Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK2758-11 CUUK2758/Dür ISBN: 978 1 107 08387 5 September 2, 2014 6:33

11

PTAs and public procurement

STEPHANIE J. RICKARD

A. Introduction

Public procurement increasingly features in international trade negotiations. Public procurement is the process by which governments purchase goods and services from the private sector for their own use. Governments buy everything from routine items such as stationery to highly complex objects such as aircraft carriers. These purchases add up. Public procurement represents between 13 and 20 per cent of gross domestic product (GDP) on average worldwide (Ueno 2013). In virtually all countries, procurement accounts for a large share of the total value of commercial activity. Given the vast sums of money at stake, it is not surprising that public procurement is part of international trade negotiations.

Public procurement has long been part of multilateral trade negotiations. The first multilateral procurement rules were adopted in 1979 and came into force as the Tokyo Round Government Procurement Code in 1981. The World Trade Organization (WTO) Agreement on Government Procurement (GPA) was adopted in 1994 and entered into force in 1996. In March 2012, the WTO Committee on Government Procurement adopted revisions to the 1994 GPA text that expanded the coverage of the WTO procurement rules (Ueno 2013). The GPA provisions generally seek to eliminate bias against foreign firms bidding for government contracts. The GPA also includes provisions that aim to ensure that procurement is carried out in a transparent and competitive manner.

Not all WTO Members are bound by the GPA. The GPA is a plurilateral agreement and consequently applies only to countries that choose to sign it. Only 42 of the WTO's 157 Members are currently signatories to the GPA.[1] Even for these 42 signatories, the GPA does not cover all

[1] As of the end of 2012, GPA signatories include the 28 Member States of the European Union (which I refer to here as 28 individual countries for ease of presentation), Armenia, Canada, Hong Kong, China, Iceland, Israel, Japan, Korea, Liechtenstein, the Netherlands with respect to Aruba, Norway, Singapore, Switzerland, Chinese Taipei and the United States.

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK2758-11 CUUK2758/Dür ISBN: 978 1 107 08387 5 September 2, 2014 6:33

public procurement. Only certain government entities are regulated by the agreement, and only purchases above a specified monetary value are subject to the rules. Perhaps for these reasons, questions exist about the effectiveness of the GPA.

Doubts about the GPA's effectiveness may have helped to fuel the proliferation of procurement chapters in preferential trade agreements (PTAs). More and more PTAs include explicit rules that aim to increase the competitiveness of government procurement. This trend raises important and interesting questions, several of which are highlighted in this chapter. Why, for example, do governments sign PTAs with procurement rules when research shows that such rules have limited success in liberalizing procurement markets? One possible reason is that PTA procurement rules represent a win–win situation for governments. Governments can sign procurement PTAs safe in the knowledge that they can still 'buy national' with relative impunity because of the opacity of public procurement. At the same time, when a government needs to buy foreign, the PTA's procurement rules give them political cover. Governments can point to the PTA and argue that their hands are tied. In effect, the agreement serves as a 'scapegoat' for unpopular foreign purchases.

B. Discrimination in public procurement

In theory, the procurement chapters included in an increasing number of PTAs seek to ensure competitive public procurement. Competitive public procurement has two main benefits. The first is that it allows governments to choose between multiple suppliers. This should establish price competition and thus reduce the costs to taxpayers. The other main argument for competitive procurement is that it allows for the use of specialists, rather than work being carried out by in-house public-sector employees who may lack the requisite expertise for a specific project or task.

Despite the benefits of competitive procurement, governments frequently discriminate against foreign firms (Lowinger 1976; Trionfetti 2000). In Norway, for example, only 7 per cent of government contracts were awarded to foreign suppliers in 2009 (Rickard and Kono 2013). On average, 98 per cent of all local authority contracts were awarded to domestic firms in European Union (EU) countries in1993 (Martin, Hartley and Cox 1999). Forty-six per cent of businesses surveyed by the EU believe that local preferences significantly influence the outcome of

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK2758-11 CUUK2758/Dür ISBN: 978 1 107 08387 5 September 2, 2014 6:33

public procurement procedures (European Commission 2011). In fact, direct cross-border procurement accounts for only 1.6 per cent of contracts awarded by the governments of EU Member States, or roughly 3.5 per cent of the total value of contract awards during 2006–9. Taken together, these numbers illustrate the extent to which public procurement markets remain closed to foreign firms.

C. Procurement rules in PTAs

International trade negotiators are working hard to try to pry open public procurement markets. More and more PTAs explicitly regulate public procurement. Forty-three PTAs notified to the WTO before 2010 and currently in force include meaningful procurement rules. Nearly 80 per cent of these procurement PTAs have entered into force since 2000, as illustrated in Table 11.1.[2] Only PTAs with explicit rules regulating government procurement are included in Table 11.1. This criterion excludes, for example, agreements that are merely aspirational in nature: for example, the European Community–Montenegro agreement states, 'The Community and Montenegro consider the opening up of the award of public contracts on the basis of non-discrimination and reciprocity to be a desirable objective.' However, no further mention of procurement is made in the agreement.

Although the specific rules differ across PTAs' procurement chapters, they generally aim to increase competition by offering fair access to all prospective bidders, whether foreign or domestic. Many procurement chapters include market access for each party to the government procurement market of the other party, national treatment for foreign firms and products, a list specifying which levels of government (national, regional and municipal) are bound by the agreement and a specification of monetary 'threshold levels' above which the agreement applies.

Some PTAs explicitly forbid certain forms of discrimination in public procurement. Many, for example, forbid explicit 'buy national' policies,

[2] Many agreements begin at the start of the year: for example, the North American Free Trade Agreement (NAFTA) entered into force on 1 January 1994. However, this is not always the case. For example, the European Free Trade Agreement (EFTA)–Chile agreement came into force on 1 December 2003. As a rule, I code the year of entry into force as $t + 1$ when agreements come into force after 1 October in year *t*. I thus code the EFTA–Chile agreement as entering into force in 2004. This coding acknowledges that in such cases governments may continue discriminating for most of year *t*.

Table 11.1 *PTAs with procurement rules*

Year	Agreement
1983	Australia–New Zealand
1985	US–Israel
1994	European Community (EC)
1994	European Economic Area (EEA)
1994	North American Free Trade Agreement (NAFTA)
1995	Costa Rica–Mexico
1997	Canada–Israel
1998	Mexico–Nicaragua
1999	Chile–Mexico
2000	EC–Mexico
2000	Israel–Mexico
2001	European Free Trade Association (EFTA)–Mexico
2001	New Zealand–Singapore
2002	Chile–El Salvador
2002	Chile–Costa Rica
2003	Japan–Singapore
2003	EC–Chile
2003	EFTA–Singapore
2003	Panama–Costa Rica
2003	Panama–El Salvador
2003	Singapore–Australia
2004	Korea–Chile
2004	US–Singapore
2004	US–Chile
2005	EFTA–Chile
2005	Japan–Mexico
2005	US–Australia
2006	Dominican Republic–Central America FTA (CAFTA-DR)
2006	EFTA–South Korea
2006	South Korea–Singapore
2006	Panama–Singapore
2006	US–Bahrain
2006	US–Morocco
2007	Chile–Japan
2008	EC–Caribbean Forum of African, Caribbean and Pacific (CARIFORUM) States
2009	Australia–Chile
2009	Canada–EFTA
2009	Canada–Peru
2009	Chile–Colombia
2009	Japan–Switzerland
2009	Peru–Singapore
2009	US–Peru
2009	US–Oman

Source: Rickard and Kono (2013).

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK2758-11 CUUK2758/Dür ISBN: 978 1 107 08387 5 September 2, 2014 6:33

such as the 2009 Buy American provisions. However, explicitly discriminatory rules, such as the 2009 Buy American provisions, are rare. Instead, governments tend to discriminate against foreign firms using less obvious measures. PTAs attempt to regulate these less formal means of discrimination. For example, some PTA procurement chapters explicitly prohibit price discrimination (i.e. choosing higher-priced domestic bids over lower-priced but otherwise identical foreign bids). Beyond this, PTAs' procurement rules typically ban a range of other policies that favour domestic firms. For example, they often outlaw local-content requirements, since local firms are much more likely to source their inputs domestically (Grier 1996).

One of the earliest and most comprehensive sets of PTA procurement rules was agreed by the European Community (EC). Harmonised procurement rules were established to create a level playing field for all businesses across Europe. Businesses registered in an EU country have the right to compete for public contracts in other EU countries. Governments and other public authorities may not discriminate against a business simply because it is registered in another EU country. EU procurement rules also require that governments make all information regarding tenders available to all interested companies, regardless of what EU country they are registered in. Like the WTO's GPA, however, these rules apply only to contracts whose monetary value exceeds a certain amount. These 'above threshold' tenders are, presumably, of cross-border interest; in other words – the tender value makes it worthwhile for a business to submit a tender abroad.

A more recent example of a procurement PTA is the 2004 bilateral trade agreement between the United States and Chile. The stated objective of this PTA's procurement chapter is to 'provide comprehensive coverage of procurement markets by eliminating market access barriers to the supply of goods and services, including construction services'. The chapter, however, goes beyond aspirations. It stipulates rules for purchases by 20 Chilean federal ministries, many regional governments and 341 municipalities, as well as 79 federal US departments and many offices of state governments. The main principles are national treatment and nondiscrimination. The chapter states: 'Each Party shall accord to the goods and services of the other Party . . . treatment no less favorable than the most favorable treatment the Party accords to its own goods, services, and suppliers.' The chapter goes further, stipulating that 'neither Party may treat a locally established supplier less favorably than another locally

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK2758-11 CUUK2758/Dür ISBN: 978 1 107 08387 5 September 2, 2014 6:33

established supplier on the basis of degree of foreign affiliation or ownership'. These provisions aim to reduce discrimination against foreign firms in government procurement.

D. Why procurement rules?

Recent research suggests at least two possible explanations for the proliferation of procurement chapters in PTAs. First, procurement rules may have become part of 'boilerplate' PTA language. Countries need not 'start from scratch' when negotiating a new PTA (Baccini, Dür and Haftel, Chapter 7 in this volume). Instead, negotiators can use an existing PTA template as the basis for their negotiations (Baccini, Dür and Haftel, Chapter 7 in this volume; Kim and Manger 2013; Jetschke and Lenz 2013BIB-11˙19: 7). Baccini, Dür and Haftel (Chapter 7 in this volume) contend that three broad templates exist. Two of the three templates identified include public procurement rules. Once procurement becomes part of a PTA 'template', all subsequent PTAs may include procurement rules simply because they were modelled on an existing 'template' that included procurement.

A second possible explanation for the increased popularity of procurement rules is that recent PTAs tend to be 'deeper' agreements (Kim, Chapter 2 in this volume). As trade negotiators pursue deeper market integration, procurement rules may become indispensable. Discriminatory procurement can substitute for other barriers to trade, such as subsidies or tariffs (Kono and Rickard 2013). If subsidies are restricted by international agreements, for example, governments can instead buy products from domestic firms at above market rates via discriminatory public procurement. By doing so, the government effectively subsidises the firm. Deep market integration therefore cannot be achieved by the elimination of tariffs and subsidies alone. Negotiators must also tackle discriminatory procurement practices.

Procurement rules may therefore be an important feature of deep trade agreements, which characterise many of the more recent PTAs. Evidence suggests that PTAs with procurement chapters do, in fact, tend to be deeper agreements than those without procurement chapters are. The depth of PTAs is measured using an index developed by Dür, Baccini and Elsig (2014). This additive index combines seven key provisions that can be included in PTAs. The first captures whether the agreement foresees that all tariffs (with limited exceptions) should be reduced to zero (that is,

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK2758-11 CUUK2758/Dür ISBN: 978 1 107 08387 5 September 2, 2014 6:33

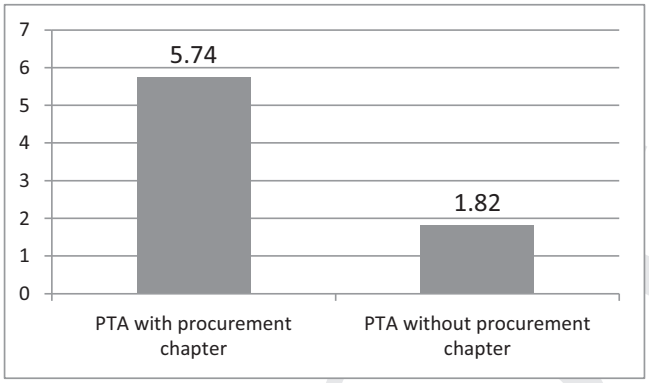

Figure 11.1 Depth of PTAs

whether the aim is to create a full free trade area). The other six provisions capture cooperation that goes beyond tariff reductions.[3]

Using this index, I calculate the average depth of PTAs with and without procurement chapters. These results are reported in Figure 11.1.

PTAs identified by Rickard and Kono (2013) as having substantive procurement chapters are, on average, deeper agreements than are PTAs without procurement chapters. PTAs with procurement chapters score 5.7, on average. This is a relatively high score given that the maximum possible value is 7. PTAs without explicit procurement rules, however, score only 1.8, on average. This difference is substantively large (3.9 units) and statistically significant at the 1 per cent level in a two-sample *t*-test with equal variances. In short, procurement rules tend to appear in deeper PTAs. Arguably, procurement rules are included in deep agreements because discriminatory procurement can substitute for other barriers to trade, such as subsidies or tariffs (Kono and Rickard 2013). Deep market integration therefore cannot be achieved by the elimination of tariffs and subsidies alone; negotiators must also tackle discriminatory procurement practices.

This argument assumes that PTAs with procurement rules foster the liberalisation of public procurement markets. However, scant evidence exists to suggest that PTAs' procurement rules are effective in reducing discrimination against foreign bidders. Rickard and Kono (2013), for

[3] One of these areas is public procurement, and as a result, the reported differences must be treated with some caution.

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK2758-11 CUUK2758/Dür ISBN: 978 1 107 08387 5 September 2, 2014 6:33

example, find no evidence that PTAs' procurement rules reduce discrimination against foreign firms. Discrimination is difficult to measure. For this reason, Rickard and Kono (2013) use a necessarily indirect method to estimate procurement discrimination. They use the elasticity of imports to procurement spending, controlling for other determinants of imports, as an estimate of the extent of procurement discrimination. They then investigate whether joining a PTA with explicit procurement rules reduces procurement discrimination against fellow PTA members. Rickard and Kono (2013) find discouraging results; the procurement–imports relationship is no different in country pairs in which both countries are members of the same procurement PTA than when they are not. In other words, PTAs' procurement rules do not significantly reduce discrimination in government procurement.

This null result holds for PTAs both collectively and individually. Rickard and Kono (2013) investigate the individual effects of various PTAs with explicit procurement rules, including the North American Free Trade Agreement (NAFTA), the Central American Free Trade Agreement (CAFTA), the European Economic Area (EEA), as well as the collective effect of all bilateral agreements between the EU and non-EEA countries, bilateral agreements between the European Free Trade Association (EFTA) and non-EEA countries and purely bilateral public procurement documents (PPAs) that are not associated with any regional agreement.[4] The results are easily summarised: none of the PTAs meaningfully affect the elasticity of imports to procurement spending. To sum up, Rickard and Kono (2013) find no evidence that PTAs with procurement rules liberalise government procurement.[5]

The null results reported by Rickard and Kono (2013) are consistent with those of other studies. Crozet and Trionfetti (2002) find that public procurement has a negative impact on trade flows using intra-European trade data from 1975 to 1985. Shingal (2011) finds that the GPA has not increased foreign access to procurement markets in Switzerland and Japan. The WTO itself concedes that many 'members still use their purchasing decisions to achieve domestic policy goals, such as the promotion

[4] Rickard and Kono (2013) do not include the EU and EFTA themselves because together they constitute the EEA. The EU provides most of the EEA's membership; hence, the correlation between the two groupings is more than 0.9. When the EEA is dropped and the EU and EFTA are included separately, both are insignificant.

[5] The WTO GPA appears to be equally ineffective in reducing procurement discrimination (Rickard and Kono 2013).

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK2758-11 CUUK2758/Dür ISBN: 978 1 107 08387 5 September 2, 2014 6:33

of specific local industry sectors or social groups' (World Trade Organization 2013).

E. Ineffectiveness of procurement rules

Why are PTA procurement rules ineffective? Several possible explanations exist. First, procurement agreements may allow governments too much flexibility. Take for example the EU's procurement rules. These rules are some of the most stringent agreed to date. Yet, significant variation exists in the procurement procedures of EU countries. EU procurement rules allow governments to select tenders using two criteria: either the lowest price criterion or a combination of qualitative and quantitative aspects, known as Most Economically Advantageous Tender (MEAT). Considerable variation exists in Member States' use of these criteria. In Lithuania, for example, 87 per cent of tenders are selected using the lowest price criterion, as reported in Table 11.2. In Germany, however, 31 per cent of tenders are selected using the lowest price criterion, and in the UK, only 3 per cent of tenders using the lowest price criterion.

Ninety-seven per cent of tenders in the UK are selected using a combination of qualitative and quantitative aspects that could include quality, technical merit and delivery times. These criteria allow the government discretion over to whom to award the contract and, thus, opportunities exist for discrimination again foreign bidders. The UK's use of MEAT criteria is higher than the EU average (see Table 11.2) and seems to be at odds with the UK government's own insistence that 'value for money is the primary driver for procurement'. The British government has stated that 'given the limited resources available to government, ensuring value for money in procurement is key to ensuring the optimum utilisation of scarce budgetary resources' (Office of Government Commerce 2008). Despite this assertion, only 3 per cent of tenders are selected using the lowest price criterion. In contrast, many other EU countries, bound by identical procurement rules, exhibit far more frequent use of the lowest price criterion.

Other procurement practices also vary across EU Member States. For example, Member States remain free to decide whether public contracts are awarded on an anonymous basis. Some EU Member States have put in place rules to protect the anonymity of the bidders, at least up to a certain stage of the procedure. In Portugal, for example, anonymity is observed until the opening of the offers. Similar practice is also reported in Cyprus.

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK2758-11 CUUK2758/Dür ISBN: 978 1 107 08387 5 September 2, 2014 6:33

Table 11.2 *Tender criteria*

Country	Lowest price (%)	MEAT (5%)
Belgium	25	75
Bulgaria	36	64
Czech Republic	38	62
Denmark	24	76
Germany	31	69
Estonia	76	24
Ireland	3	97
Greece	66	34
Spain	5	95
France	3	97
Italy	33	67
Cyprus	81	19
Latvia	61	39
Lithuania	87	13
Luxembourg	44	56
Hungary	41	59
Malta	59	41
The Netherlands	27	73
Austria	43	57
Poland	83	17
Portugal	43	57
Romania	67	33
Slovenia	68	32
Slovakia	84	16
Finland	33	67
Sweden	37	63
United Kingdom	3	97
EU average	29	71

Source: Hansard (2012) HC 1453 Transport Committee Supplementary written evidence from the European Commission (RSP 12a).

In others Member States, however, such as Greece and Spain, anonymity is not practised.

These examples suggest that procurement rules agreed as part of PTAs may be ineffective because they are flexible. Ironically, such flexibility may make it possible for governments to commit to these agreements

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK2758-11 CUUK2758/Dür ISBN: 978 1 107 08387 5 September 2, 2014 6:33

(Rosendorff 2005). PTAs can have multiple member countries with potentially different interests in public procurement. For example, PTAs may be agreed by two economically asymmetric countries, such as the United States and Oman. In these cases, the country with the larger economy, here the United States, may want stringent procurement rules, whereas the smaller economy may want no procurement rules or only shallow rules as a function of how much it can supply to a large economy like the United States. In bilateral negotiations, the two states may compromise on some middle ground, and often such compromises take the form of flexible rules. Flexibility may make an agreement palatable to both states. Yet, this flexibility may ultimately undermine the effectiveness of PTA procurement chapters.

Second, international rules may be ineffective because procurement is fragmented across many government agencies. For example, in the UK, police procurement is fragmented across the 43 police forces in England and Wales. The huge range of definitions for basic items is striking. Something as simple as a high-visibility jacket has 20 different specifications, with associated prices that differ by as much as £80 (Hansard 2013). Similarly, recent research by Peto and Ernst & Young has shown that prices charged by suppliers for the same products vary by as much as 200 per cent from one hospital to another in the United Kingdom (Trent 2013).

Finally, the ineffectiveness of international procurement rules may be due to the opaque, complex nature of public procurement. Observing and proving procurement discrimination are difficult because many aspects of procurement decisions are inherently nontransparent (Evenett 2002). The opacity of public procurement makes it difficult to prove violations of international rules. The European Commission itself recently concluded that 'discrimination in public procurement is very difficult to detect or prove' after an evaluation of the effectiveness of EU procurement legislation (European Commission 2011). Although 46 per cent of EU businesses reported that local preferences influence the outcome of public procurement procedures to a large extent, none could provide concrete evidence of discrimination (European Commission 2011).

One reason for the lack of tangible evidence of discrimination is the fact that governments can discriminate against foreign suppliers in many nonobvious ways. For example, governments may provide information necessary to draft a competitive bid only to domestic firms. An example of such selective information provision recently emerged in the EU, when in 2012 the European Commission called on Romania to comply

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK2758-11 CUUK2758/Dür ISBN: 978 1 107 08387 5 September 2, 2014 6:33

with EU procurement rules in connection with a contract awarded by the municipal authorities (European Union 2013). The contract, worth around €110 million, was allegedly awarded without allowing potential applicants sufficient time to prepare their bids. Furthermore, during the procedure the Romanian authorities made changes to a number of mandatory conditions in the procurement notice, including the selection criteria, which were announced at national level but not internationally. As a result, crucial information was available to domestic bidders, but not to foreign bidders, which subsequently gave local bidders an advantage in the process. By providing information selectively to domestic firms, the Romanian authorities were able to covertly discriminate against foreign firms.

Myriad opaque methods exist to discriminate against foreign firms. For example, governments can tailor technical requirements specifically to local suppliers (Beviglia-Zampetti 1997). In this case, discrimination would be exceedingly hard to prove. Moreover, governments can always invoke 'quality' as a reason to favour domestic bids over foreign ones (Vagstad 1995). Without overtly violating international rules, governments can split up large contracts so that the value of each of the constituent parts falls below the threshold stipulated in the procurement agreement. Contracts below stipulated thresholds use less formal procurement procedures. For example, supplies or services with a value of less than €5000 may be purchased on the basis of verbal quotes from one or more competitive suppliers in Ireland (Environmental Protection Agency 2013). Such informal procedures give governments significant leeway to discriminate in favour of local suppliers. In short, the opacity of procurement makes it difficult to verify violations of international rules. The difficultly of proving violations may allow governments to discriminate in favour of domestic bidders with impunity – even as signatories to PTAs with explicit procurement rules.

If PTAs' procurement rules are ineffective, why do governments negotiate them? Negotiating procurement chapters is costly and time consuming. Complying with such rules may incur further expense. Why then do an increasing number of PTAs include procurement chapters?

F. A win–win situation for governments

Governments may have incentives to sign procurement PTAs even though they face compelling reasons to privilege domestic firms over foreign

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK2758-11 CUUK2758/Dür ISBN: 978 1 107 08387 5 September 2, 2014 6:33

ones when purchasing otherwise similar goods and services. Awarding contracts to local firms shifts profits from foreign firms to domestic ones (Branco 1994; Vagstad 1995). Domestic firms may consequently reward politicians who discriminate in their favour by providing them with votes or campaign contributions. Government contracts may also allow local firms to create new jobs and generate higher tax revenues. For these reasons, governments value the freedom to discriminate against foreign firms in favour of domestic firms.

In theory, signing a procurement PTA limits governments' ability to buy national. In practice, however, governments often discriminate against foreign firms even as signatories to international procurement agreements (Rickard and Kono 2013). Governments may therefore sign PTAs with procurement chapters safe in the knowledge that they can still buy national with relative impunity.

PTAs' procurement chapters have additional advantages for signatory governments. Governments can claim to be working on behalf of domestic firms by providing better access to foreign procurement markets. When speaking in support of the Australia–Chile Free Trade Agreement, for example, the Australian trade minister said, 'The agreement provides greater certainty for Australians looking to participate in the Chilean government procurements market. The agreement will provide access to a non-discriminatory regime which puts Australian suppliers' goods and services on an equal footing with competitors from other countries.' The minister made this statement in a speech encouraging legislators to vote for the agreement. Access to foreign procurement markets was understood by the minister to be a 'vote-winning' characteristic of the agreement – one that merited discussion on the floor of the legislature.[6]

A further attraction of international procurement rules may be that they provide 'political cover' for governments when they choose to 'buy foreign'. Governments that reject domestic bids in favour of foreign ones often face criticism. Domestic firms may make life difficult for vote-sensitive politicians when they lose out to foreign bidders (Martin, Hartley and Cox 1999: 390). For example, a recent decision by the British government to award a train-building contract to Siemens of Germany

[6] The Australian example suggests that governments may expect to gain politically from securing improved access to foreign procurement markets. If procurement agreements do not liberalise procurement markets, however, then the value to local firms of international procurement agreements may be small.

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK2758-11 CUUK2758/Dür ISBN: 978 1 107 08387 5 September 2, 2014 6:33

rather than to the UK-based arm of Bombardier was widely criticised by opposition parties and national trade unions. Trade unions loudly criticised this decision, and for days it was widely covered by the national media. The government responded to the vociferous criticism of this decision by citing international procurement rules. Minister Theresa Villiers stated in the House of Commons, that the government was 'legally bound by European law to judge bids on a completely blind basis'. She went on to explain, 'Under EU law, domestic and overseas suppliers must be judged impartially and on a wholly equal footing' (Hansard 2011). In effect, the British government used its international obligations as a signatory to the EU's procurement rules to provide political cover for an unpopular purchase. This illustration suggests that governments might sign procurement PTAs knowing that they can be used as political cover when necessary, that is, when governments have to buy foreign.

Previous studies demonstrate how international agreements can provide political cover for unpopular governmental actions. It is often argued, for example, that the International Monetary Fund (IMF) provides political cover for governments that want to reform their economies but that face opposition at home (Haggard and Kaufman 1995; Putnam 1988; Vreeland 2003). In these arguments, governments seek to deflect the blame for unpopular policy decisions by using the international agreement as a 'scapegoat' (Steinwand and Stone 2008: 127).[7] PTAs with procurement chapters may serve such a role – acting as a scapegoat for governments when they have to buy foreign.

Governments may have to purchase from foreign suppliers for reasons of cost or supply limitations. If a required good or service is not supplied domestically, the government will have to buy from foreign suppliers. In Brazil, for example, the domestic capacity to produce oilfield equipment is limited (Economist 2013). Thus, it would be rational for the government to seek a foreign supplier from whom to buy the necessary equipment. However, it is unable to do so because of its own buy national policies. The limited domestic capacity in combination with Brazil's buy national policies has hampered the partially state-owned Petrobras's ability to exploit new deep-sea oil deposits (Economist 2013). An international procurement agreement could help governments in such situations. After

[7] Of course, scapegoating may not work under all circumstances. In the run-up to democratic elections, for example, voters may not find governments' scapegoating claims credible (Rickard and Caraway 2014).

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK2758-11 CUUK2758/Dür ISBN: 978 1 107 08387 5 September 2, 2014 6:33

signing a PTA with procurement rules, a government could buy foreign without fear of retaliation from any domestic suppliers that exist or voters who resent their tax monies being spent abroad.

Cost saving may also lead governments to buy foreign. For example, when speaking in the House of Representatives about public procurement, Australia's minister for finance said in 2009, 'We are saving around $15 million per year through a volume-sourcing arrangement with Microsoft' (Hansard 2009b). In this illustrative example, the government decided to buy foreign explicitly for cost-saving reasons. Highlighting these savings may have been an attempt to make a foreign purchase more palatable to voters. Yet despite the potential cost savings, choosing a cheaper foreign bid over a domestic bid may provoke criticism from voters and producers alike. When governments choose to buy from foreign suppliers, the domestic producers in competition for the contract face tangible economic losses. Such losses may incite firms to make their resentment known to the government. A company passed over for a lucrative government contract in the United Kingdom, for example, subsequently announced 1400 job losses. The company also stated publicly that it would now have to 'review its factory's future' in Britain (Economist 2011).

Domestic suppliers not directly affected by a government's decision to buy foreign in any particular case are likely to oppose their government's decision to buy foreign as well for fear that it might increasingly become standard practice. Taxpayers may also resent their hard-earned taxes being spent abroad. In sum, buying from foreign suppliers is politically costly for governments, and this may explain the well-documented evidence of discrimination against foreign firms by governments.

International procurement rules can provide political cover for governments that choose to buy foreign. Criticism of foreign purchases can be deflected by the government saying that its hands are tied by international rules. PTA obligations require governments to evaluate bids blindly without giving any special consideration to domestic suppliers. For example, the Australian minister of defence invoked international procurement procedures in a speech on the floor of the House of Representatives. The minister was speaking in defence of the government's decision to award a contract to an international archaeological firm. Media reports criticised the decision, alleging that the firm had misrepresented its costs in order to undercut local bids. The minister responded by saying, 'I would like to say a few words about the selection of Oxford Archaeology . . . as there has been some extremely inaccurate media representation of their

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK2758-11 CUUK2758/Dür ISBN: 978 1 107 08387 5 September 2, 2014 6:33

contract. The choice to engage Oxford Archaeology was an international decision, reached using an open and transparent tender process that was in accordance with Commonwealth Procurement Guidelines' (Hansard 2009a).

Similarly, following an announcement that 1775 shipbuilders would lose their jobs, the British government came under pressure to explain its decision to award a contract to build four new British military super tankers for the Royal Fleet Auxiliary to a Korean shipyard at a cost of £450 million. To justify this decision, government ministers made reference to EU procurement rules. When an astute constituent wrote the Department of Defence to query why a defence-related contract, which is exempt from EU procurement rules, was put out for competitive tender, the minister of defence responded that a tanker 'didn't qualify as a warship' and therefore the contract had to be put out to tender (Prestwich 2013). In this example, the government used international procurement rules as political cover for a decision that became controversial with voters following news that British workers in the shipbuilding sector were being laid off.

These illustrative examples suggest that governments may sign procurement PTAs safe in the knowledge that they can violate them with little fear of reprisal when it is in their interest to buy national and at the same time use the agreement as political cover when it is necessary to buy foreign. This valuable characteristic may explain why an ever growing number of governments sign international procurement agreements, despite (or indeed because of) the agreements' apparent ineffectiveness.

G. Conclusion

Increasingly, PTAs include rules regulating governments' purchases of goods and services. The inclusion of public procurement rules in ever more PTAs raises important and interesting questions. This chapter has highlighted several such questions and offered preliminary thoughts as to their answers. It seems puzzling, for example, that governments rush to sign such agreements when research shows they have little success in liberalizing procurement markets. Why would governments sign procurement agreements in ever greater numbers if these agreements are ineffective?

A possible reason is that PTA procurement rules represent a win–win situation for governments. On one hand, governments are able to sign

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK2758-11 CUUK2758/Dür ISBN: 978 1 107 08387 5 September 2, 2014 6:33

such agreements safe in the knowledge that they can still buy national with relative impunity because of the opacity of public procurement. On the other hand, when governments need to buy foreign, international procurement rules give governments political cover. Governments can point to the PTA and argue that their hands are tied. The agreement in effect serves as a scapegoat for unpopular foreign purchases by signatory governments.

This interpretation of PTAs' procurement chapters is consistent with existing arguments about international agreements acting as scapegoats for unpopular government actions. It suggests a potential explanation for why governments rush to sign PTAs with procurement rules, despite having strong political incentives to spend taxpayers' money at home by purchasing locally produced goods and services. However, this explanation does not explain why governments rush to sign PTAs with procurement chapters rather than accede to the WTO's GPA. The stampede to sign PTAs with procurement chapters has not been matched by a similar rush to sign the GPA. In fact, since 2000, only three new parties joined the GPA (Ueno 2013). Only 10 countries are currently negotiating accession to the GPA. If international procurement rules are a win–win for governments, why are so few countries willing to sign the GPA? One possibility is that PTAs allow for negotiation over procurement rules, whereas countries that accede to the GPA cannot negotiate the terms of the agreement. The potential trade-offs between signing the GPA and signing a procurement PTA are yet another interesting question for future study. Thus, international procurement agreements present an important area for future research – one that can shed new light on the reasons why governments sign such agreements and when and under what conditions they comply with the agreed rules.

References

Beviglia-Zampetti, Americo. 1997. 'The UNCITRAL Model Law on Procurement of Goods, Construction and Services.' In *Law and Policy in Public Purchasing*, edited by Bernard Hoekman and Petros Mavroidis, 273–87. Ann Arbor: University of Michigan Press.

Branco, Fernando. 1994. 'Favoring Domestic Firms in Procurement Contracts.' *Journal of International Economics* 37 (1): 65–80.

Crozet, Matthieu, and Trionfetti, Federico. 2002. 'Effets-frontières Entre les Pays de l'Union Européenne: le Poids des Politiques d'Achats Publics.' *Economie International* 1:189–208.

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK2758-11 CUUK2758/Dür ISBN: 978 1 107 08387 5 September 2, 2014 6:33

Dür, Andreas, Baccini, Leonardo, and Elsig, Manfred. 2014. 'The Design of International Trade Agreements: Introducing a New Dataset.' *Review of International Organizations* 9 (3): 353–75.

Economist. 2011. 'Rolling on and on.' 7 September. www.economist.com/blogs/blighty/2011/09/rail-procurement. Accessed 3 March 2014.

Economist. 2013. 'Special Report World Economy.' 12–18 October , 17–19.

Environmental Protection Agency. 2013. 'Public Procurement.' www.epa.ie/about/procurement/#.UpeBQ8RDtqU. Accessed 15 November 2013.

European Commission. 2011. 'On the Modernisation of EU Public Procurement Policy: Towards a More Efficient European Procurement Market.' Green Paper. European Commission, Brussels. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0015:FIN:EN:PDF.

European Union. 2013. 'Infringement Cases (Public Procurement).' http://ec.europa.eu/internal_market/publicprocurement/infringements/cases/index_en.htm. Accessed 15 November 2013.

Evenett, Simon J. 2002. 'The WTO Government Procurement Agreement: An Assessment of Current Research and Options for Reform.' Paper prepared for the World Bank Conference 'Informing the Doha Process: New Trade Research for Developing Economies,' Cairo, Egypt.

Grier, Jean H. 1996. 'Japan's Implementation of the WTO Agreement on Government Procurement.' *University of Pennsylvania Journal of International Economic Law* 17:605–58.

Haggard, Stephan, and Kaufman, Robert R. 1995. *The Political Economy of Democratic Transitions*. Princeton, NJ: Princeton University Press

Hansard Australia HC, 19 August 2009a. Combet, Greg, MP (Charlton), Minister for Defence Personnel, Material and Science and Minister Assisting the Minister for Climate Change. House of Representatives Ministerial Statements. Fromelles Project Update Speech. www.aph.gov.au/Parliamentary_Business/Hansard/Search&?q=&expand=true&drvH=0&drt=2&pnu=43&pnuH=43&pi=0&pv=&chi=2&coi=0.

Hansard Australia HC. 16 September 2009b. Tanner, Lindsay, MP (Melbourne), Minister for Finance and Deregulation. House of Representatives Ministerial Statements. Fiscal Policy Speech. www.aph.gov.au/Parliamentary_Business/Hansard/Search&?q=&expand=true&drvH=0&drt=2&pnu=43&pnuH=43&pi=0&pv=&chi=2&coi=0.

Hansard UK HC 1453 Transport Committee Supplementary Written Evidence from the European Commission (RSP 12a) 2012. www.publications.parliament.uk/pa/cm201314/cmselect/cmtran/850/85015.htm.

Hansard UK HC 12 July 2011. www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110712/halltext/110712h0001.htm.

Hansard UK HL 26 March 2013. A statement from The Rt Hon Margaret Hodge MP, Chair of the Committee of Public Accounts. www.parliament.uk/business/

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK2758-11 CUUK2758/Dür ISBN: 978 1 107 08387 5 September 2, 2014 6:33

committees/committees-a-z/commons-select/public-accounts-committee/news/chairs-statement-on-police-procurement.

Jetschke, Anja, and Lenz, Tobias. 2013. 'Does Regionalism Diffuse? A New Research Agenda for the Study of Regional Organizations.' *Journal of European Public Policy* 20 (4): 626–37.

Kim, Soo Yeon, and Manger, Mark S. 2013. 'Hubs of Governance: Path-Dependence and Higher Order Effects of PTA Formation.' Paper presented at the Annual Meeting of the Political Economy of International Organizations, 7–9 February, Mannheim and Heidelberg, Germany.

Kono, Daniel Y., and Rickard, Stephanie J. 2013. 'Buying National: Democracy and Public Procurement.' University of California, Davis Working Paper. University of California, Davis.

Lowinger, Thomas. 1976. 'Discrimination in Government Procurement of Foreign Goods in the US and Western Europe.' *Southern Economic Journal* 42:451–60.

Martin, Stephen, Hartley, Keith, and Cox, Andrew. 1999. 'Public Procurement Directives in the European Union: A Study of Local Authority Purchasing.' *Public Administration* 77 (2): 387–406.

Office of Government Commerce. 2008. 'An Introduction to Public Procurement.' http://webarchive.nationalarchives.gov.uk/20110601212617/http:/www.ogc.gov.uk/documents/Introduction_to_Public_Procurement.pdf.

Prestwich, Alan Quinn. 2013. Letters to the *Daily Telegraph*, 9 November.

Putnam, Robert D. 1988. 'Diplomacy and Domestic Politics: The Logic of Two-Level Games.' *International Organization* 42 (3): 427–60.

Rickard, Stephanie J., and Caraway, Teri. 2014. 'International Negotiations in the Shadow of National Elections.' *International Organizations* 68 (3): 701–20.

Rickard, Stephanie J., and Kono, Daniel Y. 2013. 'Think Globally, Buy Locally: International Agreements and Government Procurement.' *Review of International Organizations*. doi:10.1007/s11558–013–9177-x.

Rosendorff, B. Peter. 2005. 'Stability and Rigidity: Politics and Design of the WTO's Dispute Settlement Procedure.' *American Political Science Review* 99 (3): 389–400.

Shingal, Anirudh. 2011. 'Services Procurement under the WTO's Agreement on Government Procurement: Whither Market Access?' *World Trade Review* 10 (4): 527–49.

Steinwand, Martin C., and Stone, Randall W. 2008. 'The International Monetary Fund: A Review of the Recent Evidence.' *Review of International Organizations* 3 (2): 123–49.

Trent, Julian. 2013. 'The Government's Procurement Strategy Does Not Address Lack of Transparency.' *Guardian*, 29 October.

Trionfetti, Federico. 2000. 'Discriminatory Government Procurement and International Trade.' *World Economy* 23:57–76.

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK2758-11 CUUK2758/Dür ISBN: 978 1 107 08387 5 September 2, 2014 6:33

Ueno, Asako. 2013. 'Multilateralising Regionalism on Government Procurement.' OECD Trade Policy Papers No. 151. OECD Publishing, Paris.

Vagstad, Steinar. 1995. 'Promoting Fair Competition in Public Procurement.' *Journal of Public Economics* 58:283–307.

Vreeland, James R. 2003. *The IMF and Economic Development*. Cambridge: Cambridge University Press.

World Trade Organization. 2013. 'Government Procurement.' www.wto.org/english/tratop_e/gproc_e/gproc_e.htm. Accessed 15 November 2013.