

# CHAPTER 14

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## Public Procurement

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## 14.1. INTRODUCTION

Contestable government procurement markets account for an estimated 7–9 percent of GDP in developed<sup>1</sup> countries and an estimated 9–20 percent in developing countries.<sup>2</sup> Thus, the state has considerable influence over the allocation of resources in market economies through procurement. A prominent aspect of such procurement is the preference for domestic over foreign firms in the award of public contracts, regardless of cost and quality considerations. This home bias in public purchase decisions has nontrivial efficiency effects. A home bias can reduce trade flows and influence international specialization, especially in sectors where public demand is large relative to domestic output and which are characterized by monopolistic competition and increasing returns to scale.<sup>3</sup>

Given these adverse effects, non-discrimination in the award of public contracts is the cornerstone of most international rules on government procurement. These measures have included (a) efforts undertaken by the European Commission (EC) as a part of its internal market reform and deregulation programs; (b) the nonbinding proposals of the Asia-Pacific Economic Cooperation (APEC) and the model law proposed by the United Nations Commission on International Trade Law (UNCITRAL); (c) the plurilateral WTO Agreements on Government Procurement (GPAs);<sup>4</sup> and (d) the rules already present and those being negotiated in various preferential trade agreements (PTAs). The last are the subject of this chapter.

PTAs have become the main vehicle for extending procurement rules to countries not party to the GPAs.<sup>5</sup> Existing work<sup>6</sup> has identified over 40 PTAs that include commitments to open access to procurement contracts on a bilateral or regional basis and explicitly prohibit procurement practices that discriminate against foreign producers.

PTAs with deep (or substantive) provisions on government procurement, which we refer to as deep procurement agreements (DPAs), have grown more popular over time, with more than half entering into effect since the year 2000. The proliferation

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<sup>1</sup> Trionfetti 2000, based on UN-OECD data.

<sup>2</sup> OECD 2002.

<sup>3</sup> Trionfetti 2000.

<sup>4</sup> Especially the Uruguay Round GPA 1996 and Revised GPA 2012.

<sup>5</sup> Hoekman 2015.

<sup>6</sup> For instance, see Anderson et al. 2011, Ueno 2013, and Rickard and Kono 2014.

of DPAs suggests that governments see them as a means for addressing procurement discrimination. DPAs explicitly forbid some or all forms of discrimination in public procurement. For instance, many forbid explicit “buy national” policies such as the 2009 “Buy American” provisions. These types of agreements also tend to prohibit price discrimination and a range of other policies such as local content requirements, which favor domestic firms.

In general, though, PTAs vary greatly in their scope and coverage of procurement provisions. Some, in fact, either reflect the existing procurement policies of signatories or limit commitments to best-effort (non-binding, non-enforceable) clauses. Many of the more recent PTAs, however, include extensive procurement commitments and are also more enforceable, including through domestic bid-challenge mechanisms. As one study has noted, “The more ambitious PTAs go beyond commitments to remove discrimination in procurement and include language pertaining to the objectives of procurement policy (e.g., attaining best value for money); the use of new technologies, such as electronic procurement, provisions to create or strengthen national institutions that implement national procurement policies and associated reforms; how to address likely changes in the scope of transactions falling under the disciplines of the agreement as a result of privatization of government entities; and call for cooperation on the development of national procurement policies.”<sup>7</sup>

Given the proliferation of DPAs, attempts have been made to map procurement provisions in the full range of PTAs. A review of this literature in the following section finds that these attempts, as pioneering as they are, could be more comprehensive. The main purpose of this chapter is therefore to describe a new method of classifying government procurement provisions in PTAs and present stylized facts, based on this classification, for 283 PTAs notified to the World Trade Organization (WTO) as of March 2017.

The rest of the chapter is structured as follows. The next section reviews earlier attempts in the literature to map the coverage of government procurement in PTAs. Section 14.3 introduces and describes the new methodology developed in this chapter to map government procurement provisions in PTAs, while Sections 14.4 and 14.5 provide stylized facts and detailed analysis on the basis of this classification. Section 14.6 concludes.

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<sup>7</sup> Hoekman 2015.

## 14.2. LITERATURE REVIEW

Perhaps the first attempts to compare government procurement provisions in PTAs were by Bourgeois et al. (2007) and Heydon and Woolcock (2009).

Bourgeois et al. (2007) provided a comparative legal analysis of government procurement provisions in 27 PTAs as of the mid-2000s, looking *inter alia* at the scope and coverage of the procurement chapters in these PTAs and commitments made on tendering, qualification of suppliers, time limits, bid challenge, dispute settlement, and institutional features. Heydon and Woolcock (2009) provided a qualitative summary of procurement provisions in agreements negotiated by the US, EU, EFTA, Japan, and Singapore.

Horn et al. (2009) examined 14 EU and US PTAs with WTO members, dividing the agreements into 52 policy areas that they classified as WTO+ and WTO-X. For each agreement, the authors identified the areas that were covered and whether the obligations were legally enforceable. Public procurement was classified as a WTO+ policy area in their analysis, with 50 percent of the observations being legally enforceable in EU PTAs against 93 percent in US PTAs.

Shingal (2009) classified 119 PTAs into Groups (I-V) and categories: Basic, Comprehensive (minus), and Comprehensive on the basis of the coverage of public procurement provisions in the PTAs. Illustratively, PTAs classified as “Basic” included generic provisions on opening up procurement markets on a non-discriminatory and reciprocal basis and for developing rules, conditions, and practices on government procurement. Most of the EC agreements with countries in the Mediterranean and Africa belong to this category. In contrast, most of the agreements that Mexico, Singapore, and the US have entered into, as well as the EFTA-Chile agreement, were classified as “Comprehensive.”

The UN Social and Economic Commission for Asia and the Pacific codes the presence (“yes”) or absence (“no”) of government procurement provisions in 244 PTAs that involve an Asia-Pacific country. More recently, Rickard and Kono (2014) construct a variable to denote 43 PPAs notified to the WTO, where a PPA is defined as a PTA with substantive provisions on government procurement.

A more comprehensive treatment of this subject is provided in Anderson et al. (2011), Ueno (2013), Dür, Baccini, and Elsig (2014), and Gourdon and Messent (2017).

Anderson et al. (2011) provide three levels of analyses. First, they classify 139 PTAs into three broad categories: (i) agreements between GPA Parties; (ii) agreements between a GPA Party and a non-GPA Party; and (iii) agreements between non-GPA Parties. Within each category, they then distinguish between: (a) PTAs incorporating government procurement chapters/related schedules or having some provisions that include the liberalization of procurement markets as an objective; and (b) PTAs that do not include such commitments. They find 87

agreements falling into the former category and provide a more detailed analysis of these 87 agreements in their second level of analyses by looking at eleven specific types of provisions and their coverage in each agreement, providing for examples of such provisions and giving a statistical overview on the occurrence of each provision in the agreements covered. In their third level of analysis, the authors compare and contrast the coverage commitments on government procurement in PTAs with those of the WTO Uruguay Round (UR) GPA.

The eleven specific types of provisions that Anderson et al. (2011) focus on include:

- (i) provisions on national treatment (NT) and non-discrimination;
- (ii) provisions on most-favoured-nation (MFN) treatment;
- (iii) procedural provisions analogous to the GPA;
- (iv) requirements for the implementation of bid challenge procedures;
- (v) the availability of dispute settlement procedures (i.e., enforceability);
- (vi) provisions regulating the use of offsets;
- (vii) commitments to GPA accession;
- (viii) commitments regarding further negotiations;
- (ix) provisions ensuring integrity in procurement procedures;
- (x) cooperation; and
- (xi) establishment of a Joint Committee or other administering body.

In another comprehensive treatment of this subject, Ueno (2013) examines the extent to which PTAs go beyond the WTO's government procurement agreements, both UR GPA (1996) and the Revised GPA (RGPA; 2012), in 47 Organisation for Economic Co-operation and Development (OECD) PTAs and finds non-GPA countries to have achieved the general GPA level of market access commitments in their PTAs. The study provides a detailed analysis of coverage commitments (by entity, thresholds, and goods and services coverage) of government procurement in these 47 OECD member PTAs and then examines procurement provisions in these agreements in much detail, also providing a comparison with the relevant WTO procurement agreements.

Ueno (2013) too considers eleven specific features in her analyses:

- (i) General principles (NT/non-discrimination and prohibition of offsets);
- (ii) Mechanisms supporting multilateralization (third-party MFN and future negotiation clauses);
- (iii) Information on procurement systems and opportunities;
- (iv) Qualification criteria;
- (v) Criteria for contract award;
- (vi) Use of information technology;
- (vii) Time periods;
- (viii) Transparency of decisions on contract awards;
- (ix) Domestic review;
- (x) Prevention of corruption; and
- (xi) Others (SME participation).

Using the same parameters as Ueno (2013), Gourdon and Messent (2017) have recently expanded on her analysis by including 13 more agreements, including those amongst non-OECD members. The authors find little variation in coverage across a party's agreements for its central government entities, although the number of schedules with commitments in sub-central coverage is found to be slightly greater. The thresholds in the 13 new agreements also appear to be negotiated on a reciprocal basis, and are found to be closely related to those agreed in each country's existing agreements.

None of these studies, however, code the procurement provisions that they look at into an index to enable a quantitative comparison of the coverage of government procurement in PTAs.

In contrast, Dür, Baccini, and Elsig (2014) have assembled DESTA, a database that has coded 587 PTAs up until June 2013 on 11 instruments of deep integration: market access, services, investment, procurement, SPS, TBT, dispute settlement, competition, trade defense, IPRs, and non-trade issues.

Dür, Baccini, and Elsig (2014) code procurement provisions in PTAs on the basis of the following attributes framed as questions: whether there are any substantive provisions on procurement; whether there is national treatment, transparency, and coverage in terms of entities and goods/services; and whether any reference has been made to the GPA. Each question is coded between 0–2 and then a final composite index adds the responses to the individual questions in each case. The greater is the score of the final composite index, the deeper is the PTA in its coverage and treatment of government procurement.

According to their classification, about 50 percent of the agreements have a reference to government procurement, but only 14 percent include substantive provisions, i.e., those going beyond stating adherence to the GPA or the desire to exchange information in this area.

### **14.3. NEW CLASSIFICATION TO MAP PROCUREMENT PROVISIONS IN PTAs**

Building on the existing literature, this chapter develops a new classification for mapping government procurement provisions in PTAs. To do so, we draw on two recent studies;<sup>8</sup> on the WTO Agreements on Government Procurement – the 1996 Uruguay Round GPA, on which most of the existing coverage of procurement in PTAs is based, and the Revised GPA (RGPA; 2012); as well as on the texts of “comprehensive” procurement chapters in representative PTAs such as those between the US and Singapore and Australia and Singapore.

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<sup>8</sup> Ueno 2013, and Gourdon and Messent 2017.

Our methodology follows a questionnaire approach, in which questions have two types of responses: either binary or detailed. This approach enables classification at the extensive (“does a PTA have a detailed government procurement chapter/provisions?”) and intensive (“what are the salient features of the government procurement chapter/provisions in the PTA?”) margins.

Our classification is based on eight broad themes incorporating one hundred questions, which cover the salient features of government procurement chapters/provisions found in PTAs. The questions represent desirable characteristics that proscribe discrimination in the award of public contracts and/or lead to better value of money for the government.

The eight broad themes, with the number of questions for each theme in parentheses, are:

- Overview (4)
- Non-discrimination (14)
- Coverage (40)
- Procedural disciplines (26)
- Transparency (ex-ante 3, ex-post 4)
- Dispute settlement (4)
- New issues (5)

*The Overview* theme includes four questions with binary responses. These questions provide a broad overview of the coverage of government procurement in a PTA:

- Are provisions covering government procurement explicitly mentioned in the agreement?
- Are the procurement provisions enforceable?
- Is government procurement coverage detailed in the agreement?
- Is this an agreement between GPA signatories?

*Non-discrimination* includes 14 questions with binary responses that address different aspects of existing and prospective non-discrimination in the award of government contracts:

- Does the agreement contain explicit provisions on
  - national treatment?
  - prohibition of offsets?
  - Most-favored-nation (MFN) treatment of third parties?
  - future negotiation of third parties?
  - review of commitments to expand coverage (more entities, more goods and services, lower thresholds)?
  - review of commitments to progressively reduce/eliminate discriminatory measures?
- Does the agreement require rules of origin *not* to be different for procurement compared to those applied in the normal course of trade?
- Are transitional measures allowed for developing country members of the agreement?



- Do transitional measures explicitly allow
  - price preferences?
  - offsets?
  - phased-in addition of specific entities or sectors?
  - a threshold that is higher than the permanent threshold?
  - delayed implementation periods?
- Does the agreement include provisions for the extension of transitional measures and/or transition periods?

*Coverage* includes 40 questions that require both binary and detailed responses and are at the core of our methodology to classify procurement provisions in PTAs:

- Does the agreement cover central and subcentral governments and/or utilities?
- What are the numbers of each entity covered by the agreement?
- Does the agreement cover goods and/or services?
- What is the number of aggregate goods sectors at the HS2<sup>9</sup>-digit Chapter level and the number of aggregate services sectors as listed in the GATS W/120<sup>10</sup> covered by the agreement?
- Which aggregate goods and services sectors are covered by the agreement?
- Are the threshold values for each Annex,<sup>11</sup> goods and services higher, lower, or the same as in the WTO's RGPA?
- What are the threshold values for each Annex, goods, and services?
- Are threshold values adjusted for inflation?
- Does the agreement include unnecessary exceptions from coverage except those permitted by the RGPA?
- Does the agreement include elaborate provisions for modification/rectification of coverage?

*Ex-ante transparency* includes three questions with binary responses:

- Does the agreement contain explicit provisions requiring that information on the procurement system (laws and regulations) be published?

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<sup>9</sup>The Harmonized Commodity Description and Coding System generally referred to as “Harmonized System” or simply “HS” is an international nomenclature for the classification of products developed by the World Customs Organization. The HS comprises approximately 5,300 article/product descriptions that appear as headings and subheadings, arranged in 99 chapters, grouped in 21 sections.

<sup>10</sup>W/120 is a comprehensive list of services sectors and subsectors covered under the WTO's General Agreement on Trade in Services (GATS).

<sup>11</sup> Under GPA rules, only public procurement above stipulated thresholds is subject to international competitive bidding. These thresholds vary by type of procuring entity (central government, subcentral government, and utilities) and for goods, services, and construction services. GPA Members report central government entities covered by the rules of the agreement under Annex 1; subcentral government entities under Annex 2; and utilities under Annex 3.

- Does the agreement contain explicit provisions requiring that notice of the intended/planned procurement be published?
- Are the notice details of the intended/planned procurement consistent with the requirements of Article VII:2 of the RGPA?

*Procedural disciplines* contain 26 questions that require both binary and detailed responses:

- Does the agreement contain explicit provisions on
  - conditions of participation?
  - qualification of suppliers?
  - technical specifications?
  - tender documentation?
  - time periods and deadlines?
  - negotiations?
  - limited tendering?
  - electronic auctions?
  - treatment of tenders and award of contracts?
  - transparency of procurement information?
  - ensuring integrity in procurement practices; e.g., by avoiding conflict of interest?
- Are the provisions in each case consistent with the requirements of the RGPA?
- Do participation conditions prohibit imposing conditions of previous awards?
- Do requirements for the qualification of suppliers impose any limitations on the number of bidders? include explicit provisions on using selective tendering and multi-use lists?
- How many days does the agreement allow for tender submission? publication of award information?
- Does the treatment of tenders allow for protection and proper use of confidential information and intellectual property (IP) protection?

*Ex-post transparency* includes four questions with binary responses:

- Are there explicit provisions on information provided to bidders (results and reasons for non-selection)?
- Are there explicit provisions on information provided to third parties (disclosure of information)?
- Does the agreement contain explicit provisions on collection and reporting of statistics?
- Are the provisions on collection and reporting of statistics consistent with Article XVI:4 of the RGPA?

*Dispute resolution* also includes four questions:

- Does the agreement provide for domestic review procedures?
- Are the domestic review procedures consistent with Article XVIII of the RGPA?
- Does the agreement contain explicit provisions on dispute settlement?
- Is dispute settlement consistent with Article XX of the RGPA?

Finally, on *New issues* found in some of the more recent PTAs, there are five questions that require binary responses:

- Does the agreement contain explicit provisions facilitating
  - e-procurement?
  - sustainable procurement?
  - participation of small and medium enterprises (SMEs)?
  - adoption of safety standards?
  - cooperation (as in Article 15.22 of the Trans-Pacific Partnership, TPP) in matters of public procurement?

The themes in this questionnaire, especially the coverage of public procurement in PTAs by entity, goods and services, and threshold values, and the incorporation of new issues, yields a more comprehensive understanding of PTAs than provided by the existing literature.

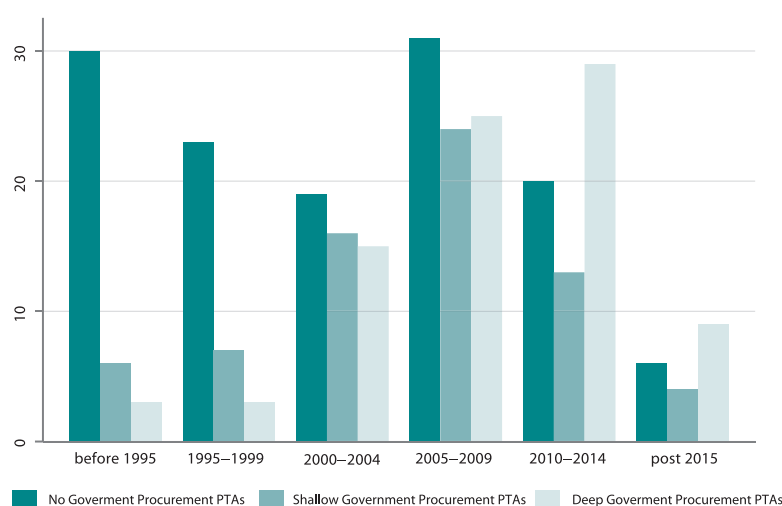
The next section presents stylized facts on the 283 WTO-notified PTAs in force as of March 2017 that were analyzed according to the eight broad themes in our classification.

#### 14.4. STYLIZED FACTS ON PROCUREMENT PROVISIONS IN PTAs

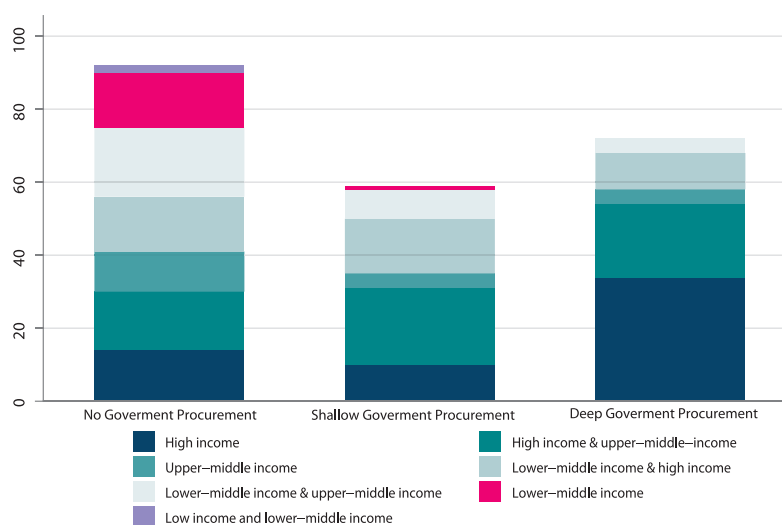
All PTAs can be classified into three groups according to their coverage of government procurement: (a) no coverage at all; (b) provisions on government procurement exist but are not detailed; and (c) detailed provisions on government procurement are included in the agreement. Of the 283 PTAs in force as of March 2017, 129 agreements (about 45 percent) have no provisions on government procurement; 70 agreements (25 percent) have shallow provisions; and 84 agreements (30 percent) have deep provisions (i.e., the group we refer to as DPAs). A complete list of PTAs in each category is presented in Annex Table 14.A.1.

The three groups of PTAs have evolved over time (Figure 14.1). The majority of agreements concluded before 1995 did not have any procurement provisions. The period from 1995 to 2004 witnessed a decline in the number of no-coverage agreements entering into effect, followed by a surge in those agreements during 2005–2009 and another decline after 2010. The period 2005–2009 also saw the highest number of shallow procurement PTAs, followed by a decline thereafter. In contrast, the number of DPAs grew steadily over the years until 2014, and reached a maximum of 29 agreements entering into effect during 2010–2014.

A majority of the DPAs have been concluded among high-income country partners or involve at least one high-income country (Figure 14.2). In fact, there are 34 DPAs between high-income countries, followed by 20 DPAs between high-income and upper-middle-income countries, and 10 DPAs between high-income and lower-middle-income countries. Thus, high-income countries exhibit the greatest propensity to conclude DPAs relative to all other income groups.

**Figure 14.1: Evolution of PTA groups by government procurement coverage over time**

Source: Deep Trade Agreements Database.

**Figure 14.2: Breakdown of PTA membership by procurement coverage and income**

Source: Deep Trade Agreements Database.

Note: (1) Income based on World Bank income classification (WBIC) for 2017. (2) The figure includes only bilateral PTAs. (3) All EFTA and EU members are classified as high-income countries. (4) These agreements comprise 223 of the 283 WTO-notified agreements.

The cohort of shallow procurement agreements is dominated by PTAs in which one partner is a high-income country (or trade bloc) and the other partner is an upper-middle-income country (21 agreements). Another 15 shallow agreements are between high-income and lower-middle-income countries, while 10 PTAs are between high-income countries. The participation of upper-middle- and lower-middle-income countries in shallow procurement agreements is higher than their participation in DPAs.

In contrast, the group of agreements with no procurement coverage exhibits a greater involvement of lower-middle-income countries. This is also the only cohort that includes agreements involving low-income countries (Afghanistan-India and India-Nepal).

In the following subsections, we provide more descriptive statistics for each of the three PTA groups. A summary of these stylized facts is provided in Table 14.1.

**Table 14.1: Summary of stylized facts on government procurement provisions in PTAs**

TOTAL NUMBER of PTAs:	129	70	84
	Provisions (%)	Shallow provisions (%)	Deep provisions (%)
Share of total PTAs	45	25	30
Of which:			
Share of North-North	10	16	27
Share of North-South	24	71	51
Share of South-South	66	13	22
Share of cross-regional	38	54	84
Share of goods-only PTAs	64	65	8
Share of services-only PTAs	0	0	1
Share of goods + services PTAs	36	36	90
Share of PTAs before 2000	41	19	7
Share of GPA signatories, both parties	11	14	30
Share of GPA-signatories, one party	38	59	51

Source: Deep Trade Agreements Database.

Note: North = OECD countries; South = non-OECD countries.

#### 14.4.1 PTAs with no coverage of government procurement

Non-OECD countries are relatively reluctant to open their procurement markets via PTAs. Among the 129 agreements with no provisions on government procurement, 85 PTAs are between South-South trading partners (a little over 65 percent of 129 PTAs), while the shares of North-South and North-North PTAs are 24 and 10 percent, respectively (Table 14.1).

A large number of the South-South agreements with no coverage of government procurement includes agreements among former Soviet countries – e.g., Armenia-Kazakhstan, Georgia-Azerbaijan, and Kyrgyz Republic-Ukraine. Among North-North agreements without any reference to government procurement, nearly half relate to treaties that have enlarged EU membership over time. While most EU enlargement agreements do not explicitly cover government procurement, EU regulations have internal directives that set forth a comprehensive framework regulating government procurement in the common market.

Most of the PTAs with no coverage of procurement have been signed with a member from within the region. Of the 129 PTAs without procurement coverage, 49 agreements (about 40 percent) are cross-regional, while 80 agreements (about 60 percent) are intra-regional. The majority of no-procurement-coverage PTAs entered into effect in the period up to the year 2000. Of the 72 PTAs signed before the year 2000, 53 agreements (74 percent) include no provisions on government procurement. In contrast, of the 211 PTAs signed during January 2000–March 2017, a much lower share (76 agreements, or 36 percent) have no provisions on government procurement. Most signatories of such PTAs are not members of the GPA. Only 14 of the 129 PTAs with no government procurement provisions involve both parties that are signatories to the Agreements of Government Procurement. The remaining 115 PTAs have at least one party that is not a signatory to the GPA. Finally, the bulk of these agreements have been negotiated under Article XXIV of the GATT. Of the 129 agreements with no provisions on government procurement, 83 agreements (64 percent) cover only goods, while the remaining 46 PTAs cover both goods and services.

#### 14.4.2 PTAs with shallow government procurement provisions

On the whole, government procurement is explicitly mentioned in 154 of the 283 WTO-notified PTAs up to March 2017 (almost 55 percent). Of these, 70 PTAs (25 percent of all 283 agreements) have only a shallow coverage of procurement. Some PTAs with shallow coverage of government procurement have only a single article (rather than a chapter) on the subject, and no binding commitments. The Tukey-Israel FTA (Box 14.1) is an example of a shallow procurement agreement.

##### Box 14.1. Turkey-Israel FTA: An example of a shallow procurement agreement

###### *Article 24. Public Procurement*

1. The Parties to this Agreement consider the effective liberalization of their respective public procurement markets an integral objective of this Agreement.
2. The Joint Committee will review progress in this area annually.

In contrast, some agreements with shallow coverage of government procurement have a full chapter on the subject that addresses a number of issues (though the coverage is limited as compared to a GPA). For example, the agreement between Japan and Mongolia has a limited chapter on public procurement that covers procurement principles, exchange of information, further negotiations, and negotiations on non-discrimination, and provides for a subcommittee on government procurement.

The group of shallow procurement PTAs is dominated by North-South agreements, which represent 50 of the 70 PTAs. Such agreements as US-Jordan, EFTA-Morocco, and Thailand-

Australia belong to the group of North-South PTAs with shallow provisions on government procurement. Only 11 PTAs between high-income countries fall into this group, including EFTA-Israel, EU-Turkey, and EU-Israel; as well as 9 South-South agreements, such as the Commonwealth of Independent States (CIS), the Melanesian Spearhead Group (MSG), and the West African Economic and Monetary Union (WAEMU). The shares of South-South and North-North PTAs within the shallow procurement PTAs are 13 and 16 percent, respectively (Table 14.1).

Of the 70 shallow procurement agreements, the distribution is relatively balanced between cross-regional and intra-regional agreements (38 and 54 agreements, or 54 and 46 percent, respectively). Countries have tended to devote more consideration to government procurement in their PTAs concluded in the last two decades. Thirteen of the 70 shallow procurement accords (19 percent) were signed before 2000, and 57 (81 percent) in the period after 2000. In the majority of shallow procurement agreements, at least one party is not a signatory to the GPA, and only around 14 percent of the PTAs (10 by number) in this group are between parties that are both GPA signatories (e.g., EFTA-Turkey, EFTA-Israel, EU-Montenegro, Ukraine-Moldova, and EFTA-Montenegro). The bulk of these agreements have also been negotiated under Article XXIV of the GATT. Almost 65 percent of the shallow procurement agreements cover only goods, while the rest (25 PTAs) cover both goods and services.

#### Box 14.2. Incorporation of GPA provisions in the Canada-Republic of Korea FTA

##### *Article 14.3: Scope*

This Chapter incorporates by reference the rights and obligations as listed in the Annex to the WTO Protocol Amending the GPA (hereinafter referred to as the “revised GPA”), with the exception of Articles V and XVIII through XXII. These rights and obligations apply mutatis mutandis to the procurement covered by Annexes 14-A through to 14-G.

### 14.4.3 PTAs with detailed provisions on government procurement

This category includes PTAs with detailed clauses on government procurement and those that have an explicit reference to incorporating provisions of the GPA. Examples of the latter include the EFTA-Hong Kong SAR, China; Canada-Republic of Korea (Box 14.2); and EFTA-Canada agreements.

Most DPAs include at least one OECD country as partner. Of the 84 DPAs, 18 agreements represent South-South partnerships, accounting for 22 percent of total DPAs, compared to 43 agreements between North-South partners and 23 between North-North countries (see Table 14.1). A majority of the South-South DPAs involve a Latin American country as a partner; for instance, Costa Rica-Peru, Panama-Guatemala, Costa Rica-Colombia, and Mexico-Central America.

It appears that parties to cross-regional agreements tend to be more willing to open their procurement markets to foreign competition. An overwhelming majority (almost 85 percent) of the 84 DPAs and almost half of all PTAs (45 percent) are cross-regional, while only 10 percent of intra-regional agreements have detailed provisions on government procurement. However, the cohort of DPAs is dominated by the EU (9 agreements), EFTA (11 agreements), the US (14 agreements), and Chile (17 agreements) and the propensity of these partners to negotiate cross-regional accords more likely explains this particular stylized fact.

The growing significance of government procurement over time is confirmed when considering DPAs. There were only 6 PTAs signed before the year 2000 that elaborated government procurement obligations in detail. The EFTA, NAFTA, EEA, US-Israel, Canada-Israel, and Canada-Chile pioneered the liberalization of government procurement by including comprehensive clauses on the subject in their PTAs prior to the year 2000. In contrast, there has been a surge in the number of such agreements (78) signed in the year 2000 and thereafter.

GPA signatories seem to find it easier to negotiate DPAs, since they have already undertaken commitments to liberalize their procurement markets. There are 44 out of 283 PTAs in which both parties are GPA signatories, and 25 of these have detailed provisions on government procurement. That said, 16 of the 84 DPAs (19 percent) have been negotiated between partners that are not signatories to the GPA. Meanwhile, in 43 of the 84 DPAs, one party is not a signatory to the GPA, while in 25 agreements both parties are GPA signatories.

An overwhelming majority of DPAs have been negotiated both under Article XXIV of the GATT and Article V of the GATS. Seventy-six out of 84 (around 90 percent) of the DPAs cover trade in both goods and services. There are also 7 agreements in this cohort which cover only trade in goods, and one (the European Economic Area) that covers only trade in services.

In terms of coverage of goods sectors, 39 DPAs follow a negative list approach, covering all goods sectors with a list of exceptions. In 9 DPAs, at least one party's commitments cover all goods sectors; Hong Kong SAR, China-Chile is the only DPA in which commitments of both parties cover all goods sectors. The most common exceptions include purchases by both Ministries of Defense in Japan-Singapore; commitments by Korea in Korea-Colombia; commitments by Singapore in Panama-Singapore; commitments by the US in US-Israel, NAFTA, and others; commitments by Canada in Canada-Israel, NAFTA, Canada-Korea, and others; purchases of agriculture-related products in US-Oman, US-Bahrain, and Central America Free Trade Agreement (CAFTA)-Dominican Republic; commitments by the US in US-Morocco; and commitments by Honduras in Canada-Honduras.

In coverage of the services sectors, 20 DPAs follow a negative list approach and 22 follow a positive list approach, explicitly specifying the sectors to which government procurement provisions would apply. In another 18 DPAs, the commitments of one party follow a positive-list approach and the commitments of the other party follow a negative-list approach. In one DPA (Korea-Chile), the



commitments of both parties cover all services sectors. Similarly, the commitments of Chile in Chile-Australia and Chile-EFTA cover all services sectors. Some of the common exceptions in services sectors include research and development (US-Colombia, Canada-Panama, commitments of Colombia in EFTA-Colombia, and commitments of Canada in Canada-Peru); telecommunication services (US-Panama, Canada-Panama, and commitments of Canada in Canada-Honduras); and financial services (commitments of Korea in Peru-Korea, and commitments of Chile in US-Chile).

The analysis also classified DPAs based on whether the majority of provisions restate the WTO obligation (WTO=), go beyond it (WTO+), or are more limited (WTO-).<sup>12</sup> Alignment with WTO coverage could only be accurately assessed for 73 of the 84 DPAs whose text is in English.<sup>13</sup> Of these, 32 were found to be equal to WTO coverage. In DPAs between GPA signatories, it is likely that the GPA was used as a reference for those accords, which explains their WTO= score. In contrast, coverage in 38 other DPAs was found to be more limited compared to the WTO, while in another three agreements - US-Chile (Box 14.3), US-Australia, and US-Peru - the coverage goes beyond the WTO.

**Box 14.3. Example of a procurement provision that goes beyond the WTO: US-Chile FTA**

*Article 9.12: Ensuring Integrity in Procurement Practices*

Each Party shall adopt the necessary legislative or other measures to establish that it is a criminal offense under its law for:

- (a) a procurement official of that Party to solicit or accept, directly or indirectly, any article of monetary value or other benefit, for that procurement official or for another person, in exchange for any act or omission in the performance of that procurement official's procurement functions;
- (b) any person to offer or grant, directly or indirectly, to a procurement official of that Party, any article of monetary value or other benefit, for that procurement official or for another person, in exchange for any act or omission in the performance of that procurement official's procurement functions; and
- (c) any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign procurement official, for that foreign procurement official or for a third party, in order that the foreign procurement official act or refrain from acting in relation to the performance of procurement duties, in order to obtain or retain business or other improper advantage.

<sup>12</sup> Coverage is classified as more limited than the GPA when (a) the PTA covers fewer provisions than the GPA; (b) the GPA provisions are not in the text of the PTA; and (c) the provisions of the PTA are not consistent with the corresponding provisions in the GPA. In contrast, coverage is defined as WTO+ when a majority of provisions in the PPA exceed those in the GPA in number and depth.

<sup>13</sup> The remaining 11 agreements are in Spanish and it was not possible to code detailed responses for these PTAs with the same level of accuracy. These agreements are: Colombia-Northern Triangle (El-Salvador, Guatemala-Honduras); Costa Rica-Colombia; Costa Rica-Peru; Dominican Republic-Central America; Mexico-Central America; Panama-Costa Rica; Panama-Guatemala; Panama-Honduras; Panama-Peru; Chile-Colombia; and the Pacific Alliance.

DPA were also classified on the basis of enforceability.<sup>14</sup> The classification depended on whether the majority of provisions in the agreement were found to be nonbinding, best-endeavor, binding but with no dispute settlement (DS), binding with state-to-state DS, binding with private DS, or binding with both state-to-state and private DS. Enforceability could be assessed accurately for only the 73 (of 84) DPAs whose texts are available in English.

Of these 73 agreements, 61 (more than 80 percent) showed high levels of enforceability marked by binding obligations with some form of dispute settlement. Of these 61 DPAs, 47 agreements have provisions on state-to-state dispute settlement, and 14 provide for both state-to-state and private dispute settlements. Of these 14, the vast majority (12) have either the US or Canada as a party to the agreement.

In another 10 DPAs, the majority of commitments were found to be nonbinding. In fact, a number of agreements have a majority of non-binding commitments despite having a clause related to the settlement of disputes. Examples include the Eurasian Economic Union and agreements between Panama-El Salvador, Chile-Costa Rica, EU-Georgia, and New Zealand-Singapore, among others.

Finally, there are two PTAs whose provisions tend to follow legally binding language but have no enforcement mechanism. For instance, a chapter on Dispute Settlement in the Korea-Singapore agreement does not cover government procurement. Its chapter on Dispute Settlement lists the chapters that fall under the scope of its coverage, and

#### Box 14.4. Non-applicability of DS chapter: Japan-Switzerland agreement

##### *Article 130: Existing Rights and Obligations*

1. The rights and obligations of the Parties in respect of government procurement shall be governed by the Agreement on Government Procurement in Annex 4 to the WTO Agreement (hereinafter referred to as “the GPA”).
2. If the GPA is amended or is superseded by another agreement, “the GPA,” for the purposes of this Chapter, shall refer to the GPA as amended or such other agreement, as of the date on which such amendment or other agreement enters into force for both Parties.
3. Chapter 14 [DISPUTE SETTLEMENT] shall not apply to this Article.

<sup>14</sup> In this analysis, we assess the overall enforceability of the PTA as measured by the modal value of the enforceability variable across the 100 questions in the questionnaire, combined with the existence of dispute settlement provisions. Enforceability based solely on the existence of a DS mechanism is evaluated in the previous section. This section assesses overall enforceability by evaluating: (a) the modal value of the enforceability variable; and (b) the interrelation between the language and the existence of a DS chapter. That is, either: (i) a DS chapter exists but the overall level of enforceability is low, as the majority of the provisions do not contain legally binding language; or (ii) most provisions have legally binding language but there is no DS chapter; or (iii) a DS chapter exists and the level of enforceability (mode) is high.

Government Procurement is not mentioned therein. Similarly, the chapter on Dispute Settlement in the Japan–Switzerland agreement specifically does not apply to government procurement (Box 14.4).

In contrast, the agreement between Japan and Chile is an example of high enforceability with a provision for dispute settlement. The Dispute Settlement Chapter applies to the Government Procurement chapter, as it is not provided otherwise in the text of the agreement, and Article 175 reads that the chapter on Dispute Settlement shall apply unless otherwise provided for in this agreement. (Box 14.5).

**Box 14.5. Example of high levels of enforceability and DS provisions: Japan–Chile FTA**

*Article 141: Tendering Procedures*

1. Each Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner and in compliance with this Chapter.
2. Each Party shall ensure that its entities do not provide to any supplier information with regard to a specific procurement in a manner which would have the effect of precluding competition.

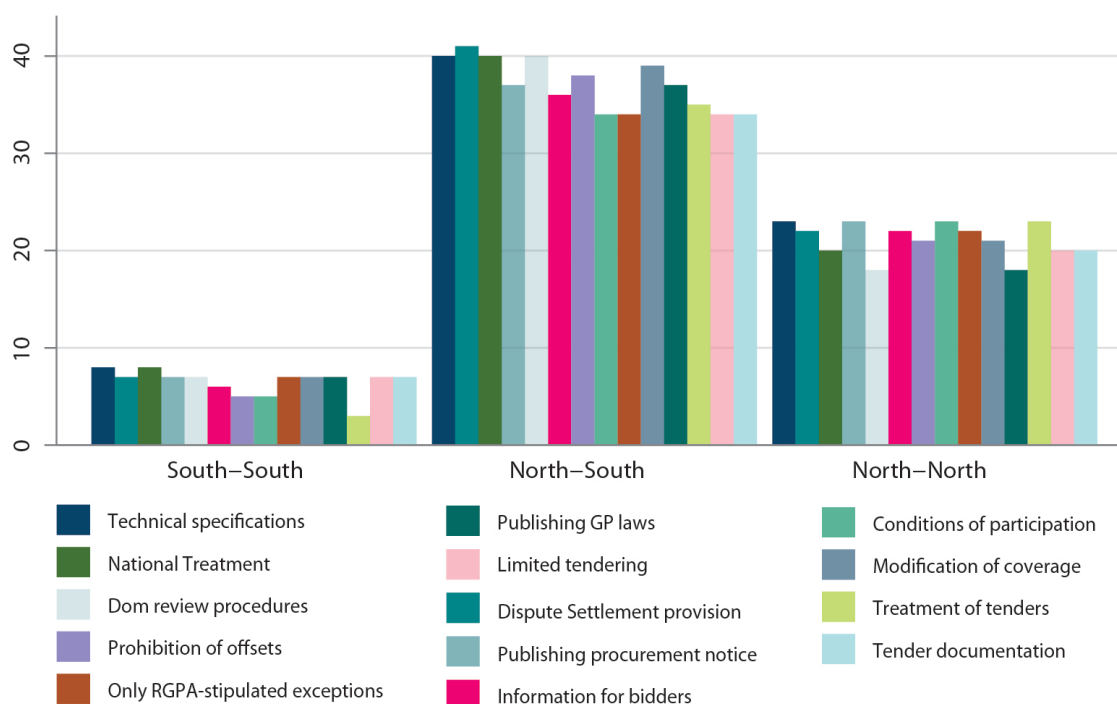
*Article 142: Qualification of Suppliers*

1. In the process of qualifying suppliers, each Party shall ensure that its entities do not discriminate against suppliers of the other Party.

*Article 143: Notice of Procurement*

1. For each case of intended procurement, each Party shall ensure that its entities make publicly available in advance in the appropriate publication listed in Part 7 of Annex 14.14.
2. The information in each notice of procurement shall include a description of the intended procurement, any conditions that suppliers must fulfill to participate in the procurement, the name of the entity, the address where all documents relating to the procurement may be obtained and the time-limits for submission of tenders.

Finally, Figure 14.3 shows the frequency distribution of leading provisions in DPAs (e.g., those on technical specifications, national treatment, and domestic review) by level of development of the signatories. These frequently-used provisions on government procurement are observed mostly in North–South DPAs, which can be partly explained by the fact that North–South agreements (n=43) dominate the cohort of DPAs. In contrast, most leading government procurement provisions are observed in around 20 (of the 23) North–North DPAs and less than 10 (of the 18) South–South DPAs.

**Figure 14.3:** Frequency distribution of leading provisions in DPAs by level of development

Source: Deep Trade Agreements Database.

## 14.5. DETAILED ANALYSIS OF DEEP PROCUREMENT AGREEMENTS

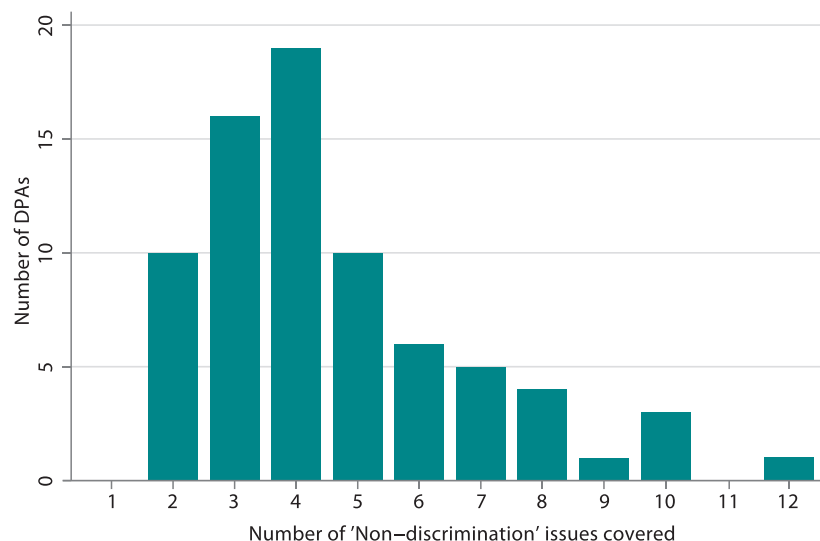
In this section, we provide a detailed analysis of the 73 English-language DPAs based on the six major themes (non-discrimination, coverage, procedural disciplines, transparency, dispute settlement, new issues) that were used to classify these accords. The frequency distribution of all provisions in DPAs across all six themes is shown in Annex Figure 14.A.1.

### 14.5.1 Non-discrimination

The non-discrimination theme covers 14 aspects of non-discrimination in government procurement such as national treatment, MFN treatment of and future negotiation of third parties; prohibition of offsets; determination of rules of origin; existing transitional measures (price preferences, offsets, phased-in addition of specific entities or sectors, higher thresholds, and delayed implementation periods); and review of commitments to expand coverage and progressively reduce/eliminate discriminatory measures.

Figure 14.4 shows the frequency distribution of non-discrimination provisions in DPAs. The analysis reveals that no single DPA covers all 14 aspects of non-discrimination. The most provisions (12) are in the Trans-Pacific Partnership (TPP), the status of which is now uncertain. The two issues not included in the TPP are MFN treatment of third parties and progressive reduction of discriminatory measures.

**Figure 14.4: Distribution of non-discrimination procurement provisions in DPAs**



Source: Deep Trade Agreements Database.

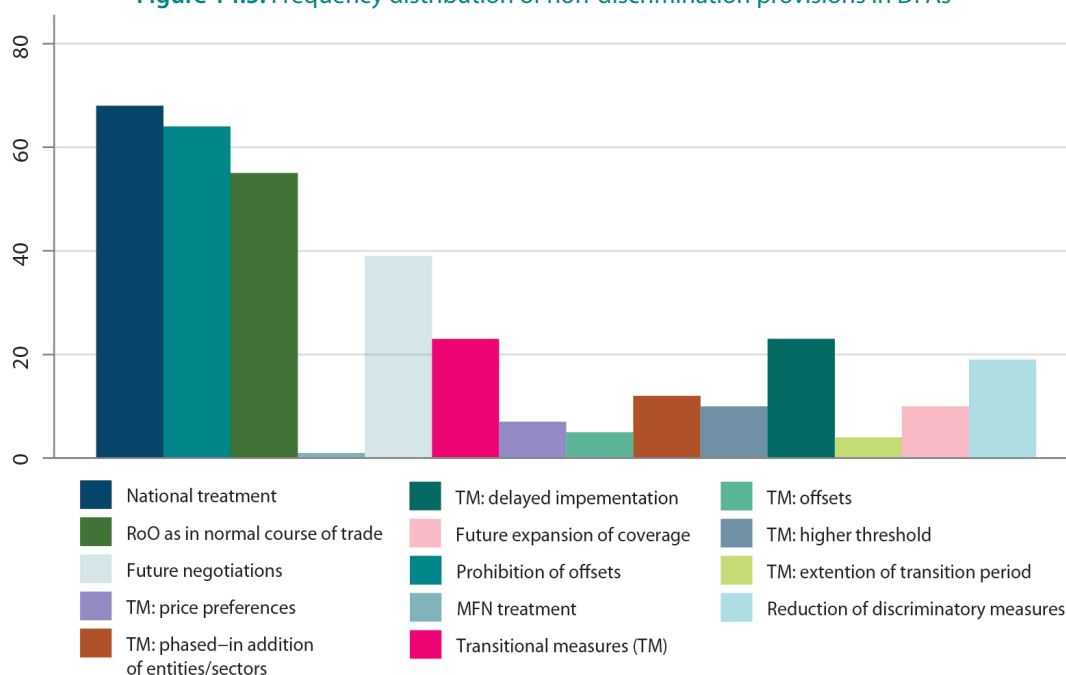
Other DPAs with relatively high coverage of non-discrimination issues include EU-Central America, EU-Moldova, and EU-Ukraine, each of which has 10 provisions, followed by EFTA-Central America (Costa Rica and Panama), with 9 provisions. Notably, all agreements with a large coverage of non-discrimination issues are between developing and developed country partners, wherein incorporated provisions relating to transitional measures are significant for developing country partners as they provide for various adjustments that can benefit developing countries, such as phased-in addition of sectors, delayed implementation, etc.

Figure 14.4 also shows that about 45 percent of the 73 DPAs include between 3 and 4 of the 14 non-discrimination provisions (23 percent cover 4 provisions and 16 percent cover 3). Meanwhile, 67 of the 73 DPAs that cover at least some issues of non-discrimination were concluded in or after the year 2000, compared to only 6 such agreements before that year.

In total, all 73 DPAs cover at least two aspects of non-discrimination. Most frequently included are national treatment, enshrined in 68 DPAs; prohibition of offsets, in 64 DPAs; and provisions requiring that rules of origin not be different from those in the normal course of trade, in 55 DPAs. The least-covered aspects of non-discrimination include MFN, transitional measures (price preferences and offsets), and extension of transitional

periods. For instance, the MFN clause is reflected in only one DPA, the EAEU or the Eurasian Economic Union that includes Russia, Belarus, Kazakhstan, Armenia, and Kyrgyzstan as members (see Figure 14.5).

**Figure 14.5: Frequency distribution of non-discrimination provisions in DPAs**



Source: Deep Trade Agreements Database.

Finally, five of the eight South-South DPAs that cover non-discrimination cover 3 of the 14 aspects. Among North-North agreements, 9 of the 23 DPAs (almost 45 percent) cover four of the assessed issues. The maximum number of issues covered in the North-North agreements is 8. As for North-South agreements, 8 of the 42 DPAs in this group cover 4 of the 14 aspects of non-discrimination.

### 14.5.2 Coverage

The analysis of coverage is based on three questions related to procuring entities under Annexes 1, 2 and 3; one question each related to inflation, modification of coverage, and unnecessary exceptions; and 18 questions about whether thresholds for goods, services, and construction services under the three Annexes are higher or lower than in the GPA.

In terms of coverage of procuring entities, 15 DPAs cover only Annex 1 entities, 20 DPAs cover both Annex 1 and Annex 2 entities, while the majority of the DPAs (44 agreements) cover entities listed under all three Annexes. Amongst North-North DPAs, 16 agreements (around 70 percent) cover entities under all three Annexes. Examples include Australia-Chile,

United States–Australia, and Canada–Israel. Only six North–North agreements, including Canada–Chile, Korea–New Zealand, and Korea–United States, do not extend coverage to entities under all three Annexes. For instance, in the Canada–Chile agreement, Annex K bis–01.1–1 and Annex K bis–01.1–2 cover central, regional, and other government entities for Chile. For Canada, however, these Annexes cover only central and other government entities, excluding regional government entities. Meanwhile, more than half of North–South DPAs (23 out of 42 agreements) and more than 60 percent of South–South DPAs (5 out of 8 accords) cover entities under all three Annexes.

In terms of comparison with GPA-stipulated thresholds, thresholds for goods and services procurement by Annex 1 entities was not found to be higher than the GPA-stipulated thresholds for any DPA. For goods procurement by Annex 2 entities, only one agreement – that between the US and Colombia – has a threshold value higher than that stipulated by the US under the GPA.<sup>15</sup>

The agreement with the largest number of thresholds above GPA levels is between the US and Bahrain; it has threshold values higher than those (for the US) in the GPA in 4 cases – for Annex 1 construction services and for Annex 3 goods, services and construction services (Table 14.2). At the same time, the US–Bahrain agreement has several threshold values that are lower than GPA levels.

**Table 14.2: US–Bahrain agreements: Threshold values higher than GPA levels**

	Threshold values under the US–Bahrain agreement	Threshold values under the GPA
Annex 1 construction services	USD 7,611,532	USD 5,000,000
Annex 3 goods	by a List A entity, USD 250,000, by a List B entity, USD 538,000	USD 250,000 or USD 400,000
Annex 3 services	by a List A entity, USD 250,000, by a List B entity, USD 538,00	USD 250,000 or USD 400,000
Annex 3 construction services	by a List A or a List B entity, USD 9,368,478	USD 5,000,000

Source: Deep Trade Agreements Database.

There are 23 DPAs with thresholds equal to the GPA in goods, services, and construction services covered under Annexes 1, 2 and 3; the coverage is equal to that in the WTO in each case. Most of these agreements have the EFTA countries or the EU as a party, including EFTA–Colombia, EFTA–Korea, EU–Central America, EU–Ukraine, and EU–Chile.

<sup>15</sup> Threshold levels are measured only for GPA signatories and Columbia is not a GPA signatory.

Significantly, 27 DPAs have threshold values lower than those in the GPA in at least one area, and 7 of these have lower than GPA thresholds across all measured aspects; i.e., goods, services and construction services under Annexes 1-3. Six of these agreements have the US as a party; namely, US-Morocco, US-Panama, US-Peru, US-Chile, US-Singapore, and CAFTA-Dominican Republic. EU-Georgia is the only agreement not involving the US that stipulates threshold values for goods, services, and construction services across all Annexes that are lower than GPA levels.

On the whole, DPAs that do not have thresholds higher than GPA thresholds comprise 11 South-South, 28 North-South, and 22 North-North agreements. Amongst DPAs that have threshold values equal to GPA levels, 52 percent (12 of 23) belong to the North-South group, while the remaining 48 percent are North-North agreements.

Notably, threshold values are adjusted for inflation in only 37 DPAs.<sup>16</sup> Out of 73 DPAs, 67 include provisions for modification/rectification of coverage and 63 exclude unnecessary exceptions from coverage except those permitted by the GPA.

### 14.5.3 Procedural disciplines

Assessment of procedural disciplines covers the existence of procedural provisions in the text of an agreement and their consistency with the GPA. The assessment includes conditions for participation in a tender; requirements for tender documents, for qualification of suppliers and for negotiation; technical specifications; treatment of tenders and award of contracts; limited and selective tendering; electronic auctions; and integrity in procurement practices. The scoring for procedural disciplines ranges from 0 to 26.

Of the 73 DPAs, 16 accords scored 18 out of 26 in terms of the coverage of procedural disciplines and their consistency with the GPA. The distribution of the number of procedural issues covered in DPAs is concentrated in the range of 12-23 (see Figure 14.6), with no single agreement covering all areas.

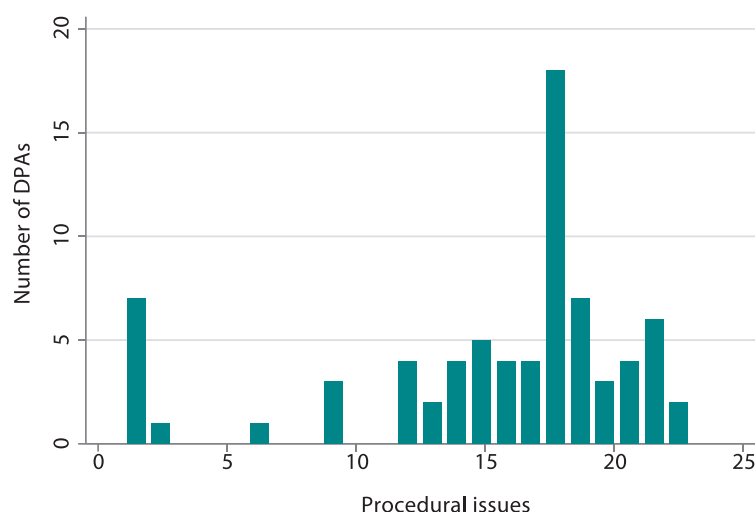
Two agreements - EFTA-Colombia and EFTA-Peru - cover the highest number of procedural disciplines, 23 out of 26, followed by 6 DPAs that cover 22 issues. The latter include agreements between EFTA-Hong Kong SAR, China, EFTA-Ukraine, Canada-Korea, and EU-Korea, among others. Most DPAs with a high coverage of procedural disciplines are either North-South or North-North agreements.

Within this distribution, 71 out of 73 agreements encompass provisions on technical specifications, of which 90 percent (64 out of 71) are GPA-consistent. More than 80 percent

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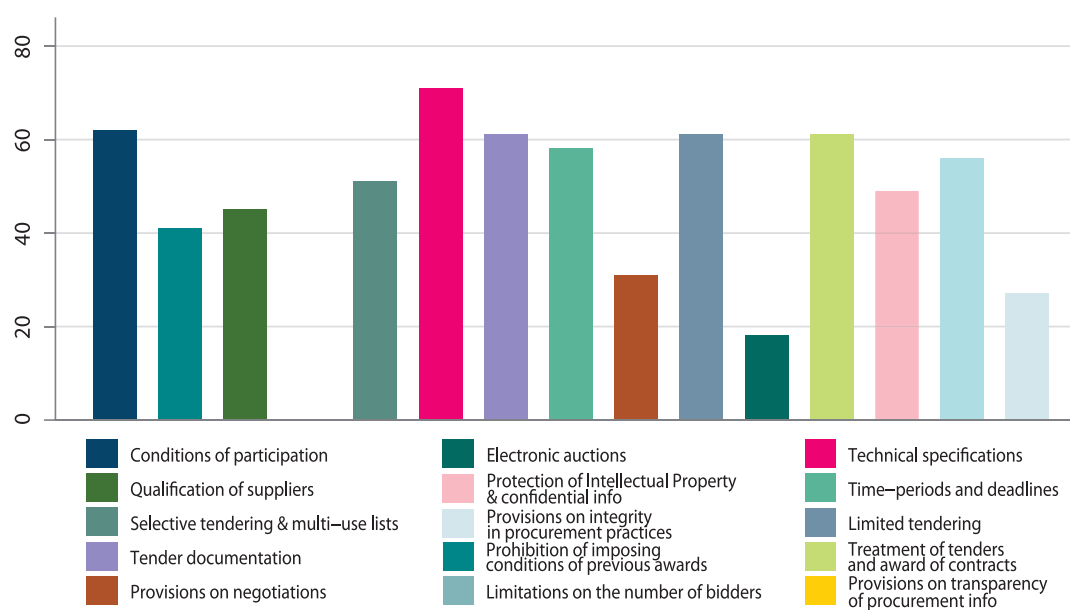
<sup>16</sup> Data on inflation-adjustment of threshold values is available for only 66 DPAs.



**Figure 14.6: Distribution of procedural disciplines in DPAs**

Source: Deep Trade Agreements Database.

of the 73 DPAs cover issues related to conditions of suppliers' participation (with an 87 percent GPA consistency rate); treatment of tenders, award of contracts, and provisions on limited tendering (with a 98 percent consistency rate each); requirements for tender documentation (with a 75 percent consistency rate); and provisions on time periods and deadlines (Figure

**Figure 14.7: Frequency distribution of procedural disciplines in DPAs**

Source: Deep Trade Agreements Database.

14.7). With regard to the GPA consistency of the most common procedural disciplines (see Box 14.7 for an example in the context of NAFTA), the provision on tender documentation is consistent in 75 percent of the 73 DPAs, and the remaining frequently-used clauses are consistent in more than 85 percent of the 73 DPAs. In contrast, provisions on electronic auctions are contained in only 25 percent of DPAs; provisions ensuring integrity in procurement practices (e.g., by avoiding conflict of interest) are present in about 35 percent; and provisions on negotiations are reflected in 43 percent of DPAs.

Finally, the highest average coverage of procedural issues, equal to 16.5, is observed among North-North DPAs. For North-South DPAs, the mean coverage stands at 15.4; and for the group of South-South DPAs, the average coverage of procedural disciplines is 12.

#### Box 14.6. Example of a fully GPA-consistent provision on technical specification: NAFTA

##### *Article 1007: Technical Specifications*

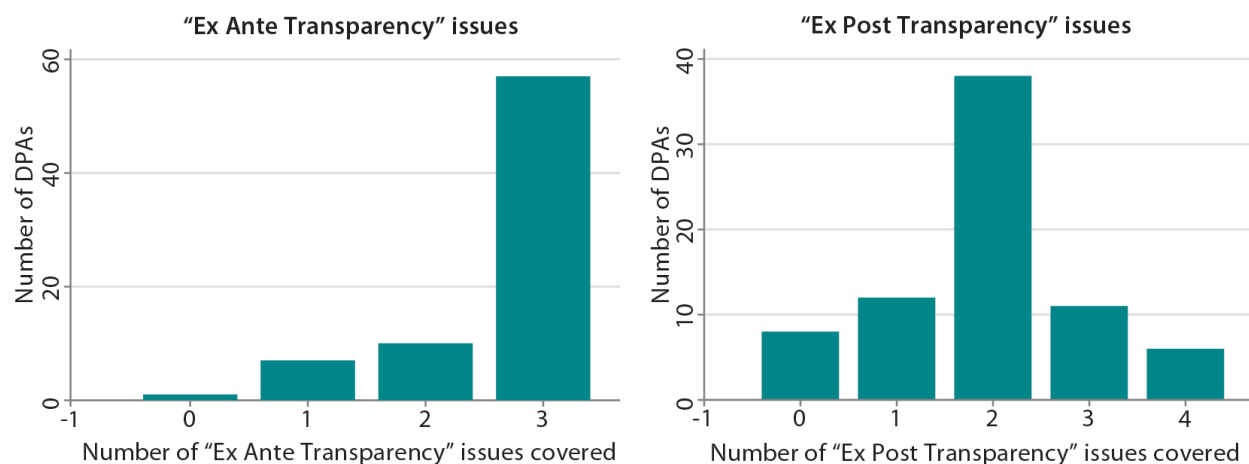
1. Each Party shall ensure that its entities do not prepare, adopt or apply any technical specification with the purpose or the effect of creating unnecessary obstacles to trade.
2. Each Party shall ensure that any technical specification prescribed by its entities is, where appropriate:
  - (a) specified in terms of performance criteria rather than design or descriptive characteristics; and
  - (b) based on international standards, national technical regulations, recognized national standards, or building codes.
3. Each Party shall ensure that the technical specifications prescribed by its entities do not require or refer to a particular trademark or name, patent, design or type, specific origin or producer or supplier unless there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements and provided that, in such cases, words such as “or equivalent” are included in the tender documentation.
4. Each Party shall ensure that its entities do not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a specific procurement from a person that may have a commercial interest in that procurement.

### 14.5.4 Transparency (*ex-ante* and *ex-post*)

The transparency assessment covers both *ex-ante* and *ex-post* issues. The three *ex-ante* issues relate to (a) publication of procurement laws and regulations; (b) publication of the notice of intended/planned procurement; and (c) consistency of the notice of the intended/planned procurement with the requirements of Art.VII:2 of the RGPA. The four *ex-post* issues cover (a) information provided to bidders (results and reasons for non-selection); (b) disclosure of information provided to third parties; (c) collection and reporting of statistics; and (d) consistency of such provisions with Art. XVI:4 of the RGPA.

More than 75 percent of the 73 DPAs cover all ex-ante transparency issues, while only 8 percent of the 73 DPAs cover all issues of ex-post transparency. Roughly half of all DPAs cover only 2 issues of ex-post transparency (Figure 14.8).

**Figure 14.8: Distribution of transparency-related provisions in DPAs**



Source: Deep Trade Agreements Database.

Amongst issues of ex-ante transparency, the requirement to publish a notice of intended/planned procurement is reflected in more than 90 percent of all DPAs. Among ex-post transparency issues, provisions on information provided to bidders (results and reasons for non-selection) are incorporated in a majority of the DPAs (87 percent), while those on information provided to third parties can be observed in almost two-thirds of all DPAs. In contrast, the least common provision relates to the collection and reporting of statistics, which is enshrined only in 20 percent of DPAs. Thus, a very important element of ex-post transparency is largely ignored by signatories that otherwise negotiate deep commitments on government procurement in their trade agreements.<sup>17</sup>

On the whole, only 5 DPAs cover all ex-ante and ex-post transparency issues. In the North-North group, Canada-Korea and EU-Korea cover all transparency issues, while most other DPAs in this cohort cover at least 3 issues and the majority cover 5 to 6. In the North-South group, Japan-Mexico and EFTA-Hong Kong SAR, China, have extensive coverage of transparency issues. More than 70 percent of the DPAs in this group cover 4 to 5 issues. In the South-South group, the maximum number of transparency issues covered in an agreement is 5. The Panama-El Salvador accord is the only agreement across all income groups that does not cover any transparency issues.

<sup>17</sup> A similar lack of statistical reporting by GPA signatories is documented in Shingal 2011, 2012, 2015.

### 14.5.5 Dispute resolution

The dispute resolution theme covers domestic review procedures and their consistency with Art. XVIII of the GPA, as well as provisions on dispute settlement and their consistency with Art. XX of the GPA.

More than 70 percent of the 73 DPAs cover all four issues related to dispute resolution, including domestic review procedures and dispute settlement, and the consistency of those provisions with the GPA. DPAs covering only two of the four issues constitute another 14 percent, as do PPAs covering three of the four dispute resolution issues.

More specifically, provisions on dispute settlement are reflected in all DPAs except for Korea–Singapore, Japan–Switzerland, and Panama–El Salvador. The Korea–Singapore agreement lists the particular chapters to which dispute settlement procedures apply, and the government procurement chapter is not among them. The Japan–Switzerland agreement also excludes government procurement from dispute settlement (Box 14.4).

In contrast, the Korea–Canada agreement specifically applies dispute settlement to government procurement provisions (Box 14.8).

#### Box 14.7. Free trade agreement between Korea and Canada

*Chapter 21: Dispute Settlement*

*Annex 21-A: Nullification and Impairment*

1. If a Party considers that any benefit it could reasonably have expected to accrue to it under any provision of:

(c) Chapter Fourteen (Government Procurement);

is nullified or impaired as a result of the application of any measure that is not inconsistent with this Agreement, in the sense of Article XXIII(1)(b) of GATT 1994, Article XXIII (3) of GATS or Article XXII(2) of GPA, the Party may have recourse to dispute settlement under Section A of this Chapter [Chapter on Dispute Settlement].

### 14.5.6 New issues

The new issues theme covers a number of disciplines that have emerged in recent agreements, including those on e-procurement, sustainable procurement, SME participation, adoption of safety standards, and (as in the TPP) cooperation between the parties on matters of public procurement.

There is no agreement covering all five of these new issues. Of the 73 DPAs, 17 percent cover three new issues, while 27 percent and 38 percent cover one or two issues, respectively. Across all income groups (North-North, North-South, and South-South), most of the DPAs cover one to two new issues, whereas 12 DPAs (17 percent) do not cover any new issue.

More specifically, provisions facilitating e-procurement can be observed in 60 percent of all DPAs, followed by clauses on facilitation of SME participation, which are reflected in just over half of the 73 DPAs. Provisions facilitating cooperation are in just over 40 percent of these agreements. Provisions on sustainable procurement are not observed in any DPA,<sup>18</sup> while facilitation of safety standards is incorporated in only one agreement, that between the US and Korea (Box 14.9).

#### Box 14.8. Example of provision on facilitation of safety standards: US-Korea agreement

##### *Article 17.7: Technical Specifications*

For greater certainty, a Party, including its procuring entities, may, in accordance with Article VI of the GPA, prepare, adopt, or apply technical specifications:

- (a) to promote the conservation of natural resources or protect the environment; or
- (b) to require a supplier to comply with generally applicable laws regarding
  - i. fundamental principles and rights at work; and
  - ii. acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health, in the territory in which the good is produced or the service is performed.

## 14.6. CONCLUSIONS

The proliferation of preferentialism in the last decade and a half, and the increasing use of PTAs to liberalize government procurement, warrants an analysis of procurement provisions in these agreements. This chapter builds on the existing literature to come up with a new methodology to classify procurement provisions in trade agreements and then presents stylized facts based on this classification.

Our analysis suggests that 45 percent of the 283 WTO-notified PTAs in force as of March 2017 still do not include any provisions on government procurement, while 30 percent have

<sup>18</sup> Note that principles of sustainable procurement for Australia and New Zealand are reflected in Australian and New Zealand Government Framework for Sustainable Procurement released in September 2007. The framework provides for the integration of sustainable development considerations in government procurement by the two countries. However, ANZCERTA, the PTA between Australia and New Zealand, does not have a detailed chapter on government procurement.

deep provisions. These deep procurement agreements (DPAs) have been primarily negotiated among the developed and developing country trading partners of Canada, Chile, EFTA, the EU, and the US where at least one country is a GPA-signatory (with the exception of Chile). Most DPAs have come into effect since 2000. They are predominantly cross-regional and cover both goods and services trade. However, the coverage of government procurement can be classified as WTO+ in only three DPAs (US-Australia, US-Chile, and US-Peru), while the coverage was found to equal that in the WTO in the majority of other agreements. Significantly, more than 80 percent of the DPAs show high levels of enforceability marked by binding obligations with some form of dispute settlement.

In terms of coverage of entities, the majority of the DPAs were found to cover procurement undertaken by entities listed under all three Annexes. Moreover, 27 DPAs were found to have lower-than-GPA threshold values in at least one area of goods, services, or construction services procurement, and 7 were found to have lower-than-GPA threshold values across all measured aspects – i.e., goods, services, and construction services under Annexes 1–3. Significantly, six of these seven agreements involve the US as a party: US-Morocco, US-Panama, US-Peru, US-Chile, US-Singapore, and CAFTA-Dominican Republic – highlighting the dominance of the US in being able to negotiate GPA+ provisions in its PTAs with both developed and developing country trading partners.

We also found the following provisions to be covered in the majority of the DPAs: provisions on national treatment (68 DPAs); provisions on prohibition of offsets (64 DPAs); provisions on technical specifications (71 DPAs, of which 90 percent were found to be GPA consistent); and provisions on dispute settlement (70 DPAs). Among the new issues, provisions facilitating e-procurement were observed in 45 DPAs, followed by clauses on facilitation of SME participation in 39 DPAs.

In contrast, the least-covered issues include MFN, transitional measures in the form of price preferences and offsets, extension of transitional periods, provisions on electronic auctions, provisions ensuring integrity in procurement practices, and provisions relating to the collection and reporting of statistics. Among the new issues, provisions on sustainable procurement were not observed in any agreement, while the provision on facilitation of safety standards is in only the US-Korea FTA.

Finally, the primary objective of DPAs seems to be to offer trading partners preferential access to each other's public markets by, inter alia, extending coverage of procurement to more entities; expanding procurement coverage to a larger set of goods and services; and lowering threshold values above which public markets can be contested by preferential partners. To that extent, DPAs lead to de jure and even de facto discrimination against third parties.

One way of monitoring actual implementation of these agreements would be to examine whether the number and value of government contracts awarded to preferential suppliers, relative to third parties, have risen since a DPA came into effect, using established empirical methodologies.<sup>19</sup> One reliable information source in this regard are the data submitted by GPA Contracting Parties to the WTO Committee on Government Procurement, which, at least for some GPA signatories,<sup>20</sup> include data over time on contract awards by procuring entity, sector, and nationality of the winning supplier.

## ACKNOWLEDGMENTS

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<sup>19</sup> For example, Shingal 2015.

<sup>20</sup> Despite the requirements of Article XIX: 5 of UR GPA and Article XVI 4: of RGPA, GPA signatories exhibit considerable heterogeneity in reporting procurement data to the WTO Committee on Government Procurement. For details and discussion of related issues see Shingal 2011, 2012, 2015.

## REFERENCES

- Anderson, R., C. Müller, K. Osei-Lah, J. Pardo de Leon, and P. Pelletier. 2011. Government procurement provisions in regional trade agreements: A stepping stone to GPA accession? In *The WTO regime on government procurement: Challenge and reform*, edited by S. Arrowsmith and R. Anderson. Cambridge: Cambridge University Press.
- Bourgeois, J., K. Dawar, and S. Evenett. 2007. *A comparative analysis of selected provisions in free trade agreements*. Report for Directorate General for Trade, Chief Economist's Office, European Commission, Brussels.
- Dür, A., L. Baccini, and M. Elsig. 2014. The design of international trade agreements: Introducing a new dataset. *Review of International Organizations* 9(3): 353–75.
- Gourdon, J., and J. Messent. 2017. How government procurement measures can affect trade. OECD Trade Policy Papers 199, OECD Publishing, Paris.
- Heydon, K., and S. Woolcock. 2009. *The rise of bilateralism: Comparing American, European, and Asian approaches to preferential trade agreements*. Paris: United Nations University Press.
- Hoekman, B. 2015. International cooperation on public procurement regulation. EUI Working Paper RSCAS 2015/88, European University Institute, Fiesole.
- Horn H., P. Mavroidis, and A. Sapir. 2009. *Beyond the WTO? An anatomy of EU and US preferential trade agreements*. Brussels: Bruegel.
- OECD (Organisation for Economic Co-operation and Development). 2002. The size of government procurement markets. *Journal of Budgeting* 1(4).
- Rickard, S., and D. Kono. 2014. Think globally, buy locally: International agreements and government procurement. *Review of International Organizations* 9(3): 333–52.
- Shingal, A. 2009. Three essays on trade in services: Exploring tradability, regional trade and government procurement of services. PhD thesis, University of Sussex.
- . 2011. Services procurement under the WTO's Agreement on Government Procurement: Whither market access? *World Trade Review* 10(4): 1–23.
- . 2012. Estimating market access in non-GPA countries: A suggested methodology. NCCR–Trade Working Paper 2012/06.
- . 2015. Econometric analyses of home-bias in government procurement. *Review of International Economics* 23(1): 188–219.
- Trionfetti, F. 2000. Discriminatory public procurement and international trade. *The World Economy* 23: 57–76.
- Ueno, A. 2013. Multilateralising regionalism on government procurement. OECD Trade Policy Paper 151, OECD Publishing, Paris.
- UN Social and Economic Commission for Asia and the Pacific. Asia-Pacific trade and investment agreement database (APTAD).
- World Trade Organization. No date. Services sectoral classification list: MTN.GNS/W/120: Scheduling of commitments under the GATS. [http://tsdb.wto.org/Includes/docs/W120\\_E.doc](http://tsdb.wto.org/Includes/docs/W120_E.doc).



## ANNEX

Annex Table 14.A.1: List of PTAs with no, shallow, and deep provisions on government procurement

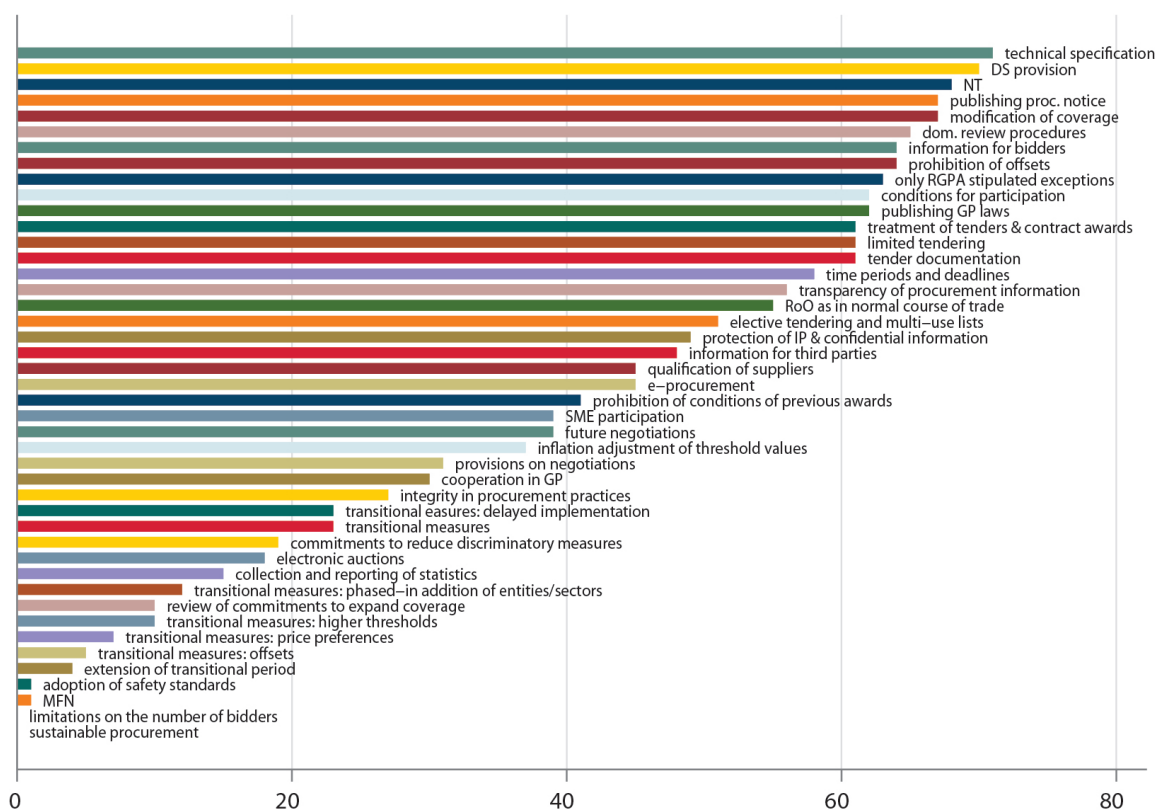
PTAs with no provisions: APTA; APTA-Accession of China; ASEAN FTA; ASEAN-Australia New Zealand; ASEAN-India; ASEAN-Japan; ASEAN-Korea, Rep.; ASEAN-China; Agadir Agreement; Andean Community; Armenia-Kazakhstan; Armenia-Moldova; Armenia-Turkmenistan; Armenia-Ukraine; CACM; CARICOM; CEMAC; CEZ (Common Economic Zone); COMESA; Canada-Jordan; Chile-India; Chile-Malaysia; Chile-Mexico; Chile-Vietnam; China-Costa Rica; China-Hong Kong SAR, China; China-Macao SAR, China; China-New Zealand; China-Singapore; Colombia-Mexico; EAC; EAC-Burundi/Rwanda; EAEC; EAEU-Kyrgyz Republic; EAEU-Armenia; EC-10; EC-Enlargement-25; EC-Enlargement-27; EC Treaty; EC(12), Enlargement EC(9); ECO; ECOWAS; EU-Faroe Islands; EU-Syrian Arab Republic; EU-Albania; EU-Andorra; EU-Côte d'Ivoire; EU-Iceland; EU-Lebanon; EU-North Macedonia; EU-OCT; EU-Papua-New Guinea-Fiji; EU-San Marino; EU-Switzerland/Lichtenstein; El Salvador-Honduras-Taiwan, China; El-Salvador-Cuba; EU-Norway; GCC; GSTP Agreement; Georgia-Turkmenistan; Georgia-Armenia; Georgia-Azerbaijan; Georgia-Kazakhstan; Georgia-Russia; Georgia-Ukraine; Guatemala-Taiwan, China; India-Afghanistan; India-Singapore; India-Bhutan; India-Malaysia; India-Nepal; India-Sri Lanka; Japan-Malaysia; Japan-Indonesia; Korea, Rep.-Vietnam; Korea, Rep.-India; Korea, Rep.-Turkey; Kyrgyz Republic-Armenia; Kyrgyz Republic-Uzbekistan; Kyrgyz Republic-Kazakhstan; Kyrgyz Republic-Moldova; Kyrgyz Republic-Ukraine; Lao PDR-Thailand; Latin American Integration Association; MERCOSUR; MERCOSUR-India; Malaysia-Australia; Mauritius-Pakistan; Mexico-Panama; Mexico-Uruguay; New Zealand-Malaysia; Nicaragua-Taiwan, China; PAFTA; PATCRA; Pakistan-Malaysia; Pakistan-Sri Lanka; Panama-Chile; Panama-Taiwan, China; Panama-Dominican Republic; Panama-Nicaragua; Peru-Chile; Peru-China; Peru-Mexico; Russian Federation-Serbia; Russian Federation-Tajikistan; Russian Federation-Turkmenistan; Russian Federation-Uzbekistan; Russian Federation-Azerbaijan; Russian Federation-Belarus/Kazakhstan; SACU; SADC; SADC-Seychelles; SAFTA; SAFTA-Accession of Afghanistan; SAPTA; SPARTECA; Thailand-New Zealand; Turkey-Chile; Turkey-Albania; Turkey-Mauritius; Ukraine-Azerbaijan; Ukraine-Belarus; Ukraine-Kazakhstan; Ukraine-Montenegro; Ukraine-Tajikistan; Ukraine-Turkmenistan; Ukraine-Uzbekistan, Faroe Islands-Switzerland.

PTAs with shallow provisions: ANZCERTA; Australia-China; Brunei Darussalam-Japan; CEFTA; CIS; Canada-Costa Rica; Chile-China; China-Korea, Rep.; China-Switzerland; EC Enlargement (15); EFTA-Albania; EFTA-Bosnia and Herzegovina; EFTA-Israel; EFTA-Jordan; EFTA-Lebanon; EFTA-Montenegro; EFTA-Morocco;

EFTA-North Macedonia; EFTA-SACU; EFTA-Serbia; EFTA-Tunisia; EFTA-Turkey; EFTA-West Bank and Gaza; EU-Algeria; EU-Arab Republic of Egypt; EU-Bosnia and Herzegovina; EU-Cameroon; EU-Eastern and Southern Africa States Interim EPA; EU-Enlargement; EU-Israel; EU-Jordan; EU-Mexico; EU-Montenegro; EU-Morocco; EU-Serbia; EU-South Africa; EU-Turkey; EU-Tunisia; EU-West Bank and Gaza; Egypt-EFTA; Egypt-Turkey; Iceland-China; Iceland-Faroe Islands; India-Japan; Japan-Mongolia; Japan-Philippines; Japan-Thailand; Japan-Vietnam; Jordan-Singapore; MSG (Melanesian Spearhead Group); PICTA; Pakistan-China; Thailand-Australia; Turkey-Syrian Arab Republic; Turkey-Bosnia and Herzegovina; Turkey-Georgia; Turkey-Israel; Turkey-Jordan; Turkey-Montenegro; Turkey-Morocco; Turkey-North Macedonia; Turkey-Serbia; Turkey-Tunisia; Turkey-West Bank and Gaza; United States-Jordan; Ukraine-Moldova; Ukraine-North Macedonia; WAEMU; Faroe Islands-Norway.

PTAs with deep provisions: Australia-Chile; CAFTA-Dominican Republic; Canada-Chile; Canada-Colombia; Canada-Honduras; Canada-Israel; Canada-Korea, Rep.; Canada-Panama; Canada-Peru; Chile-Nicaragua (Chile-Central America); Chile-Colombia; Chile-Costa Rica; Chile-El Salvador; Chile-Guatemala (Chile-Central America); Chile-Honduras; Chile-Japan; Colombia-Northern Triangle (El-Salvador, Guatemala-Honduras); Costa Rica-Colombia; Costa Rica-Peru; Costa Rica-Singapore; Dominican Republic-Central America; EAEU; EFTA; EFTA-Canada; EFTA-Central America (Costa Rica and Panama); EFTA-Chile; EFTA-Colombia; EFTA-Hong Kong SAR, China; EFTA-Korea, Rep.; EFTA-Mexico; EFTA-Peru; EFTA-Singapore; EFTA-Ukraine; EU-CARIFORUM; EU-Central America; EU-Chile; EU-Colombia/Peru; EU-Georgia; EU-Korea, Rep.; EU-Moldova; EU-Ukraine; EEA; Gulf Cooperation Council-Singapore; Hong Kong SAR, China-Chile; Israel-Mexico; Japan-Singapore; Japan-Australia; Japan-Mexico; Japan-Peru; Japan-Switzerland; Korea, Rep.-Chile; Korea, Rep.-Australia; Korea, Rep.-Colombia; Korea, Rep.-New Zealand; Korea, Rep.-Singapore; Korea, Rep.-US; Mexico-Central America; NAFTA; New Zealand-Taiwan, China; New Zealand-Hong Kong SAR, China; New Zealand-Singapore; Pacific Alliance; Panama-Costa Rica; Panama-El Salvador; Panama-Guatemala; Panama-Honduras; Panama-Peru; Panama-Singapore; Peru-Korea, Rep.; Peru-Singapore; Singapore-Australia; Singapore-Taiwan, China; TPP; Trans-Pacific Strategic Economic Partnership; US-Australia; US-Bahrain; US-Chile; US-Colombia; US-Israel; US-Morocco; US-Oman; US-Panama; US-Peru; US-Singapore.

**Annex Figure 14.A.1. Distribution of provisions in PPAs under six different themes - non-discrimination, procedural issues, transparency, new issues, dispute settlement, and coverage**



Source: Deep Trade Agreements Database.