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OECD taxonomy of measures affecting trade in government procurement processes

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OECD TAXONOMY OF MEASURES AFFECTING TRADE IN GOVERNMENT PROCUREMENT PROCESSES

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This paper develops a taxonomy of government procurement (GP) measures to provide a basis for further analysis. It aims to undertake a more comprehensive, albeit not exhaustive, collection of GP barriers across countries, and to develop a classification system of GP measures to facilitate further data collection and analysis. The output is a taxonomy of different GP measures, policies and procedures which can impact cross-border public procurement.

Keywords: Government procurement, regulation, Public Good, Government Procurement Agreement (GPA), International Trade

JEL Classification: F13, K20, H41, H57, F53

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Background information

The work draws on information on government procurement measures from a number of sources. The only internationally available cross-country data on government procurement (GP) is found in the Global Trade Alert (GTA), which provides information in real time on state measures taken in G20 countries during the current global economic downturn that are likely to discriminate against foreign commerce. The World Trade Organisation (WTO) has also compiled GP legislation for the 19 signatories (representing 47 WTO Members) of the Government Procurement Agreement (GPA). The OECD-STRI (Service Trade Restrictiveness Index) contains five types of government procurement measures which could restrain trade in services for 42 OECD and partner countries. In addition, this project aims to draw on and complement work by the OECD Public Governance directorate (GOV) to collect information on measures affecting transparency in GP procedures (OECD, 2012). UNCTAD is convening a global project on the development of a classification of non-tariff measures (NTMs), work which began in 2006. The project is supported by a Multi-Agency Support Team (MAST), of which the OECD is a member. The NTM classification includes 16 different categories and six, including GP restrictions, are currently being classified. Designated MAST members take responsibility for leading a working group of experts to elaborate the classification of a specific NTM. Given the commonalities between the OECD GP classification project and the MAST work programme and in order to avoid any duplication of effort, the OECD volunteered to chair the working group of experts on GP classification.

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1. Introduction

In setting out different categories of measures that can impact access to cross-border procurement, the OECD taxonomy has two objectives: to promote further consideration of the nature of measures, and to determine whether and how they impact foreign suppliers. The OECD taxonomy is not designed to pass judgment on the legitimacy of the public policy objectives that measures seek to achieve, but rather to highlight the trade impact of the measures as one element for consideration in policy-making and with a view to promoting consideration of less trade restrictive measures to achieve the same policy objectives. It is particularly important to bear this in mind when examining, for example, the effectiveness of measures based on preferences for certain disadvantaged groups, or requirements (technical or qualification) for bidders reflecting the right to regulate services at the national level.

More generally, it is also important to bear in mind that countries' public procurement rules play an important role in their efforts to achieve efficient and effective use and management of public resources. Indeed, value for money is often the objective behind procurement systems. The processes and requirements ensure value for money, namely that procuring entities conclude contracts with suppliers that guarantee economic efficiency as well as quality of the services, goods or works contracted.

The OECD taxonomy should be used to cast as wide a net as possible for the collection of all possible relevant government procurement (GP) measures. Once this first extensive exercise is completed, a more refined sifting process can be undertaken to ensure that the measures are trade restrictive and thus belong to the subcategories identified in the taxonomy. For this reason, some of the descriptions for each sub-category are broadly defined.

Furthermore, the OECD taxonomy seeks to set out a more structured and standardized approach to identifying GP measures in countries. It thus could also be used to provide a better picture of the overall openness of countries' GP sectors, which may reveal useful information for the purposes of negotiating preferential trade agreements (PTAs) or accession to the WTO GPA. The taxonomy can help to take stock of a country's procurement system, which in turn can help countries in their legislative reform or in increasing transparency *vis-à-vis* other countries, interested parties or suppliers seeking information.

It is important to note that many issues can impact home bias in government procurement without being trade barriers. These include size of domestic market, distance to main partners, and trade facilitation issues (shipping/infrastructure limitations, etc.). Equally, there are also barriers in other areas, for example in access for goods (such as tariffs) and in modes of services delivery beyond mode 3 (which is covered in the taxonomy), such as cross-border supply (mode 1) and presence of natural persons (mode 4) that could also affect access to government procurement opportunities and the competitiveness of bids. This taxonomy focuses on measures and factors most directly related to GP policies. Some key outcomes in terms of the scope and coverage of the taxonomy needed to be addressed and summarized below.

All GP measures or just those related to trade: There were two possible approaches to presenting the procurement process and guiding data collection: (i) an holistic approach, covering all elements that govern GP activities; or (ii) a narrow approach, focusing only on GP measures which could have an impact on trade flows. Given the purpose of the taxonomy and its trade policy context, the narrower focus was chosen.

Purpose of measures and terminology: Measures can be aimed at a range of public policy objectives (e.g. to provide opportunities for disadvantaged populations or to meet national security objectives). The taxonomy should thus include measures related to a range of relevant policy objectives, including sustainable procurement that can be tailored for SMEs or aimed at specific social policy (regional development or environment protection). While the taxonomy covers measures with a wide range of objectives, it avoids using terminology that may imply a judgement, such as “barrier” and refers instead more neutrally to “measures that have an impact on trade”. Not all measures are protectionist in intent. The taxonomy focuses solely on measures with an impact on foreign suppliers that wish to access the market of government contracts.

Concessions and private-public-partnerships (PPPs): Government (or public) contracts can encompass numerous transactions, such as concessions, built-operate-transfer (BOTs) and other forms of PPPs. The taxonomy takes a narrow view of the scope of public procurement and as such is not designed to be exhaustive. It does not cover measures that relate to concessions, PPPs or BOTs. Extending the taxonomy to these areas would increase the complexity and size of the data collection. In spite of this exclusion, the taxonomy is sufficiently comprehensive to cover essential procurement and to provide a sound picture of trade-affecting measures. It should also be noted that the WTO GPA text does not refer expressly to BOTs or other PPPs.

Foreign Direct Investment (FDI): It was agreed that there was merit in including broader FDI regulations in the taxonomy. These measures – while not aimed at GP per se – often have the effect of restricting foreign participation in GP as part of a sector-wide restriction (e.g. where participation in construction services in a given country requires a joint venture or national ownership this would also cover participation in government contracts). Moreover, in some cases the trade-impeding effect will be the result not of a single measure but rather of a combination of measures. A requirement for bidders to have a local presence may or may not have the effect of prohibiting foreign participation depending on whether a foreign company is able to form a local presence under GATS mode 3 in the relevant sector. That said, among the experts consulted, there is ongoing debate over whether to include relevant investment restrictions within the GP taxonomy itself (as is currently the case) or to simply cross-reference the separate work on investment being undertaken.

Level of government and state-owned-enterprises (SOEs): With respect to coverage of the taxonomy, two further issues were raised: first, whether the taxonomy should collect measures that pertain to the two levels of government: central/national and sub-central/sub-national, such as states and provinces. Second, whether measures governing SOEs should be included. On the one hand, excluding SOEs and subnational levels of government would be a loss for the classification, as they each can account for a significant share of GP contracts. On the other hand, including SOEs raises several challenges in identifying the measures and coverage of SOEs given the specificity and diversity of the laws governing SOEs and the different definitions across countries. For the purpose of the taxonomy, SOEs are broadly defined and include information on subnational entities, thus increasing the complexity and size of the data collection task. On balance, it was decided that, to the extent possible, SOEs and subnational levels of government would be included in the data research. The pilot data collection was thus used to test the feasibility of these two specificities (Section 5).

Laws, regulations and procedures: There were two issues here. First, the diversity and heterogeneity of legal approaches governing GP necessitated including the legislative framework (laws, regulations as well as all administrative procedures and guidelines) as well as standard bidding documents, notwithstanding the complexity of including all the relevant GP administrative procedures rather than only GP legislation. Moreover, a review of the literature on discriminatory procurement policies and practices indicated there was merit in identifying both measures that can explicitly impede trade flows, which come mostly from legislation or government policies, and measures that can implicitly constrain trade flows, which tend to be embedded in procurement practices and procedures. An important value added of the proposed classification lies in capturing both of these types of measures.

Secondly, examining legislation and regulations only partly indicates whether procurement is actually taking place. A key aim of the taxonomy is to identify measures that actually affect trade, and to be able to identify specific products/sectors for which imports are reduced by regulation. To this end, it was suggested to extend the taxonomy beyond legislation to tender documents; however, this approach would entail laborious effort to verify every single tender. The proposed approach is thus to identify information on procedures using standard bidding documents (SBDs) instead of tender documents.

Hence the taxonomy covers primary information, namely *de jure* and *de facto* measures adopted in any fashion by national or subnational governments (legislation, regulation, other administrative sources and SBDs). It also proposes to refer to secondary sources (other databases, expert reports) to help identify measures, but users should exercise caution and always cross-check measures found in secondary sources with the actual legal text or SBD (primary source).

Coverage of goods, services and public works: It was agreed that there is no need for distinct frameworks on services and goods since most countries have general GP legislation with some sector-specific regulations. This approach is in line with the WTO GPA, which draws no distinction among sectors, although defence is dealt with separately. The taxonomy thus covers goods, services and public works (construction) of civilian contracts, but it excludes defence procurement, given the complex balance of sensitive political and security issues that arise in this market.

In order to test the use of this taxonomy and its methodology, a pilot data collection exercise was carried out across six countries, namely Chile, Colombia, India, New-Zealand, South-Africa and Tunisia. Most of the of GP measures provided in this report come from this pilot study, while others were identified at an earlier stage in a preliminary exercise covering an additional 15 countries (see Section 4 on pilot exercise).

2. Description of the OECD taxonomy entries

This section provides further details on the GP taxonomy subcategories in order to help users identify and collect relevant measures according to the classification of the GP taxonomy

The taxonomy covers explicit and implicit measures and practices (M) that may impede trade flows and result in loss of market opportunities for foreign companies. The **explicit categories (M1 to M4)** gather measures or practices that directly reduce or prevent foreign companies' access to a government procurement system. The **implicit categories (M5 to M10)** group measures or practices that do not expressly target foreign bidders but that may, indirectly or potentially, affect cross-border procurement. These measures or practices may not be restrictive *de jure* but in their application they may prevent access to procurement by foreign firms. These nine categories are described in greater detail in the following sections.

It should be noted that many of the sub-categories qualified as implicit barriers may not at first be considered to be barriers. However, they are included in the taxonomy because they could potentially function as barriers, or may deter companies wishing to enter a foreign GP market, depending on how they are implemented or how they interact with other measures. Thus, it is important to consider how these subcategories relate to the measures within the specific GP context of the country under review. For example, registration *per se* is not a barrier, yet if the registration procedure requires physical presence, then the measure becomes more restrictive for foreign firms. Similarly, allotment is not itself a barrier to foreign participation; however, it could function as such where a contract is split with a view to avoid threshold triggers for international obligations.

To ensure that the taxonomy captures all relevant measures, a sub-category "Other" was created for each subgroup to be used for any measures that may not fall within the existing subgroups listed in the taxonomy.

M1: Market access restrictions

The first set of measures (**M1**) relates to market access restrictions. It groups measures and practices that expressly restrict access to government procurement to national suppliers (**M11**), sub-national (local) suppliers (**M12**) or which require joint ventures with a national/local entity (**M13**).

Box 1. National supplier / local supplier

The taxonomy distinguishes between national and local suppliers. The term “national” is broadly understood as including any domestic suppliers, anywhere within the country where the procurement takes place. The term “local” refers to a particular group of domestic suppliers within a specific region or locality within the country. This distinction applies to M1 but also to M2 and M3.

Measures related to access based on reciprocity (**M14**) capture provisions allowing foreign suppliers to bid only if the supplier's country (where the entity is legally established) grants reciprocal access. Under the commercial presence requirement (**M15**), a supplier can participate in a bid only if its business is established locally in the procuring country (either through a subsidiary (ownership) or lease of premises (franchise, etc.)). **M16** captures the occurrence observed where countries use national security reasons to exclude foreign firms from projects which are not directly link to security matters. Measures pertaining to thresholds (**M17**) entitle foreign firms to bid in the country *only* for contracts above or below a given threshold.

Subgroup	Sub-category	Examples
M1: Market access restriction	M11: To national supplier	In South Africa, under Section 217(2) of the Constitution, and under the 2011 Preferential Procurement Policy Regulations, Organs of State are encouraged to implement a procurement policy that provides categories of preference in the allocation of contracts and the protection or advancement of persons that are, subject to unfair discrimination.
	M12: To local supplier	In India, some goods (e.g. handloom textiles) must be purchased exclusively from local suppliers.
	M13: To joint ventures with national supplier	In Turkey, for public tenders exceeding a value threshold, foreign contractors are required to cooperate with local companies.
	M14: Access based on reciprocity	In Colombia, national treatment in GP is only granted to foreign firm if the same treatment is offered by the country of the foreign firm.
	M15: Commercial presence required	In Chile, public entities may request foreign companies to constitute a national company or agency. In any case, this could be required only to the awarded supplier before the signing of the contract.
	M16: Exclusion for national security or safety reasons	In Japan, railway equipment and infrastructure are excluded from the scope of the GPA justified under the “Operational safety clause” legislation.
	M17: Thresholds	In Nigeria, below some value thresholds, access to the bidding processes is restricted to national companies.

M2: Domestic price preferences

The second set of measures covers provisions that explicitly favour domestic firms by allocating a price preference (M2) to national suppliers (M21), local suppliers (M22) and joint ventures with national companies (M23).

Subgroup	Sub-category	Examples
M2: Domestic price preferences	M21: For national supplier	In Tunisia, national bids are preferred to foreign ones that are of equal quality where national bids' price does not exceed 10% of the price quoted in the foreign one.
	M22: For local supplier	In India, there is a price preference of 5% to local scheduled castes and tribes.
	M23: For joint ventures with national entity	No measure found.

M3: Local content requirement

The third category targets measures that require bidders to purchase domestically manufactured goods or domestically supplied services, such as a percentage of value added or intermediate inputs to be purchased locally. Measures that fall within the ambit of this category include requirements to use inputs or to store data locally (M31), use local services (M32), hire staff from the country (M33), or subcontract national firms/experts (M34). These subcategories are themselves divided according to the national /local split. Offsets requirements (M35) are generally measures that require or encourage suppliers to provide additional economic benefits to the local economy, such as in-country investments or transfers of technology. They require that foreign firms, partly or entirely, produce locally. They span a wide range of activities, such as technology transfer, production under license, or marketing/exporting assistance. Under the WTO GPA, offsets are only authorized as transitional provisions for developing countries.

Subgroup	Sub-category	Examples
M3: Local content requirement	M31: Inputs and data storage	In India, GP is subject to a preference policy for use of domestically manufactured electronic products [components] in procurement.
	M32: Services	In Colombia, in case of equality between national and foreign tenderers, the attribution of services contracts will be in favour of the offer that proposes major national content (national human resources, national components and technology transfer).
	M33: Staff requirement	In South Africa, the government has set up a preferential policy to promote local job creation.
	M34: Subcontract requirement	In Tunisia, general conditions of contracts contain a clause that encourages use of national subcontractors.
	M35: Offsets	In India, technical proposals are evaluated by taking into account criteria such as the capability for transfer of knowledge.

M4: Collateral restriction / restrictive effects

The last set of explicit measures (**M4**) aims to collect measures that are relevant because of their potential collateral restrictive effect but are less centred on government procurement access per se. It includes measures imposing a tax on procurement projects carried out by foreign entities that is not incurred by national bidders (**M41**); measures that act as barriers to foreign direct investment (FDI) in the country where the procurement takes place which effectively can prevent access to procurement in sectors where local presence or joint ventures are required (**M42**); measures that restrict eligibility of foreign bidders to subsidies and tax preferences (**M43**), and any measures that relate to the lack of transparency in investment and trade (e.g. information access) likely to discourage or disadvantage foreign investors (**M44**).

M42 is divided into finer subcategories to precise the classification:

- constraints on forming joint ventures (**M421**)
- constraints on mergers (**M422**)
- absence of national treatment (**M423**)
- if the sector is closed to FDI (**M424**).

These subdivisions may relate to measures under different areas of law; for example, measures identified as M421 and M422 may be within the ambit of laws regarding corporations, whereas M424 measures are more likely to be found in investment laws.

Subgroup	Sub-category	Examples
M4: Collateral restrictions / Restrictive effects	M41: Tax on procurement for foreign entities	In the United States, a 2% tax is imposed on foreign firms in the procurement of goods and services by the Federal government.
	M42: Barriers to FDI	In Tunisia, if a foreign investor seeks to hold more than 50% of the ownership of a domestic company, a pre- authorization from the High Committee on Investment is required.
	M43: Restricted eligibility to subsidies and tax preferences	In India, direct subsidies and differential taxation favour small scale industries.
	M44: Transparency measures in investment and trade	No measure found ¹

1. Some measures arguably could be included here, although they may involve an element of subjective judgment. For example, in Tunisia, the *Investment Incentive Code* has been amended 64 times since 1993. Out of its 67 articles, 43 have been revised, some more than once, leading to complaints from investors about complexity and lack of transparency.

M5: Conduct of procurement

In the implicit restrictive measures, the first category groups measures related to the conduct of procurement, namely the ways procurement are carried out under specific conditions and rules. They can be considered restrictive when their purpose or effect limits or avoids competition by protecting domestic suppliers. Many of these practices are commonly used and referred to in international agreements or GP model laws (e.g. UNCITRAL or WTO Government Procurement Agreement). These two legal instruments recognise that countries may use these measures but they also assist in building appropriate safeguards in law to prevent against discriminatory practices.

This subgroup contains potentially restrictive measures regarding the design of methods of procurement (**M51**) such as the division of contract lots (allotment); registration of tenderers (**M52**); shortlists/pre-selected list of tenderers (**M53**); direct/limited tendering (**M54**); selective tendering (**M55**); and the time period for tenderers to participate (**M57**). Registration of tenderers or shortlist of tenderers do not prevent foreign firms to submit bids per se (they allow tenderers to be identified); however, they can

be applied in such a way that they become restrictive to foreign firms – as, for instance, if digital signatures are accepted only in specific local offices.

In addition, implicit measures affecting foreign firms can also result from securities requirements (M56) during the conduct of procurement. This latter subcategory will be based on tender securities (M561) which are amounts that each bidder pays to guard against the risk that they will withdraw from the tender process before the final selection (e.g. bonds, bank warranties, letters of credit), and in performance securities (M562), which are amounts paid in case of refusal or failure of the supplier to execute the work after the award of the contract.

Box 2. Distinction between registration mechanisms and shortlist

Registration mechanism is a mandatory process for any firm seeking to bid. This first registration process may be carried out by the procuring entity or by another public entity (i.e. registration with the Ministry of Commerce). Only upon completion of a registration can a firm submit its bid. Registration may involve a simple mechanism for identification of bidders.

Shortlists are lists of preselected suitable contractors established by the procuring entity. Only these shortlisted firms are allowed to submit bids (to be distinguished from normal listing as part of an open bidding process). Shortlists may be compiled after rigorous international bidding.

Subgroup	Sub-category	Examples
M5: Conduct of procurement	M51: Design of methods of procurement	In Tunisia, the allotment (i.e. division of contracts) mechanism designed to encourage national firms' participation is mandatory.
	M52: Registration mechanisms	In Colombia, foreign bidders must be registered in the bidders' national record. Registration must be renewed before the fifth working day of April each year.
	M53: Shortlist / pre-selected list of bidders	In India, the expression of interest may state that the short list will comprise only national consultants (firms registered or incorporated in the country).
	M54: Direct/Limited tendering	In Senegal, only nationals can participate in direct tendering.
	M55: Selective tendering	No measure found.
	M56: Securities	In India, bidders registered with the National Small Industries Corporation are exempted from issuing bid security along with their bids.
	M57: Time period	In Indonesia, the minimum time period to submit a bid is seven days while on average it is around 30-40 days. ¹

1. The classification relies on the benchmark set out by the BPP or the GPA for acceptable time period

M6: Qualification criteria

The second set of measures consists of qualification criteria (M6) used to determine the eligibility of suppliers to participate in procurement. This subgroup includes measures prescribing administrative formalities, such as certification or license requirements beyond the regular professional qualifications required to undertake a given activity (M61); measures allowing set asides for specific groups such as SMEs or local minorities (M62); and requirements related to specific past performance (M63) or prior experience (M64).

Box 3. Distinction between past performance / prior experience requirement

Past performance requires the bidder to be able to demonstrate that they have successfully performed similar tasks.

Prior experience requires the bidder to have previously been granted procurement contracts by public entities within the country.

Subgroup	Sub-category	Examples
M6: Qualification criteria	M61: Certification or license criteria	In Colombia. Foreign companies shall establish Colombian branches. To establish a branch, the companies must register before a notary and obtain the authorization of the Superintendence of companies
	M62: Set asides for specific groups	In South Africa, the bidding process goes through a selection which promotes and favours "small and emerging enterprises".
	M63: Past performance requirement	In India, in order to evaluate the consultant's key professionals, experience in the region (number of projects in the region) may be a criterion.
	M64: Prior experience requirement	In India, bidders must have achieved work of any nature with some national public entity listed.

M7: Evaluation criteria

The third set of measures relates to evaluation criteria (**M7**), namely criteria the procuring entity relies on to select the successful bidder. These criteria include contractual terms and conditions which may be geographically specific, out of step with international standards and which would impose a disproportionate compliance burden or cost on non-national firms (**M71**); or financial requirements related to the tender process (**M72**), which may, for example, impose national currency requirements.

A further measure is the possibility of offer-backs (sometimes referred to as "best and final offers") only for certain suppliers or categories of suppliers (**M73**). Under this procedure, a preferred group is offered a second chance to improve their offer or match or beat the best tender.

Subgroup	Sub-category	Examples
M7: Evaluation criteria	M71: Technical contractual conditions favour domestic firms	In Tunisia, technical specifications must be drafted in a way to promote local products.
	M72: Financial requirements	In Tunisia, the Finance Minister must grant special approval for the personal and solidary/joint surety (guarantee) to be accepted.
	M73: Preference for specific groups	In South Africa, preference for national firms in line with the Broad-Based Black Economic Empowerment (B-BBEE) Act - preferential point systems for the evaluation of tenders, according to which bidders that have a higher B-BBEE status level (that score better in terms of black economic empowerment) enjoy progressive award preferences. ¹

1. Note that M73 measures can also be considered as M22 if the measure is linked to a domestic price preference (which is not the case in this example).

M8: Review / Complaint system

Foreign firms may also be affected by the operation of complaint and review mechanisms (M8). Countries should ensure that foreign firms (either aggrieved suppliers or contractors) have access to an independent judicial body or court that allows for a timely, effective, transparent and non-discriminatory complaint mechanism and/or review procedure to challenge a decision regarding the procurement process. These mechanisms and considerations with regard to public procurement ensure competitive neutrality (OECD, 2012).

This subgroup identifies restrictive measures related to: the existence of a mechanism allowing for challenge to a bidding process or award to which foreign suppliers have access (M81); options for a complaining party to choose the authority for filing its complaint¹ (M82); inadequate time period allowed to bidders to challenge an award decision (M83), for example that would be shorter than that provided in the WTO GPA; inadequate or discriminatory costs (M84); the inadequacy of suspension of bidding process remedies that can be imposed by the bid challenge authority (M85); and unequal sanctions and remedies for domestic versus foreign suppliers (M86).

Subgroup	Sub-category	Examples
M8: Review/ complaint system	M81: Challenge of bidding process or award	No measure found.
	M82: Choice of complaint forum	Few economies offer a choice, of complaint forum
	M83: Time period	In the West African Economic and Monetary Union (WAEMU) complaints must be addressed at the latest five working days after the date of the contract award decision, of the invitation for bids, or of the communication of the bid, while it is above 15 days in most of the countries.
	M84: Cost	In India, when bringing a complaint before the relevant administrative authority, suppliers must pay fees that are not refundable.
	M85: Suspension of bidding process	In Ecuador, anybody can file a complaint and block the bidding process, while in Peru automatic suspension exists but only for firms which submitted a bid
	M86: Sanction and remedies	No measure found.

M9: Transparency and information

Transparency and access to information is key to ensuring that all suppliers participate in the procurement process on a level playing field and that fair conditions of competition are maintained. This subgroup includes measures that make it difficult or impossible for foreign firms to access the information required for any of the stages of procurement process. In general, it reflects a lack of transparency or clarity of information: namely, whether the documents are published in official gazettes or by any other accessible means, including e-publication (M91); e-procurement (M92) and the different stages of online procurement (see the subdivisions); inappropriate delay of the award notification or of notification to bidders that their bid was non-compliant (M93); as well as measures creating unnecessary complexity in procurement rules (M94), such as documents only available in one language.

1. As stated in the World Bank Benchmarking Public Procurement report, the “complaining party should have some choice in the review forum, especially if the reviewer is the procuring entity”.

The subcategory M92 is further subdivided into different subdivisions to represent the lifecycle process of e-procurement:

- online publication of tender (M921)
- online tender process (M922)
- online award process (M923)
- e-communication (M924)
- e-signature (M925)
- other online requirements (M926)

These subdivisions are particularly important and may also reach into other areas of law; for instance, e-commerce laws related to e-signatures may exclude foreign firms from a procurement market.

Subgroup	Subcategory	Example
M9: Transparency and information	M91: Publication in Official gazette or accessible publication	In India, work valued below a certain threshold may not be published in press.
	M92: Accessible e-procurement	In India, distributing the bidding documents online is optional
	M93: Notification delay	In Chile, public entities will be able to shorten the period between the publication of the call for tenders to take part in the bidding and the receipt of the offers, when they think that it is a question of goods or services of simple and objective specification. ¹
	M94: Complexity of procurement rules	In Tunisia, GP regulations are fragmented and dispersed (due to huge set of rules, frequently revised) which results in uncertainty and unpredictability, in particular for foreign bidders.

1. The period for the presentation of offers for contracts of high value will be able to be reduced from 20 to 10 days; for contracts of medium value from 10 to 5 days; and for contracts of low value from five days to 48 hours (+ thresholds).

M10: Effectiveness of ethics and anti-corruption system

Government procurement can also be susceptible to corruption, so M10 also covers the inadequacy of a country's anti-corruption laws or their enforcement. According to the United Nations Office on Drugs and Crime (UNODC, 2013), a "procurement system that lacks transparency and competition is the ideal breeding ground for corrupt behaviour". Echoing these concerns, the United Nations Convention against Corruption (UNCAC) calls for "the establishment of appropriate systems of public procurement based on the fundamental principles of transparency, competition and objective criteria in decision-making". The Preamble of the WTO GPA refers to UNCAC and expressly calls for the avoidance of conflict of interest and corruption. In addition, Article IV:4 requires that parties conduct procurement in a transparent and impartial manner so as to prevent corruption. Although not a legally binding instrument, the UNCITRAL 2011 Model Law on Public Procurement also addresses anti-corruption to improve the integrity in public procurement.

By applying and guaranteeing objective and transparent decision-making criteria, procuring entities comply with the principle of non-discrimination and equal treatment for providers. These principles are found in the GP taxonomy under several subgroups, such as "market access restrictions" (M1), domestic preference (M2), conduct of procurement (M5), and qualification criteria (M6).

Transparency is also an important feature for an effective procurement system. It includes several elements covered by subgroups M91 to M94, such as publicity of procurement opportunities and the disclosure of the rules to be followed; undertaking procurement processes publicly and visibly, according to prescribed rules and procedures that limit the discretion of officials; and the provision of a system for monitoring and enforcing applicable rules. These features are also underpinnings of other subgroups; for example, M5 (conduct of procurement), M6 (qualification criteria), M7 (evaluation criteria), and M8 (review / complaint system).

While inadequate anti-corruption laws or ineffective enforcement thereof affect all firms, they may disproportionately affect foreign firms, including by discouraging them from participating in the GP market and posing particular challenges for them in navigating non-transparent and compromised processes. The taxonomy thus includes some important anti-corruption measures that affect cross-border procurement.

According to the OECD Guidelines for managing conflict of interest in the public service (**M101**), “citizens expect individual public officials to perform their duties with integrity, in a fair and unbiased way”. Managing conflict of interests, a significant public concern, is a key component in ensuring integrity and transparency of decision-making by public officials. Matters of conflict of interests are often addressed through guidelines, laws and regulations and codes of ethics.

A further risk for public procurement from corruption relates to bribery (**M102**). An OECD analysis shows that among the proportion of bribes paid, per category of public official, 3% are procurement officials (OECD, 2016f). Moreover, among the bribes in cross-border business transactions involving foreign officials, 57% involved “bribes to obtain public procurement contracts” (OECD, 2016f).

Whistle-blowing systems help detect and prevent corruption in the public sector and can be the starting point for investigations (**M103**). Ensuring the effective protection of whistle blowers encourages accountability and integrity in public institutions (OECD, 2016e). While many countries have translated whistle-blower protection into dedicated law, only a few countries have specifically targeted procurement (e.g. United States).

GP systems should also ensure a competitive market, with two or more bidders that act independently and obtain a public contract by offering the most favourable terms (UNODC, 2013). The need for two or more bidders for a competitive and efficient public procurement process means that anticompetitive practices such as cartels or collusions should be prevented or deterred. Hence countries should put in place measures to avoid or detect bid rigging (**M104**).² In 2012, the OECD Council adopted a Recommendation on fighting bid rigging in public procurement (OECD, 2012). It recommends to “design the tender process” in a way to “reduce the opportunities for communication among bidders, either before or during the tender process” and encourages “procurement agencies to use electronic bidding systems, which may be accessible to a broader group of bidders and less expensive”.³

Corruption can be deterred or prevented in public procurement by, for example, eliminating corrupt companies in the early stages of the procurement process (**M105**), or in the bidding or tendering stages.

In contrast to some other areas of the taxonomy, for measures related to the effectiveness of ethics and anti-corruption systems, what is recorded for countries is the presence of active measures to prevent

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2. The OECD adopted in 1998 a Recommendation concerning Effective Action against Hard Core Cartels (OECD, 1998), which refers, among others, to tenders. It defines a hard core cartel as “an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce”.
 3. The Recommendation also advocates “ensuring that officials responsible for public procurement at all levels of government are aware of signs, suspicious behaviour and unusual bidding patterns which may indicate collusion” so that public officials can prevent and detect such practices of the Recommendation incorporates detailed “Guidelines for Fighting Bid Rigging in Public Procurement”.

and combat corruption. That is, while in other areas the taxonomy is used to identify restrictions, in this instance it is used to identify facilitating measures. This is discussed further in Section 3.

Subgroup	Examples	
M10: Effectiveness of ethics and anti-corruption system	M101: Conflict of interest policies and / or measures in public procurement	In New Zealand, the Audit Office developed specific <i>Good Practice for Purchasing by Government Departments</i> guidelines that sets out the standards for identification and management of conflict of interest.
	M102: Anti-bribery measures in public procurement	In Germany, at the sector level there are “sector agreements such as Business Principles for Countering Bribery in Engineering and Construction Industry” (OECD, 2007).
	M103: Whistle-blowing protection measures in public procurement	In Korea, the Public Procurement Service decided to introduce an ‘Anonymous report system’ to encourage and protect whistle-blowers while their reports would be carried out by an independent and external ombudsman.
	M104: Guidelines on preventing and detecting bid rigging in public procurement	In Chile, the Chile’s Competition Authority, Fiscalía Nacional Económica has issued “guidelines and checklists for preventing and detecting bid rigging in public procurement in 2011”. The guidelines include details on what public procurement officials should do when they encounter suspicious patterns in tendering. (OECD, 2016d).
	M105: Debarment regulations in public procurement	In the European Union, Public Procurement Directive 2014/24/EU excludes companies that were involved in criminal acts such as corruption. ¹

1. Article 57 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC.

3. Methodology

This methodology offers guidance on collecting relevant measures (what, where and how) according to the classification proposed in the taxonomy.

Which GP measures to collect?

When collecting GP-related measures for the taxonomy, the following two main questions may help identify relevant measures:

- *Can this measure have a restrictive effect on cross-border government procurement?*
- *Can this measure have a discriminatory effect on foreign firms or discourage foreign participation in GP?*

The taxonomy covers both measures that have an explicit effect on trade as well as measures that potentially can affect cross-border procurement. Collecting these two types of explicit and implicit measures requires examining primarily *de jure* discriminatory measures covered by the extensive body of laws and regulations concerned directly or indirectly with GP. It also requires extending the investigation to SBDs as a baseline for *de facto* practices of GP rules. The taxonomy covers measures binding any procuring entities such as ministries and agencies, department, commissions, and any other governmental unit that engages in procurement.

When mapping measures to the proposed classification in the taxonomy, there may be overlap between some subgroups. This may be especially true for M1 (market access restrictions) and M5 (conduct of procurement) or M6 (qualification criteria), but other categories may also encounter similar difficulties. In such cases, a further analysis of the measure may be required to determine under which category it should be included. For example, a broad explicit restriction to market access under M1 impedes access to the entire GP market for foreign bidders. However, under M5 a restriction applying to a

specific type of procurement, e.g. selective tendering or direct bidding, does not actually exclude foreign firms from the entire procurement market, rather their access is limited to the other types of procurement.

Where to collect GP measures?

In order to use the taxonomy and identify the relevant explicit and implicit measures that may impede international trade, the methodology is based on different categories of sources grouped into primary and secondary sources. The categories cover the legal framework (from the highest level to detailed regulations and procedures) as well as SBDs and other types of sources that may be useful.

To the extent possible, the official version of laws, statutes and regulations (either on paper or official websites) should be used. It may, in some cases, be necessary to verify whether the measures have entered into or are still in force.

The methodology seeks to provide a wide-array of different sources where measures can be located and identified. When using secondary sources, it is important to always verify and refer to the primary source to verify the information.

Moreover, not all of the categories of sources will necessarily exist for all the countries studied. The pilot exercise highlights that countries use different means to issue their regulations on government procurement. The information needed is thus contained in legal tools that differ across countries, in particular between countries from the common and the civil law systems.

The first four categories listed below reflect Pillar 1 of OECD/DAC Methodology for Assessing Procurement Systems (MAPS), which is composed of four elements of the GP legislative, regulatory, and policy framework: 1) the supreme legal instrument (constitution and procurement laws); 2) regulations and other instruments of a more administrative nature; 3) procurement-related provisions in other national laws; and 4) international agreements.

Primary sources

1. Legislation / regulation on government procurement:

The first type of source to examine is the legislative and regulatory framework that directly relates to the GP system. These sources include national laws covering GP, regulations and other legal instruments (e.g. “decrees”, “national rules”). The constitution may also contain relevant information. It is important to start by examining the highest body of provisions, be they at the constitutional, statutory or regulatory level. Where applicable and necessary, the national body of law should be examined first followed by any subnational level laws.

Civil law countries mainly use statutory law or executive regulation belonging to an official hierarchy of norms with a designated coverage. Common law jurisdictions tend to have a more flexible approach based on the norms to be implemented and policies or guidelines may come from different sources reflecting a more decentralized system (Prime Minister's Office, Ministry of Finance, specific ministries or agencies, etc.).

With respect to SOEs, it will be necessary to look at the specific laws governing these entities to examine the coverage of GP rules that apply to their procurement activities. Attention must also be paid to entities that are excluded from coverage by GP laws and regulations, such as specific ministries or local government.

Examples

- New Zealand, *The Government Rules of Sourcing 2015*
- Tunisia, *Décret n°2014-1039 du 13 mars 2014 portant réglementation des marchés publics*

2. *Legislation / regulation on related topics:*

Legislation and regulations on related topics such as trade law, company law, competition law or investment law should also be considered. While these types of measures may not at first affect GP they may implicitly affect cross-border GP access. Moreover, they sometimes include or refer to official norms *or documents directly related to procurement*.

Examples

- New Zealand, *Land Transport Management Act 2003*
- India, *Companies Act 2013*

3. *Other administrative documents (guidelines, etc.)*

In many civil law countries, official guidelines are drafted by the governments in order to explain and provide additional information on the domestic legal framework contained in national/state law or regulations. When a public entity adopts its own customized procurement rules and procedures, it normally refers to such explanatory guidelines. Guidelines are also widely used in common law countries.

Examples

- India, *Manual of Policies and Procedure of Employment of Consultants 2006*
- Tunisia, *TUNEPS Guide Enregistrement des fournisseurs pour l'utilisation du système d'achat public en ligne 2015*
- New Zealand, *Guide to Supplier Feedback and Complaints 2015*

4. *Trade Agreements*

Trade agreements (e.g. WTO GPA or other regional trade agreements with GP provisions/chapter) to which a country is signatory may also provide a source of information on different measures. For example, information provided in annexes (either by positive or negative lists of sectors or suppliers covered) can help identify the scope of coverage of GP access and conditions. Furthermore, the taxonomy suggests adding specific information to identify if a trade agreement covers a GP measure and with which partners (see section 4).

Example

- WTO GPA Annexes of each signatory

5. *Standard bidding documents (SBDs) and practices*

SBDs are model documents issued by the government or the procuring entity that set out the terms and conditions of procurement and include the invitation to bid. The more harmonized and centralized the procurement system, the easier it is to collect these materials. For example, a country may have distinct SBDs for procuring construction works, goods, and services. On the other hand, in a less centralized system, each procuring entity may issue its own bidding documents which can result in voluminous sources. Specific websites of all national or state entities have to be checked, their “call for tenders” websites being the main source of information, albeit not always easily accessible (some require fees or mandatory registration).

Secondary sources

1. *External Databases on Trade Measures and Trade Restrictions*

Several databases compile different trade measures which may include different government procurement measures (Annex 3). The taxonomy initially drew from existing databases that collected information of GP measures to set up its classification:

- *OECD-STRI* (Service Trade Restrictiveness Index): This covers GP regulations across 42 OECD and partner countries across 18 services sectors.
- *Benchmark Public Procurement (BPP) database from the World Bank Group*: This lists more than 100 indicators to assess the quality of public procurement procedures in over 77 countries.
- *Product Market Regulation (PMR)*: These OECD indicators cover regulations that can prevent foreign firms from participating in the national economy, such as restrictions on FDI and will help to identify such measures for 40 countries.
- *Global Trade Alert (GTA)*: This database provides information in real time on state measures taken in G20 countries during the current global economic downturn that are likely to discriminate against foreign commerce. It contains regulations on GP as of 2008 and covers 25 countries.

These databases can be used as a starting point to collect the data or to complement the collection from other sources, but collection should not be restricted to these databases. Other databases may also be relevant.

2. *Official reports on GP system*

Official reports on the government procurement system in a country can also be used to identify measures or practices. Reports produced by international organizations such as the OECD, the World Bank, the United Nations, or the European Bank for Reconstruction and Development (EBRD) or other governmental agencies (e.g. Sweden National Board of Trade) can be useful sources.

These institutions regularly publish studies on specific countries, including on government procurement. These documents are a useful starting point to collect information, as they often summarize the measures needed. However it is necessary to trace upstream the relevant data / source before recording the measure (and the data / source) in the taxonomy.

Examples

- OECD (2016), *Towards Efficient Public Procurement in Colombia: Making the Difference*, OECD Public Governance Reviews, OECD Publishing, Paris.
- EBRD (2013), *Public procurement sector assessment - Review of laws and practice in the SEMED region* (Egypt, Jordan, Morocco, Tunisia)

3. *Official reports on related topics*

Unofficial reports on related topics are similar to *Official reports on GP systems* except that they gather documents dealing with ancillary topics such as business environment, investment climates, integrity and transparency or energy sectors that could also be relevant to the collection of procurement measures.

Example

- US Department of States Report, *Investment Climate Statements 2015* (available for different countries)

4. *Other reports*

This list of sources is meant to be illustrative and to highlight other types of reports that may be a useful source of information. These may include unofficial reports, analyses by private firms (e.g. accounting, law or consulting firms), or academic papers.

Example

- RSM International, *Doing business in Tunisia 2012*

How to collect information

Drawing on the OECD pilot exercise conducted across six countries,⁴ the methodology can suggest guidelines on how to collect the GP measures. This will help creating databases that are consistent and will facilitate subsequent updates. The approach used in the pilot exercise and described below is by no means exhaustive but rather should be used as a starting point. (Box 4)

The templates for collecting the measures cover : Chapter code, sub-chapter codes, sector/products concerned, the measure, text quotation, date of implementation, name of source (law, etc.), type of sources, internet links (Table 2 illustrates the precise format). This is also in line with the standard format for all measures covered under the MAST project.

- **Sub-chapter, Group and Sub-group.** Once a measure has been identified, it should be recorded in one of the relevant categories of the taxonomy (Section 2).
- **Sectors.** The sector refers to whether the measure applies to goods, services, or construction works. In some cases, the legislation may provide specific information as to the type of services or goods that it covers; for example, it may expressly indicate the ambit of the regulation applies to “electronic products”. In other cases, the sectors are not explicitly identified. When the law is silent on the sector coverage, it can be assumed that the law applies to goods, services and construction works.
- **Description/Summary of the measure.** Users should summarise essential information about the measure.
- **Text of the law (quote).** The full text of the measure in its original language should also be included in a separate entry. This will ensure that the taxonomy remains faithful to the original source, thereby reducing possible losses in translation.
- **Type of source.** Recording the source of a measure permits assessment of the extent of its binding force and relevance. For example whether the measure comes from legislation, executive regulation / decree, or SBDs can provide important information on the strength and the scope of its application.
- **Reference.** Keeping track of the exact reference of the source, law or provision of the law, as the case may be, is necessary for subsequent verification and use of the classification. It also facilitates updates to the measures.
- **Source.** Providing the URL or the exact source supports the reference. It enables verification of the document in which the measure has been identified, and thus verification of the information recorded.

Specificity for collecting measures under M10

The same approach described above will apply to the collection of the measures falling within the four sub-categories under M10 (effectiveness of ethics and anti-corruption measures). However, as noted above, in many cases, it will be the absence of measures that will indicate the heightened risk that the GP system may be affected by corrupt practices.

The main difference between the sub-category “effectiveness of ethics and anti-corruption system” (M10) and the other sub-categories lies in the fact that M10 does not collect measures that have restrictive effects. Instead it captures existent anti-corruption measures covering public procurement that ensure the integrity of the system. Therefore, when collecting measures for M10, there are two questions to ask that focus on anticorruption in the procurement system:

- Are there specific measures that can restrict, deter or address corrupt practices in public procurement?

4. Chile, Colombia, India, New Zealand, South Africa and Tunisia.

- Is procurement covered by general anti-corruption legislation?

When collecting data on anti-corruption measures, it is important to consider both those measures that cover GP and more general anti-corruption measures. While the first focus should be on anti-corruption measures that specifically target procurement, such measures may not always exist. Some areas (e.g. whistleblowing) may be the subject of general, rather than procurement-specific, regulations. In such cases, the suggested approach of the taxonomy will be to include more general anti-corruption laws and regulations but always ensuring that GP falls under the scope of such measures.

One of the main challenges with the M10 category lies in the implementation and effectiveness of anti-corruption measures. For example, a measure on debarment can foster anti-corruption in procurement, yet if that measure results in excluding all potential bidding companies bar one this would adversely affect competition and value for money in public contracts.

Contrary to the methodology for all other taxonomy entries (M1 to M9), which rely on the existence of the measure, risks of corruption will often be revealed by the absence of laws covering bid rigging or conflicts of interest. The absence of such anti-corruption measures or the lack of enforcement can often act as a marker for discrimination and exclusion of foreign capital (or at least can be perceived as such by foreign investors). Therefore, for this section, the taxonomy should record measures at two levels: existing measures, which will be a signal that countries have an anti-corruption framework for procurement, and where the law is silent, will be indicative of how a country's legal framework may deter foreign firms from participating in the tendering process. The proposed methodological approach is to collect all existing measures and to explicitly indicate, where applicable, the absence of specific anti-corruption measures. By doing so, the taxonomy tracks the implicit measures (or lack thereof) that can potentially impede cross-border trade.

4. Data collection for pilot countries

A pilot exercise across six countries was carried out to further test the taxonomy. The pilot countries are Colombia, New Zealand, South Africa, Tunisia, Chile and India. The pilot covers countries from all regions in the world – OECD and non-OECD members as well as GPA and non-GPA members – and countries with different legal frameworks (common and civil law).⁵ Some of the examples used in this report are drawn from this data collection. This exercise aims to test only if and how the taxonomy can be effectively used for data collection. No analysis of the potential restrictiveness of measures collected on trade flows is undertaken.

It is recommended that, once measures are collected and matched with the relevant taxonomy category, the database be reviewed and evaluated by other experts (or a third party) to ensure that the collection exercise is as complete as possible. For the purpose of the pilot exercise, the OECD established a review process to ensure quality control of the collected measures (Box 4). This also permitted a “process endorsement” by the country experts who participated in the project and kindly reviewed the measures collected and provided comments when the measures were not appropriately matched to the taxonomy classification.

Chile volunteered to participate in the project and self-assess its procurement system through the taxonomy. The Chilean GP expert at Chile Compra collected the information after the OECD team provided documents and instructions. The measures for all other countries were collected by the OECD and subsequently reviewed by the legal senior consultant to the OECD (Professor Folliot-Lalliot) before being sent out for external assessment, either by an OECD team (STRI team for Colombia, India, and South-Africa, and SIGMA for Tunisia) or by the country's GP authorities in the case of New Zealand

5. The data collection for those countries are provided for information, but not for declassification, in an accompanying excel document.

(Office of the Government procurement). Following this external assessment, data collection was finalised by the OECD.

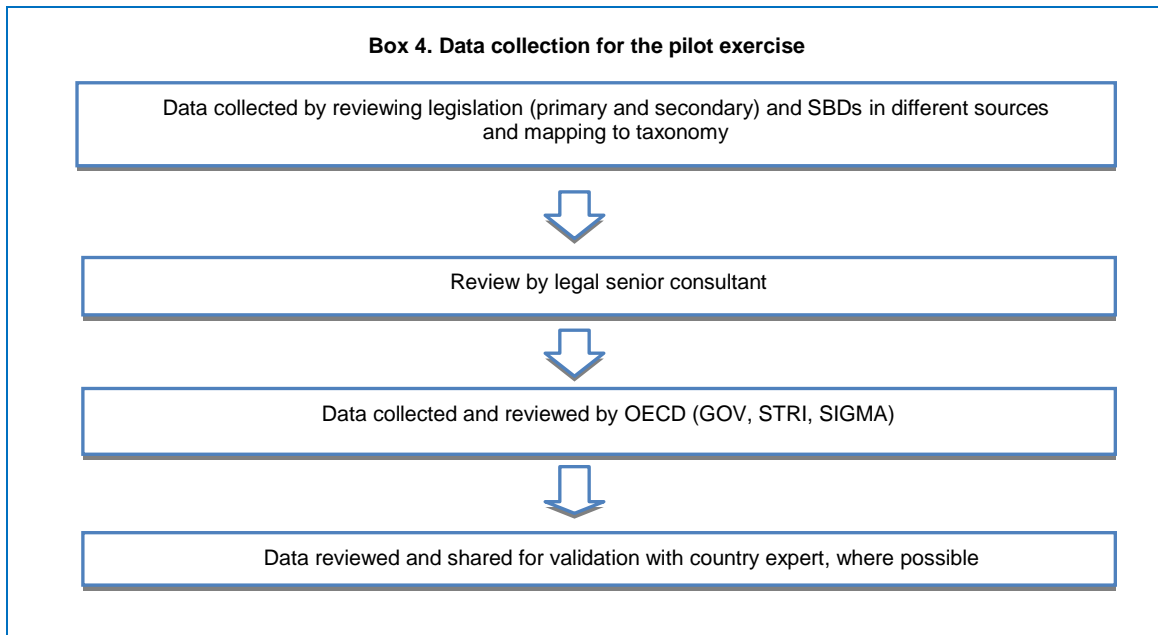


Table 2 illustrates the format used for the taxonomy, setting out the measures and relevant sources.

Table 3 provides descriptive statistics on the measures collected in pilot countries based on the number of measures (there is no weighting or assessment of the degrees of restrictiveness of measures so this should be seen as a snapshot only). For other types of NTMs, the table shows significant heterogeneity in the occurrence of measures across countries, ranging from 95 in India to 4 in Chile. The heterogeneity is even more important when looking at each chapter. While only a snapshot, this suggests that firms face very different challenges in different countries when dealing with GP-related measures.

The M10 measures on anti-corruption have been collected for two countries (Table 4). Note that these numbers reflect the positive presence of anti-corruption measures.

Table 2. Example of the OECD Taxonomy Format

Sub-chapter	Sector / product	Measure	Text quotation	Date of implementation	Data	Type of source	Link (1)
M6: Qualification criteria							
M61: Certification or license criteria	Goods	Mandatory enlistment of Indian agents : it is compulsory for Indian agents who desire to quote directly on behalf of their foreign principals, to get themselves enlisted with the Central Purchase Organisation.	« Enlistment of Indian Agents : As per the Compulsory Enlistment Scheme of the Department of Expenditure, Ministry of Finance, it is compulsory for Indian agents, who desire to quote directly on behalf of their foreign principals, to get themselves enlisted with the Central Purchase Organisation (eg. DGS&D). »	2005	General Financial Rules 2005, Rule 143	Regulation	http://finmin.nic.in/the_ministry/dept_expediture/gfrs/GFR2005.pdf

Table 3. Descriptive statistics for pilot countries

	Chile	Colombia	India	New Zealand	South Africa	Tunisia
M1 Market access restrictions	1	7	5	1	9	2
M2 Domestic price preferences	0	0	4	0	0	1
M3 Local content requirement	1	8	8	0	19	8
M4 Collateral restriction/restrictive effects	0	0	14	1	0	8
M5 Conduct of procurement	0	4	22	5	2	10
M6 Qualification criteria	0	6	14	1	5	9
M7 Evaluation criteria	0	1	6	3	2	5
M8 Review/complaint system	1	1	3	3	0	3
M9 Transparency & Information	1	1	19	6	2	8
Total	4	28	95	20	39	54

Table 4. Anti-corruption measures M10

	Colombia	Chile
M101: Conflict of interest policies and / or measures in public procurement	3	4
M102: Anti-bribery measures in public procurement	3	2
M103: Whistle-blowing protection measures in public procurement	2	3
M104: Guidelines on preventing and detecting bid rigging in procurement	0	1
M105: Debarment regulations in public procurement	2	2
Total	10	12

The statistics also do not provide any indication of the incidence of the measures in terms of goods and services covered, and thus do not provide information on the impact on trade flows. Table 5 shows results from a mapping exercise on four countries: it counts the number of measures mapped to a particular sector. The percentage of measures which were specific to a particular sector is 46% in New Zealand (11 out of 24), 41% in Tunisia, 38% in South Africa and 96% in India. Hence it seems that often half of the measures are not sector or product specific but apply to any goods and services. Moreover, the sectors listed are often broad, in contrast to other types of non-tariff measures which can be mapped to product at tariff line (SPS or TBT).

Table 5. Matching measures with specific sectors/products

New-Zealand	Tunisia	India	South Africa
Goods, services and refurbishment works 10	Works 4	Goods 26	Industry, manufacturing 4
New construction works 1	Goods 3	Services 13	Renewable energy 3
	Goods, services, works, studies 3	Works 13	Automotive 1
	Industry, tourism, craft 2	Manufactured electronic products 9	Construction, metals capital and rail transport equipment and renewable energy 1
	IT industry, software 2	Goods / Services 6	Electricity 1
	Works / goods 2	Manufactured goods 5	Electronics industry 1
	Goods, services 3	Railways 3	Industry 1
	Craft 1	Health products / medicine 2	Medical devices sector 1
	Digital sector 1	Manufacturing 2	Nuclear energy sector 1
	Works/Goods/IT 1	Electricity 1	Pharmaceutical sector 1
		Electronic and IT goods 1	
		Electronics and Information Technology Goods 1	
		Energy 1	
		Goods / Services + Industrial goods 1	
		Goods supplied to Fertilizers, power and petroleum 1	
		Industrial goods 1	
		Khadi and Village industries Goods / Handloom textiles 1	
		Manufactured telecom products 1	
		Manufacturing /textile / electronic hardware and IT industry / agro-related business / tourism / health 1	
		Outsourcing services 1	
		Services / goods - Khadi products, Coir products, handicraft and handlooms 1	
		Small scale industries 1	
11	22	92	15

In addition, the taxonomy proposes adding three other levels of information to all subcategories in additional columns. This information provides helpful complements and context to the categories in the taxonomy and also contributes to coherence with the broader MAST format.

The first addition to the template is to include GPA provisions, which the WTO-GPA team mapped to each measure of the taxonomy. The GPA provision, designed to serve as a benchmark for best practice, is indicated in a column to permit side-by-side comparison between the GPA provision and the corresponding relevant national/subnational measure (a practical example has been tested on Tunisia, where 32 out of the 54 measures collected could be mapped to GPA provisions by category, but without assessment as to how closely they reflected the best practice outlined in the GPA provision).

The second addition is a column that specifies if a threshold applies to a measure and what that threshold represents (in local currency). While there is already an entry “thresholds” (M17) in the taxonomy, which simply indicates if this feature exists, this additional information clearly highlights if measures apply above or below certain thresholds, which could be useful information for negotiations (a practical example has been tested on Tunisia, where only three measures were subject to a threshold, namely M54, M58 and M62).

The third addition is a column that stipulates whether a GP provision in trade agreements means that the measure does not apply to certain partner countries or in certain sectors and for which partners (and sectors). This enhances transparency and helps understanding which measure is covered or excluded from the scope of a trade agreement (a practical example has been tested on New Zealand, which has numerous GP provisions in its PTAs which will affect how the standard measures collected in the taxonomy will - or will not - impact partner’s access to the GP market).⁶

5. State-Owned Enterprises

The OECD taxonomy was initially prepared for the assessment of a country's procurement framework. However, it could equally be used to assess procurement measures at the sub-national level (Sub-federal State, region, municipality or any kind of local government) or those of a state-owned enterprise (SOE).

Given that definitions of SOEs vary across jurisdictions, the GP taxonomy relies on the definition of the OECD SOE guidelines: “Countries differ with respect to the range of institutions that they consider as state-owned enterprises. For the purpose of the Guidelines, any corporate entity recognised by national law as an enterprise, and in which the state exercises ownership, should be considered as an SOE. This includes joint stock companies, limited liability companies and partnerships limited by shares. Moreover statutory corporations, with their legal personality established through specific legislation, should be considered as SOEs if their purpose and activities, or parts of their activities, are of a largely economic nature” (OECD, 2015). In addition, the *SOE Guidelines* (OECD, 2005a) call for the removal of legal and non-legal barriers to fair procurement and for the promotion of ethics in the procurement process.

6. Most provisions remove the ability for parties to impose buy-national, local price preferences or local content requirements for procurement on suppliers from the other parties. Other provisions set out transparency requirements related to the procurement information that must be made public and readily accessible. Some agreements require that the tender information, including specifications, qualification and participation requirements not be designed in such a way as to favour domestic suppliers. Potential suppliers can be barred from participating in procurement markets due to prior corrupt practices. Some agreements also prescribe minimum timeframes for procurement processes, the rules as to when different procurement methods can be used (i.e. open, selective, limited, or multi-use lists), and the independent domestic review processes to be made available for unsuccessful suppliers to challenge procurement decisions.

SOEs have a dual role in the procurement system since they can act as potential bidders or as contracting authorities. Procurement by SOEs can fall under the jurisdiction of Ministries, and even sometimes be governed by the national public procurement legislation. However, they may hold some discretionary power in governing their own procurement processes, which may be outside the scope of national procurement rules. In this situation, they may apply the same commercial procurement rules as any other private company. SOEs can operate as a private company, usually acting as a monopoly in charge of a sector (e.g. energy) or managing utilities in a competitive environment (e.g. ground transportation). SOEs may also participate as candidates to bidding opportunities, which can give rise to concerns about potential unfair advantage but this issue is beyond the scope of this paper.

When SOEs (as purchasers) fall outside the scope of the public procurement rules applying to public authorities (including trade agreements dealing with equal access and national treatment in public procurement), they may seek to set up or reintroduce preferential procurement measures for local operators. Using the taxonomy as a tool for assessing separately a SOE legal framework is thus interesting when an SOE is governed by specific procurement rules.

In procurement, SOEs are often governed by a mixed bag of laws, combining their own rules and general obligations under the country's legal framework for procurement (e.g. those covering transparency and access to documents, judicial and arbitration processes, or anti-corruption). It is therefore necessary to understand the broader legal context for procurement in order to understand which aspects apply to the SOE. It is recommended to first review the GP trade measures in the country using the general taxonomy before looking at a specific SOE in that same country.

In testing the taxonomy on a SOE, the exercise focused on customized rules that derogate from the national procurement law/system with the SOE as a procuring entity.

Box 5. State-Owned Enterprises in South Africa

In South Africa, SOEs provide access to water, electricity, sanitation and transportation, with more than 300 publicly owned SOEs across all levels of government (Sultan Balbuena, 2014). However, the eight most important SOEs in the network industries fall under the jurisdiction of the Department of Public Entities (DPE). The other SOEs are governed by various ministries in the corresponding field, including telecommunications, agriculture, transport, water affairs, defence, trade and industry, minerals and energy and finance (APRM, 2007). Public procurement policies of SOEs fall under the authority of the DPE (Sultan Balbuena, 2014).

The pilot exercise focused on four SOEs in South Africa and also included measures that apply to all SOEs. It confirmed that the taxonomy is well designed to collect measures specific to procurement in SOEs. Table 6 shows that procurement by SOEs tends to feature more explicit types of measure, in particular market access restrictions (M1), than ordinary GP. Nearly half of the measures identified fell under M1: this underscores the relevance of including SOEs in GP access analysis.

The SOEs listed in Table 6 issue their own procurement policies, guidelines, templates, SBDs and codes of conduct, which follow the DPE's general regulations. They are also governed by general procurement regulations. For example, all SOEs are subject to the Competitive Supplier Development Programme (CSDP), which aims to encourage all procuring SOEs to purchase more locally. SOEs thereby reserve their right to alter the tender specifications during the course of negotiations with shortlisted suppliers. The CSDP also requires to identify specific purchase areas and apply to them appropriate procurement strategies, one of them being the provision of transfer of technology. On the other hand, each SOE can adopt specific procurement measures tailored to its market, such as specific supplier development plans to encourage local supply of services, or regulations that stipulate that procurement contracts are to be awarded in a way that creates sustainable jobs for South Africans, and particularly for those who were previously disadvantaged.

Table 6. Taxonomy for SOEs in South Africa

SOE		Transnet	South African Post Office (SAPO)	PetroSA	Eskom	ALL
Sector		Ports, rail and pipelines infrastructure	Postal services, courier, banking	Oil and gas industry	Energy, electricity	
M1	Market access restrictions	6	2	2	3	2
M2	Domestic price preferences					
M3	Local content requirement	6	2	1	1	1
M4	Collateral restriction/restrictive effects			1		1
M5	Conduct of procurement	1	1	2	3	1
M6	Qualification criteria	3	1		2	
M7	Evaluation criteria	1	1	1	4	
M8	Review/complaint system					
M9	Transparency & Information		1			
TOTAL		17	8	7	13	5

6. Conclusion and possible use of the OECD taxonomy

The starting point for this work was the lack of reliable information, at the global level, about government procurement markets and the policies that govern them. Few statistics are widely available to understand the types of procurement measures that governments choose to implement and which can impact trade flows. There is therefore, uncertainty about the degree to which governments actually discriminate in their own markets. Finally, uncertainty about the scale of home-bias procurement creates difficulty in assessing the effectiveness of international agreements in reducing that home bias. One of the goals of the taxonomy project is to set up a framework to generate data in the future that can be used for direct estimates of openness in GP.

There are a range of possibilities for the future application and applicability of this taxonomy. It could be a useful public good for analysts and policy makers working towards reducing the impact of trade barriers in GP and could help inform GP negotiations. It is therefore necessary for the taxonomy to be as comprehensive as possible, to fill existing gaps and to be able to be effectively used by experts and organizations working on GP. This taxonomy could hence particularly fit to the MAST NTM classification.

Once the taxonomy has built up sufficient use, there is potential for it to facilitate further analysis of GP measures. First, the taxonomy could help provide the basis for an assessment of whether a country's public procurement practices were in line with its legislation. Indeed, for several measures in the taxonomy the sources of information lay both in legislation and in practices and sometimes discrepancies between them were identified. Second, the information collected could be useful for conducting "gap-analysis" to assess the extent to which a country's public procurement legislation is in line with certain standard requirements. The GPA would be used as the benchmark for determining best procurement practices (minimum).

Towards a mapping of the OECD taxonomy with the WTO GPA

The plurilateral WTO GPA covers 47 WTO Member governments. Examining the WTO GPA in light of the entries of the taxonomy permits the establishment of a correspondence between the key international obligations under the GPA and the domestic procurement legal framework. This analytical diagnostic could enable countries to thoroughly examine their procurement measures and assess where they stand *vis-à-vis* the GPA. In other words, it provides a picture of existing restrictions that could help shed light on what, if anything, needs to be changed to conform with GPA obligations. This is particularly useful for countries in process of acceding to the GPA. In addition, since many RTAs transpose directly GPA provisions into their GP chapters, it may also be useful in providing countries with a common analytical grid on which to negotiate access the GPA or GP provisions in PTAs. This mapping exercise thus provides an opportunity to enhance countries' understanding of their procurement system as well as the variables and flexibility they need to reach the standards set out in the GPA. Overall, the taxonomy is potentially a significant tool to enhance transparency and information on procurement systems and foster more alignment or coherence.

Many of the explicit measures of the taxonomy correspond to the general principles of non-discrimination and transparency in the GPA. They also relate to the general principles and scope and coverage articles of the Agreement. Conversely, under the implicit measures, there is more direct correspondence between the Taxonomy entries and the GPA provisions that pertain to the qualification and evaluation criteria or the conduct of procurement. Table 7 shows a preliminary general mapping with the main entries of the taxonomy.

Table 7. Examples of an early mapping

Taxonomy entry	Examples of WTO GPA Provisions
Explicit measures	
Market access restriction	Article IV:2 -- Non-discrimination
Domestic price preference	Article IV:2 -- Non-discrimination
Local content requirements	Article IV:6 -- Offsets
Collateral effect	Article IV:7 -- Measures not specific to procurement
Implicit measures	
Conduct of procurement	Article IX:4 -- Selective tendering
Qualification criteria	Article VIII:3 -- Conditions for Participation
Evaluation criteria	Article X — Technical Specifications and Tender Documentation
Complaint/Review mechanisms	Article XVIII — Domestic Review Procedures
Transparency	Article XVI — Transparency of Procurement Information
Anti-corruption	Preamble and Article IV:4 -- Conduct of Procurement

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Annex 1.
OECD Taxonomy

Sub-Chapter	Group	Sub-Chapter	Group
Explicit measures		Implicit measures	
M1	Market access restrictions	M5	Conduct of procurement
M11	To National supplier (incl. national flag carriers)	M51	Design of procurement methods
M12	To Local supplier	M52	Registration
M13	To Joint ventures with national supplier	M53	Shortlist / preselected list of bidders
M14	Access based on reciprocity	M54	Direct/Limited tendering
M15	Commercial presence required	M55	Selective tendering
M16	Exclusion for national security or safety reasons	M56	Securities
M17	Thresholds		M561: tender securities
M18	Other		M562: performance securities
M2	Domestic price preferences	M57	Time period
M21	For National supplier	M58	Other
M22	For Local supplier	M6	Qualification criteria
M23	For Joint ventures with national entity	M61	Certification or license criteria
M24	Other	M62	Set asides for specific groups (SMEs, minorities)
M3	Local content requirement	M63	Past performance requirements
M31	Inputs and data storage (M311: national/ M312: local)	M64	Prior experience requirements
M32	Services (M321: national/ M322: local)	M65	Other criteria
M33	Staff requirement (M331: national/ M332: local)		
M34	Subcontract requirements		

		M7	Evaluation criteria
M35	Offsets (transfer of technology...)	M71	Technical contractual conditions for domestic firms
		M72	Financial requirements
M4	Collateral restriction/restrictive effects	M73	Offer-backs for specific groups (SMEs, minorities)
M41	Tax on procurement from foreign entity	M74	Other restrictive criteria
M42	Barriers to FDI	M8	Review / complaint mechanisms
	M421: constraint on forming joint venture,	M81	Challenge of bidding process or award
	M422 constraint to merger	M82	Choice of complaint forum
	M423: absence of national treatment	M83	Time period
	M424 Closed sectors to FDI	M84	Cost
M43	Restricted eligibility to subsidies and tax preferences	M85	Suspension of bidding process
M44	Transparency measures in investment and Trade	M86	Sanction and remedies
M45	Other	M87	Other
		M9	Transparency and information
		M91	Publication in official gazette or accessible publication
		M92	Accessible e-procurement
			M921 online publication of tender
			M922 online tender process
			M923 online award process
			M924 e-communication
			M925 e-signature
			M926 Other online requirements
		M93	Notification
		M94	Complexity of procurement rules
		M95	Other
		M10	Effectiveness of ethics and anti-corruption system

Annex 2.

Sources to populate the OECD taxonomy classification

This annex shows how existing databases can help filling the taxonomy. Of course, there is no one-to-one matching and a number of judgments were made in mapping one set of data against another for the purposes of guiding future data collection.

Table A2.1 features the concordance table between STRI measures on GP barriers in services and the taxonomy across 34 countries.

Table A2.1. Concordance between STRI measures and GP Taxonomy

STRI code	STRI measure	Code	Group
3_2_1	Public procurement: Explicit preferences for local suppliers	M1	Market access restrictions (all measures except M17)
		M2	Domestic price preferences (all measures)
		M3	M32 (Services)
3_2_2	Public procurement: Procurement regulation explicitly prohibits discrimination of foreign suppliers	M11	Market access restrictions to national companies
3_2_3	Public procurement: The procurement process affects the conditions of competition in favour of local firms (all sectors except construction)	M5	Conduct of procurement
3_2_33	Public procurement: Technical specifications affect the conditions of competition in favour of local providers (only in construction)	M71	Technical specifications in the contract favour domestic firms
3_2_4	Public procurement: Discriminatory qualification processes and procedures (only in construction)	M6	Qualification criteria (all measures)
3_2_5	Public procurement: Contract award on the basis of non-objective/discriminatory criteria (only in construction)	M7	Evaluation criteria (all measures)
3_2_6	Public procurement: Procurement laws, regulations and procedures are transparent (only in construction)	M9	Transparency and Information (all measures)
3_2_7	Public procurement: Foreign suppliers are provided the opportunity to challenge the consistency of the conduct of procurement with the laws and regulations (only in construction)	M81	Challenge of selection or award

Table A2.2 displays the concordance table between GTA measures on GP barriers in goods and services and the taxonomy. The measures in the GTA database are not listed according to a specific nomenclature making the correspondence process more challenging. Below is the concordance for the explicit part of the taxonomy (M1 to M4).

Table A2.2. Concordance between GTA measures and GP Taxonomy

Label of measures in GTA	Code	Group
Buy local policy	M12	To local companies
Buy national policy	M11	To national companies
Restricted public procurement	M15	Commercial presence required
Restrictions on market access for foreign producers	M11	National companies
Exclusion of foreign made and joint-venture made products from government procurement list	M11	To national companies
	M12	To local companies
Ban on certain types of foreign goods from participation in public procurement	M31	National inputs and data storage
Exclusive preference to local firms in public procurement	M12	To local companies
Buy national requirements	M311/M321/M331	National inputs/services/staff
Buy Local requirements	M312/M322/M332	Local inputs/service/staff
Preference margins in the public procurement for local business	M21	For national companies
Local price preference in government procurement	M22	For local companies

Table A2.3 shows the concordance table between BPP indicators (questionnaire) across 64 countries on GP procedures in goods and services and the taxonomy. While there is no clear reference to implicit barriers to foreign entries, it is possible to select indicators that are constraints for foreign firms to participating to the tender procedure: for example, indicators related to the time delay (T), online access (O), application of international standards (I), and facilitation in the complaint process (C). Clearly this source will help for the implicit part the taxonomy.

The OECD-PMR indicators which collect information on barriers to FDI can provide important information on collateral discrimination affecting access to GP markets (Table A2.4).

Table A2.3. Concordance between BPP measures and GP Taxonomy

	BPP questions	Code	Group
C1	Is the procuring entity legally required to publish the award notice?	M91	Publication in official gazette
C2	Are suppliers required to register on a national or local registry of suppliers before they can submit their bids or have their bids reviewed?	M71	Technical specifications in the contract favour domestic firms
C3	Do suppliers have the choice regarding the form of bid security (cash deposit, bank guarantee, insurance guarantee etc.)?	M72	Financial requirements (bonds, warranties...)
C4	Is competitive tendering the default method of procurement?	M5	Conduct of procurement
C5	Does a complaining party have a choice regarding the authority before which to file its complaint (i.e. the procuring entity itself, an independent administrative review body or a judicial court)?	M82	Choice of complaint forum
C6	Are parties that have not submitted a bid allowed to challenge the award of the contract?	M81	Challenge of bidding process award
I1	Do technical specifications follow international or national industrial standards (for instance, reference to standards of the International Organization for Standardization or the United Nations Standard Products and Services Code classification)?	M71	Technical contractual conditions favour domestic firms
I2	Does the regulatory framework require the use of standard tender documents?	M5	Conduct of procurement
O1		M92	E-procurement

Table A2.3. Concordance between BPP measures and GP Taxonomy (cont.)

	BPP questions	Code	Group
O2	Can suppliers access tender documents online?	M92	E-procurement
O3	Can suppliers access guidelines on how to respond to a call for tender on the procurement portal?	M92	E-procurement
O4	Can suppliers submit a question for clarification to the procuring entity on the notice of invitation to tender or tender documents?	M5	Tendering process
O5	Is there a procurement portal in place in your country?	M92	E-procurement
O6	Are the rules and regulations on mechanisms governing bidders' complaints freely accessible on a government-supported website?	M92	E-procurement
O7	Is the procedure to file a complaint listed on a government-supported website?	M8	Review/Complaint System
T1	Does the legal framework provide for a standstill period to allow unsuccessful bidders to challenge the decision between the announcement of the winning bidder and the beginning of the contract?	M93	Notification delay
T2	Is there a minimum legal period of time that the procuring entity must grant to suppliers for them to submit their bids?	M55	Time period
T3	Is there a legal time limit for the first-tier review body to render a decision?	M55	Time period
	Is there a time limit during which the second-tier review body must issue a decision?		
T4	Would the supplier have the possibility, through an online platform (an e-procurement platform or an online payment system) to request a payment online?	M55	Time period
01		M92	E-Procurement

Table A2:4 Concordance between PMR measures and GP Taxonomy

Indicator	Question text 2013	Code	Group
Barriers to FDI	Is foreign ownership constrained by allowing only joint ventures in at least one sector?	M421	Constraints on joint venture
	Is foreign ownership constrained by restricting mergers and acquisitions in at least one sector?	M422	Constraints on merger
	Are foreign suppliers subject to regulations which do not recognize national treatment principles?	M423	No recognition of national treatment principles
Barriers to trade facilitation	Are regulations systematically published or otherwise communicated to the public in a manner accessible (e.g. in a foreign language) at the international level?	M44	Transparency regulations in Investment and Trade
	If yes, are there inquiry points for information on the operation and enforcement of regulations?	M44	Transparency regulations in Investment and Trade
	Are there any specific provisions which require or encourage regulators to use internationally harmonized standards and certification procedures?	M6	Qualification criteria