singular "**GPA Party**") must observe in the process of covered procurement in order to ensure open, fair, and transparent conditions of competition in government procurement activities. These rules include general principles like national treatment and most-favored-nation ("**MFN**") clauses, as well as procedural rules governing matters such as notices of intended procurement, conditions of participation, and other matters.

These rules do not apply to all government procurement activities conducted by the GPA Parties, but are limited only to government procurement activities carried out by covered entities with regard to covered goods, services, or construction services that have a value exceeding the specified thresholds. The scope of covered procurement activities is listed in the individual annexes, which differ from party to party.

The GPA is a plurilateral agreement, meaning that not all WTO members are parties to it. Therefore, the GPA does not apply to all WTO members; instead, the GPA rules are applicable only to covered procurement activities engaged in by the GPA Parties.

In addition to the GPA, some bilateral EPAs and FTAs (collectively, "**FTAs**") include chapters or provisions relating to government procurement. The relevant chapters or provisions may be included in FTAs between the GPA Parties as well as in FTAs between a GPA Party and a non-GPA Party.

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[1] For the definition of the "Revised GPA" *see* S III.1(1).

However, if FTAs include rules in addition to those contained in the GPA, the MFN clauses of the GPA (and other FTAs with MFN clauses regarding government procurement) require that GPA Parties (or parties to such FTAs) must be accorded the additional treatment agreed upon with regard to specific public procurement procedures covered by all of the overlapping treaties.

This article will review the history and content of government procurement regulations in the GPA and other bilateral treaties (Section II), as well as the FTAs negotiated by Japan (Section III), and then discuss the existence and effects of the MFN clauses in the GPA and other bilateral treaties (Section IV), including the application of such effects to India (Section V).

Ultimately, MFN clauses and similar regulations governing government procurement activities, such as those contained in the GPA and FTAs, may serve to expand fair and transparent procedures for government procurement. However, countries entering into FTAs with government procurement provisions, which are not the GPA parties, will need to take special note of the potential effects of these clauses on their government procurement activities.

II. GOVERNMENT PROCUREMENT REGULATIONS IN THE GPA AND BILATERAL TREATIES

A. GPA

1. A brief history of the GPA

Governments tend to favor procurement of their own country's goods and services for reasons ranging from national security to the promotion of domestic industry. Therefore, the General Agreement on Tariffs and Trade ("**GATT**") Article III: 8(a) expressly exempts government procurement from the requirement of national treatment.[2] However, the use of procurement procedures to protect domestic industries constituted a major non-tariff barrier to trade and, considering that the size of the government procurement market and its share of the economy were non-negligible, major contracting parties to the GATT recognized the need to liberate government procurement markets and establish internationally accepted rules for government procurement activities.

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[2] Japan Ministry of Economy Trade and Industry, 2016 Report on Compliance by Major Trading Partners with Trade Agreements -WTO, EPA/FTA and IIA, (2016) 559.

As a result, in the 1979 Tokyo Round, the first Agreement on Government Procurement ("**1979 GPA**") was concluded. The 1979 GPA required national treatment and most-favored-nation status, as well as fair and transparent procurement procedures. Additional negotiations, with the aim of improving the text, and expanding the scope and coverage, of the 1979 GPA resulted in a new Agreement on Government Procurement ("**1994 GPA**"), which was signed in Marrakesh on 15 April 1994 and entered into force on 1 January 1996. After additional renegotiations, a further revised version of the 1994 GPA was formally adopted in March 2012 and entered into force on 6 April 2014 ("**Revised GPA**") (hereinafter the 1994 GPA and the Revised GPA will collectively be referred to as "**GPAs**").

The Revised GPA currently has 20 parties (including the European Union and its 28 member states, all of which are covered, and counted, as a single party) which collectively comprise 47 of the WTO member-states. Another 34 WTO members/observers, including India, participate as applicants to the GPA Parties or observers on the GPA Committee.[3]

The GPA incorporates provisions related to national treatment and non-discrimination for the suppliers of the GPA Parties. It also includes procedural and transparency-based provisions to ensure that any procurement covered by the GPA is carried out in a transparent and competitive manner.[4]

1. Composition of the Revised GPA

The Revised GPA consists mainly of two parts: the text of the GPA itself and the Appendix, in which each GPA Party's market access schedule of commitments is described. The text of the GPA establishes rules and obligations to ensure fair, transparent, equitable, and non-discriminatory treatment, and to ensure open access to potential suppliers seeking to participate in the covered procurement activities. In the context of trade agreements on procurement transparency the GPA has three primary functions: to support non-discrimination (by making it difficult to conceal discriminatory motives), to facilitate participation by suppliers unfamiliar with the system, and to improve information for market access negotiations.[5] The primary procedural and transparency-related provisions include regulations and procedures relating to notices, conditions for participation, and technical specifications.

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[3] A list of the current parties, observers, and accession status can be found on the WTO website at <https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm>

[4] Ayako Ueno, Multilateralising Regionalism on Government Procurement,(OECD Trade Policy Papers, No. 151, 2013)<https://doi.org/10.1787/5k46l8vvq2np-en> 8.

[5] Sue Arrowsmith, 'Reviewing the GPA: The Role and Development of the Plurilateral Agreement after DOHA'(2002) 5(4) Journal of International Economic Law, 761, 765.

The Appendix to the Revised GPA describes the coverage of the Revised GPA with regard to each GPA Party, and is divided into Annexes concerning the parties' specific obligations. The Annex applicable to each GPA Party lists the covered: (1) central government entities, (2) sub-central government entities, (3) "other" entities, (4) goods, (5) services, and (6) construction services, in positive lists. This means that only the covered procurement elements and activities described in the Annexes are open to GPA Parties, and only the procurement procedures associated with those covered procurement elements and activities are subject to the rules set out in the text of the Revised GPA. The seventh Annex also provides general notes.

B. Government Procurement Provisions in EPAs and FTAs

FTAs may also include chapters or provisions relating to government procurement activities.

It should be noted that since the latter half of the 1990s the European Union ("**EU**")has become proactive in pushing for multilateral rules, binding on all government procurement activities; this position was motivated by the EU's view that competition-based, objective procurement activities are in the interest of all countries, and by the EU's desire for others to follow its government procurement model.[6] However, developing- and emerging-market countries feared that the binding rules advocated by the EU would extend to market access issues (defined as the removal of *de jure* preferences for national suppliers) and argued to restrict the coverage of these rules, including transparency rules, to covered procurement activities.[7] The EU's efforts to establish multilateral rules for government procurement activities were not initially successful, as can be seen from the fact that the current procedural and transparency-related rules of the Revised GPA apply only to the covered procurement activities. Instead, the aim of establishing liberal procurement rules has been pursued via GPA-type provisions in bilateral FTAs negotiated by the major WTO Members, as described above.[8]

The primary text of FTAs may establish procedural and transparency rules, which may be similar to or dissimilar from those contained in the GPA, and FTAs may also list the covered procurement activities in their Annexes. This approach is customarily taken when the parties to the FTAs

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6 Steve Woolcock, 'Policy Diffusion in Public Procurement: The Role of Free Trade Agreements' (2013) 18 International Negotiation 153, 165.

7 Stephen Woolcock, Public Procurement in International Trade (European Parliament Directorate-General for External Policies of the Union Directorate B Policy Department, 2012) 14.

8 Woolcock (n 6) 165.

are already GPA Parties and wish to introduce stricter procedural and transparency rules than the Revised GPA contains ("**GPA-Plus Rules**") or to expand the scope of covered procurement activities in order to reciprocally open their government procurement markets beyond the scope of the Revised GPA. For example, the Japan-EU EPA, which not only expands the scope of the covered government procurement activities, but also introduces stronger procedural and transparency rules than the Revised GPA applicable to the parties, as discussed in Section III.

Procurement chapters and provisions may also be included in FTAs in which one or both parties to the FTA are not GPA Parties. Since only 47 countries and regions are parties to the Revised GPA, the establishment of rules for government procurement in FTAs is particularly significant where the other contracting party is not the GPA Parties.[9] For example, the FTAs concluded between Japan and Chile, Peru, Australia, Singapore and Mexico, which are not GPA Parties, have all included chapters on government procurement rules.

By incorporating the GPA rules into FTAs between GPA Parties, or by using the Revised GPA rules as a model for government procurement regulations in FTAs between non-GPA Parties, FTAs often cover not only general principles of government procurement, such as national treatment and prohibition of offsets, but also key procedural rules including transparency measures.[10]

III. Government Procurement Provisions in FTAs negotiated by Japan

A. Japan-EU EPA

The Agreement Between the European Union and Japan for an Economic Partnership (the "**Japan-EU EPA**"), which entered into force on 1 February 2019, provides for government procurement rules in Chapter 10 of the main text and lists the covered procurement activities of both parties in Annex 10.

Since the EU member states and Japan are both members of the Revised GPA, the government procurement chapter of the Japan-EU EPA incorporates the provisions of the Revised GPA "*mutatis mutandis*", as well as establishing new, additional rules that are not included in the Revised GPA.

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[9] Japan Ministry of Economy Trade and Industry (n 2) 1056.
[10] Ueno (n 4) 6.

The rules on government procurement procedures that exceed those contained in the Revised GPA include, for example, a provision stating that government procuring entities shall not exclude suppliers established in the other party from participating in tendering procedures on the basis of any legal requirement that a supplier must be either be a natural or a legal person (Article 10.5, paragraph 1 of the Japan-EU EPA). Further, with regard to establishing the conditions for participation in the tendering process for covered government procurement, Article 10.5, paragraph 2 of the Japan-EU EPA requires that the "procuring entity shall not impose the condition that such prior experience must have been acquired within the territory of that Party".

With regard to the GPA-Plus Rules for government procurement procedures established in the Japan-EU EPA, as explained in the following Sections III.2 and III.3, if the procurement in question is also covered by other treaties containing government procurement provisions and MFN clauses (e.g., the 1994 GPA, the Revised GPA, and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("**CPTPP**")), the parties to those other treaties must also be accorded the *same treatment* as the EU parties, due to the nondiscrimination obligations contained in the MFN clause(s) of those other treaties. This means that suppliers of countries that are not parties to the GPAs or the Japan-EU EPA, but are parties to an EPA containing government procurement chapters and MFN clauses, are able to state in a complaint review procedure that, by the Japan-EU EPA, they were treated unfairly compared with EU suppliers.

In implementing the Japan-EU EPA, Japan amended its domestic laws and regulations in accordance with the Japan-EU EPA and instructed the relevant procuring entities to comply with the Japan-EU EPA. However, some of the rules have not been incorporated into Japanese domestic laws and regulations explicitly, but have been implemented on a *de facto* basis.

In particular, upon becoming a party to the GPA and the Revised GPA, Japan established special laws and regulations in order to implement the GPAs.[11] When new FTAs introduce the GPA plus rules, some of these laws

[11] For example the Cabinet Order Specifying Special Provisions for Procurement Procedures for Goods, etc. or Specified Services by the National Government (Cabinet Order No. 300 of 1980) available at <https://elaws.e-gov.go.jp/search/elawsSearch/elaws_search/lsg0500/detail?lawId=355CO0000000300> (In Japanese only) and the Cabinet Order Specifying Special Provisions for Procurement Procedures for Goods, etc. or Specified Services by Local Governments (Cabinet Order No. 372 of 1995) available at <https://elaws.e-gov.go.jp/search/elawsSearch/elaws_search/lsg0500/detail?lawId=407CO0000000372> (In Japanese only) have been established with the purpose of implementing the GPA and the Revised GPA.

and regulations will be amended to include those GPA plus rules. In such cases, it is clear that once the relevant domestic laws and regulations are amended, the new procedures can be enjoyed by all suppliers of countries, subject to such domestic laws and regulations. However, it should be noted that the GPA plus rules under new FTAs that are not explicitly incorporated into such domestic laws and regulations must also be applicable to the government procurement procedures open to suppliers of other countries, through the MFN clauses of GPAs or other EPAs with government procurement chapters, as explained in Sections III.2, III.3 and IV.2 (2).

For example, Article 10.9, paragraph 2 of the Japan-EU EPA states that when procuring entities require suppliers to submit a test report or a certificate issued by a conformity assessment body (or similar organization) as part of an evaluation of the supplier's qualifications, procuring entities will accept the results of conformity assessment procedures conducted by the registered conformity assessment bodies of the other party, in accordance with the Agreement on Mutual Recognition between the European Community and Japan. By contrast with other procedural rules that do not limit their applicability to EU suppliers, the procedural rule above, regarding the use of test reports in evaluating the suppliers' qualifications is explicitly limited to EU suppliers, as the article itself cites the Agreement on Mutual Recognition between the European Community and Japan, which applies only between Japan and the EU.

It should also be noted that the Japan-EU EPA opened the government procurement market to EU suppliers with regard to procurement of goods and services related to the operational safety of railway transportation; this area was specifically excluded from the scope of the GPA by the so-called "Operational Safety Clause" of the Japanese Annexes (included in Appendix I) to the GPAs. However, as explained in Section IV.2(1), since the MFN clauses of the GPA do not extend to coverage of government procurement under the GPA, the liberalization of the railway market in Japan is limited to EU suppliers only; other GPA Parties do not have automatic access to this market.

B. The Relationship Between Japan and Switzerland

Although Switzerland ratified the 1994 GPA in 1996, it has not yet ratified the Revised GPA. Thus, as between Japan and Switzerland, the rules and coverage limitations of the 1994 GPA apply to government procurement rules and the scope of covered procurement. Since Switzerland is not an EU member, the procurement activities in Japan which are listed in Annex 10 of

the Japan-EU EPA, and newly covered by that agreement, are not available to Switzerland.

However, a different situation exists with regard to application of the Revised GPA and Revised GPA-Plus Rules contained in Chapter 10 of the Japan-EU EPA to government procurement activities involving Japan and Switzerland, due to the MFN clause in the 1994 GPA.

Article III (1) of the 1994 GPA established the following nondiscrimination rules:

> 1. *With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favourable than:*
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> *(a) that accorded to domestic products, services and suppliers; and*
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> *(b) that accorded to products, services and suppliers of any other Party.*

Since both Japan and Switzerland are parties to the 1994 GPA, Japan is obligated to treat Switzerland no less favorably than any other parties to the 1994 GPA (a set of countries which includes the EU member states), with regard to procedures and practices relating to government procurement activities covered by the 1994 GPA. In other words, if the procurement in question is covered by both the 1994 GPA and the Japan-EU EPA, and other parties to the 1994 GPA (specifically the EU) participate in the relevant procurement process, the MFN clause of the 1994 GPA requires Japan to accord Switzerland treatment equal to that extended to the EU.

Therefore, due to the MFN clause in the 1994 GPA, Japan is obligated to extend to Switzerland the benefits of both the Revised GPA rules and the Revised GPA-Plus Rules set out in the Japan-EU EPA, despite the fact that Switzerland is not a party to either the Revised GPA or the Japan-EU EPA. For example, Article 10.5, paragraph 2 of the Japan-EU EPA prohibits procuring entities from requiring that suppliers have prior experience acquired within the territory of the procuring Party, as explained in Section III.2 above. Therefore, through the MFN clauses in the 1994 GPA, Japan must treat EU suppliers and Swiss suppliers equally in actual procurement procedures, and if Japanese procuring entities require suppliers to have prior experience, they may not require that either the EU suppliers or the Swiss suppliers have prior experience in Japan.

Again, it should be noted that the coverage of the Japan-EU EPA does not extend to Switzerland. In other words, Japan does not have to open the same government procurement activities that have been opened to EU suppliers (i.e. procurement related to railway transportation) to Swiss suppliers. However, when conducting government procurement processes that are open to EU and Swiss suppliers, the Japanese procuring entities must treat EU suppliers and Swiss suppliers equally.

C. The Relationship Between Japan and the CPTPP Parties

Chapter 15 of the CPTPP, which entered into force in December 2018, provides rules for government procurement activities modeled on the Revised GPA. In particular, the CPTPP chapter on government procurement activities is meaningful because it (a) introduces procedural and transparency rules regarding government procurement activities to countries that are not GPA Parties, (b) expands the scope of the covered procurement activities, and (c) establishes Revised GPA-Plus Rules among the CPTPP parties.

Japan, Canada, New Zealand and Singapore are GPA Parties and parties to the CPTPP. Additionally, with regard to CTPP parties, governmental procurement rules had already been introduced in FTAs concluded between Japan and Chile, Peru, Australia, Singapore and Mexico. Therefore, the primary significance of the government procurement chapter in the CPTPP is its introduction of government procurement rules governing Brunei Darussalam, Viet Nam, and Malaysia, which are not GPA Parties and do not have FTAs with Japan containing substantive government procurement provisions.

A similar non-discrimination issue as that discussed in Section III.2 above with regard to Switzerland also arises in the CPTTPP context, through the application of MFN clauses contained in the Revised GPA and the CPTPP.

Article IV (1) of the Revised GPA sets out the following nondiscrimination rules:

> *With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to:*
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> *a. domestic goods, services and suppliers; and*
>
> *b. goods, services and suppliers of any other Party.*

When Japan conducts government procurement activities involving covered procurement activities under the Japan-EU EPA, Japan is obliged (as discussed above) to conduct its procurement activities in accordance with the procedural and transparency obligations set out in the Japan-EU EPA. Since Japan and the EU member states are also GPA Parties, if the procurement activity in question is also covered by the Revised GPA, Japan is obliged to extend non-discriminatory treatment to other GPA Parties. The relevant treatment must be "no less favourable" than the treatment Japan accords to EU member states by virtue of the MFN clause in the Revised GPA. In such a case, the rules contained in the Japan-EU EPA must be extended to countries which are GPA Parties(but are not parties to the Japan-EU EPA; among the signatories to the CPTPP; such countries include Canada, New Zealand and Singapore) through the MFN clause contained in the Revised GPA.

Article 15.4 (1) of the CPTPP also contains the following nondiscrimination rule:

> 1. *With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party, treatment no less favourable than the treatment that the Party, including its procuring entities, accords to:*
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> *(a) domestic goods, services and suppliers; and*
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> *(b) goods, services and suppliers of any other Party.*
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> *For greater certainty, this obligation refers only to the treatment accorded by a Party to any good, service or supplier of any other Party under this Agreement.*

Therefore, the CPTPP requires Japan to provide nondiscriminatory treatment in the relevant procurement processes to countries which are only parties to the CPTPP (i.e., Chile, Peru, Australia, Mexico, Brunei, Vietnam and Malaysia), and requires that the treatment be "no less favourable than [what Japan] accords" to other CPTPP party countries that are also GPA Parties (namely, Canada, New Zealand, and Singapore). This means that the rules set out in the Japan-EU EPA must be extended to countries which are neither GPA Parties nor parties to the Japan-EU EPA, due to the MFN clause contained in the CPTPP.

As a result, application of the MFN clauses in both the Revised GPA and the CPTPP require application of the procedural and transparency rules set out in the Japan-EU EPA to various countries that are not parties to the Japan-EU EPA.

It is important to keep in mind that this application of procedural and transparency rules is only "equally transferred" to non-GPA Parties if the relevant government procurement activity at issue is covered by all three treaties (i.e., the Japan-EU EPA, the Revised GPA, and the CPTPP).

IV. MFN Clauses in the GPAs and Bilateral Treaties: Their Effects

A. MFN treatment

MFN rules, along with the national treatment rule, are one of the fundamental principles in international trade agreements. MFN rules are non-discriminatory treatment rules that require states to accord the industries of one foreign state "no less favourable" treatment than that which is given to the industries of another. Under MFN rules, concessions negotiated bilaterally on the basis of reciprocity between the negotiating parties must be extended to the other parties to the relevant agreement.[12]

The MFN obligation established in Article I of the GATT and Article II of the General Agreement on Trade in Services ("**GATS**") requires the parties to those agreements to extend to all other parties, immediately and without discriminatory conditions, the most favorable trade and market access concessions the granting party has given to any third party.

However, government procurement activities are largely excluded from the MFN rules contained in the GATT and the GATS, allowing states to enter into agreements to open government markets only to the parties to certain agreements, without extending those benefits to third parties.[13] Discussions have taken place as to whether the GATT MFN rules apply to the coverage of the GPA or to government procurement provisions in EPAs, in which it has been agreed that the MFN rules in GATT Article 1 do not apply to the coverage of the GPA relating to government procurement; that is, the negotiated coverage scope of applicable government procurement (i.e., the threshold of the procurement, the procuring entities, and the scope of the goods and services procured) is limited to the parties to the relevant GPAs or EPAs with government procurement clauses, and other countries do not obtain automatic access to the government procurement market(s) opened by

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[12] Sue Arrowsmith, Government procurement in the WTO (Kluwer Law International, 2003) 111.

[13] *Ibid* 66.

other treaties.[14] This article does not address those issues; instead, it focuses on the relationship of MFN rules within the 1994 GPA, the Revised GPA and other trade agreements containing government procurement provisions, and how such MFN clauses also expand the procedural and transparency-related obligations, but not the scope, to other parties.

B. MFN Treatment in the GPAs

(1) Non-application of MFN treatment to the scope of the GPAs

Both the 1994 GPA and the revised GPA include MFN clauses which provide that each party shall provide the products, services, and suppliers of other member countries, "treatment no less favorable" than the treatment accorded to goods, services, and suppliers of any other party.

However, the MFN obligation does not extend to the scope of the GPAs. This can be seen from the fact that the GPAs limit the covered procurement activities to the procurement activities positively listed in the Annexes for each party, and reciprocally and conditionally open the government procurement markets only to the member states that are GPA Parties or parties to the 1994 GPA, respectively. Therefore, if the GPA Parties enter into an agreement with other countries, and that agreement grants wider access to procurement markets than the GPAs,[15] the MFN clauses of the GPAs do not automatically extend the scope of access to include the additional markets included in the other agreements. For example, see the procurement of goods and services related to the operational safety of railway transportation in the Japan-EU EPA, as described in Section III.1 above.

On the other hand, this also means that countries which are not parties to the GPAs may enter into agreements with the GPA Parties and freely set out the extent to which the countries that are not parties to the GPAs (often, developing countries wishing to protect their domestic industries) wish to reciprocally open their markets to the foreign counterparty.

(2) Application of MFN Treatment to the Procedural and Transparency Rules of the GPAs

The MFN clauses in the GPAs make it clear that the MFN rules apply to the procedural and transparency rules governing procurement activities

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[14] On the other hand, the GATS exclusion for government procurement is clear, in that art XIII.1 explicitly states that it applies to GATS art II on MFN. For further discussion on the relationship between the MFN rules of GATT and GATS regarding government procurement, *see* Arrowsmith (n 12) 83.

[15] For example, by way of lowering the thresholds or adding new industries.

that are covered by those agreements. This means that if a party to the GPAs enters into a trade agreement that promises or requires any treatment more favorable than the GPAs with respect to government procurement activities that are covered by the GPAs, such favourable treatment also must be extended to all countries that are parties to the GPAs by virtue of the relevant non-discrimination clause.[16]

An example of this can be seen in the relationship between Japan and Switzerland, discussed in Section III.2 above. Due to the MFN clause in the 1994 GPA, if Japan conducts any government procurement activities that fall within the coverage parameters of the 1994 GPA, Japan must treat suppliers from Switzerland, which is a party to the 1994 GPA, in the same manner as it treats EU suppliers. The GPA-Plus Rules in the Japan-EU EPA also extend to Switzerland, which is not a member of the EU, through the MFN clause of the 1994 GPA.

This also applies to cases where the government procurement provisions in FTAs include MFN clauses similar to those of the GPAs. The relevant MFN clauses often require (either directly or as a practical matter, through their operations) that preferential treatment granted in one agreement must be extended to the parties or beneficiaries of other agreements. This, in turn, limits discrimination among the FTAs' trading partners by extending better treatment granted in new FTAs to the parties to earlier FTAs.[17] For example, due to the MFN clauses in the Revised GPA and the CPTPP, Japan must provide the same non-discriminatory treatment set out in the Japan-EU EPA to all countries that are parties to the CPTPP (although those member states are not part of the EU),when the specific government procurement activity at issue is covered by all three treaties (i.e., the Revised GPA, the Japan-EU EPA, and the CPTPP); this requirement exists as a result of the MFN clauses in the Revised GPA and the CPTPP, as described in more detail in Section III.3.

Thus, as long as government procurement activities are covered by agreements to which the countries in question are parties, MFN clauses in the GPAs and other, earlier, FTAs may require the relevant government(s) to extend preferential treatment relating to procedural and transparency rules to countries that are parties to earlier agreements containing MFN clauses relating to government procurement.

Consequently, suppliers from such countries may invoke the preferential treatment granted under other FTAs in complaint review procedures for

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[16] Japan Ministry of Economy Trade and Industry (n 2) 1056.
[17] Ueno (n 4) 34.

the relevant government procurement activities. For example, suppose that the EPA between Country B and Country C ("FTA I") accords stipulates stronger procedural and transparency rules than the EPA between Country A and Country B ("FTA II"), which has an MFN clause. In a particular government procurement procedure, if the suppliers from Country A are not accorded the stronger procedural treatment provided to Country C by the procuring entities in Country B under FTA II, the suppliers from Country A may use the unequal treatment as the basis for bringing a complaint review procedure. Specifically, Country A may object that this unequal treatment by the procuring entities in Country B violates FTA II, by invoking the preferential treatment accorded to Country C under FTA I through the MFN clause in FTA II.

This outcome is not surprising, and is in fact the best overall treatment of procedural and transparency rules. It is not cost-effective for countries to establish individual procedural and transparency rules according to the terms of various agreements in force between the suppliers' countries from time to time. Rather, it is far more natural and efficient, as well as equitable, to establish a single set of (most favourable) procedural and transparency rules and then to apply those terms to all relevant countries, whether or not those countries are parties to the agreement that contains the most favorable rules. However, this process may have unpredicted effects, if the parties to the relevant trade agreements did not understood this mechanism.

That said, countries entering into FTAs must be aware that commitments made in FTAs regarding procedural and transparency rules for government procurement activities can be extended to countries that are not parties to the relevant FTAs through other, earlier trade agreements containing MFN clauses relating to government procurement, including the 1994 GPA and the Revised GPA. FTAs with government procurement chapters aim to liberalize the government procurement markets of the parties, not only by expanding the coverage of the applicable government procurement activities, but also by eliminating discriminatory measures and practices in order to prohibit discrimination against foreign suppliers, goods, and services.[18] Countries entering into FTAs with government procurement clauses may focus primarily on the former half of the objectives above, but such countries must not forget that the latter half of the objectives are crucial to gaining equal market access opportunities, and that they will also have an effect on countries that are not parties to the relevant FTA.

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[18] *See* Kamala Dawar, 'The WTO Government Procurement Agreement: The Most-Favoured Nation Principle, the GATS and Regionalism' (2015) 42(3)Legal Issues of Economic Integration 257, 258.

V. APPLICATION TO INDIA

India has not yet ratified the Revised GPA but it has been participating in the GPA Committee as an observer since 2010. Since India has pursued a strict import substitution policy, its public procurement activities have been geared toward promoting national or regional producers.[19] Therefore, although India has entered into some FTAs with government procurement provisions, as a general rule, India seems to take a negative stance on accepting binding commitments in multilateral, bilateral, or regional level trade agreements on opening its government procurement market to others.[20]

For example, although Chapter 10 of the Japan-India CEPA includes one of the most detailed rules on government procurement activities contained in any of India's FTAs, the number and scope of the provisions are limited, and detailed obligations are left for future determination through further negotiations.

Nevertheless, even among the limited provisions established in the Japan-India CEPA, Article 111 of the Japan-India CEPA, which addresses non-discrimination in government procurement, states "*[w]ith respect to any measure regarding government procurement, each Party shall provide to the goods, services and suppliers of the other Party treatment no less favourable than that it accords to non-Party's goods, services and suppliers in accordance with its laws and regulations*." Additionally, Article 114 establishes obligations relating to future negotiations, establishing opportunities for the parties to enter into negotiations to expand the scope of covered procurement activities, on a reciprocal basis, when one party offers to extend advantageous treatment concerning government procurement measures to another, non-party state.

None of the FTAs signed by India include coverage schedules relating to government procurement, including the Japan-India CEPA. Therefore, currently, and until such time as India opens its government procurement market to suppliers from other countries, India's procurement entities may not need to be concerned about amending the domestic rules and regulations regarding procedural and transparency rules with regard to government procurement.

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[19] Woolcock (n 7) 24.

[20] India and the EU have agreed on negotiating government procurement as part of the India-EU FTA*See* Government of India Ministry of Commerce and Industry, India-EU Broad Based Trade and Investment Agreement (BTIA) negotiations <https://commerce.gov.in/international_nextDetail_WTO.aspx?LinkID=32&idwto=34>.

However, the Japan-India CEPA includes MFN provisions relating to government procurement, and India may enter into FTAs with similar MFN provisions with other countries. It should be noted that, in the future, if India decides to open its government procurement market and to establish procedural and transparency rules relating to government procurement that are more favorable than those granted in other FTAs, those rules must be extended to countries that are parties to other FTAs signed by India that contain MFN clauses relating to government procurement. As a result, India will be required to extend the favorable procedural and transparency rules contained in those future FTAs to countries that are parties to earlier FTAs containing MFN provisions.

In particular, India should take this into consideration when entering into an agreement with a country with a stronger trade policy of seeking access to the procurement markets of foreign countries by introducing procedural and transparency rules in the area of public procurement. For example, the EU has been one of the most enthusiastic countries in terms of introducing fair and transparent rules regarding government procurement procedures to other countries in their FTAs, to ensure more opportunities and greater fairness for EU businesses competing internationally.[21]

Thus, when India enters into FTAs with countries that focus on introducing fair and transparent procedural rules with regard to government procurement, India should be aware that it may require time and effort to amend its domestic procedural rules, and that it should be prepared to apply those new international standards to procurement that is open not only to suppliers of such countries but to suppliers of other countries as well.

If we look at the experience of Japanese procuring entities in implementing the Japan-EU EPA, although the government procurement regarding railway transportation was opened only to EU suppliers under the Japan-EU EPA, Japanese domestic procuring entities expended significant effort to amend their internal rules and gain understanding of how the procedural rules in the Japan-EU EPA were implemented, because government procurement activities relating to the operational safety of railway transportation were never open to foreign suppliers before that time.

If India believes that any procedural rules should apply only between certain countries, India may carve out those relevant rules from the set of rules

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[21] European Commission website on trade policy on public procurement <https://ec.europa.eu/trade/policy/accessing-markets/public-procurement/>; *See* also, Directorate-General for Communication (European Commission), International Procurement Instrument (2019).

that will be extended to other states under the MFN clause, by means of an explicit statement in any new FTAs that India enters into.

Again, taking the Japan-EU EPA as an example, as explained in Section III.1, Article 10.9, paragraph 2 of the Japan-EU EPA requires suppliers to accept the results of conformity assessment procedures conducted by the registered conformity assessment bodies of the other party, "in accordance with the Agreement on Mutual Recognition between the European Community and Japan". Therefore, this procedural requirement is applicable only to Japanese and EU suppliers, and is not applicable to suppliers of other countries, regardless of whether or not the FTAs of the suppliers' countries also have MFN clauses.

However it should also be remembered that the operation of MFN clauses relating to government procurement may also benefit India, in the sense that if the counterparties to future FTAs also enter into agreements containing preferable rules for government procurement, those counterparties will be required to grant India the benefit of those preferable rules as well.

It is important to note that the requirement to extend preferable procedural and transparency rules is limited to the specific types of government procurement activities covered by the relevant FTAs, if any, and that the FTAs currently signed by India do not contain such coverage.

VI. Concluding Remarks

The procedural and transparency rules on government procurement activities contained in the GPA may be extended to countries that are parties to FTAs containing MFN clauses relating to government procurement. While these MFN clauses may operate to promote the expansion of fair, transparent, and equitable government procurement procedures, supplementing the GPA regime, they also may have unanticipated effects, unless the countries entering into the relevant FTAs are well aware that the procedural rules may apply beyond the suppliers of the countries who are parties to the relevant FTAs.

Therefore, countries that enter into FTAs containing government procurement provisions (including without limitation India), should take careful note of the effects of MFN clauses on the operation of regulations governing covered government procurement activities, and should consider which procedural and transparency rules may be expanded beyond, or limited to, the parties to the FTA in question.