

**Dispute Settlement Provisions in PTAs:  
New Data and New Concepts**

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Dispute settlement occupies a central role within the study of international institutions. The fact that state parties have signed a treaty or joined a regime signifies not so much an end but a beginning. Whether one conceptualises the important post-treaty (or post-accession) process as compliance or enforcement, the question of how future disputes between state parties will be resolved is crucial. In fact, within the economic realm one would be justified in claiming that academic research on the World Trade Organization (WTO) is dominated by studies of its noteworthy dispute settlement system (see Bernauer et al. 2012). If one looks more narrowly at something like bilateral investment treaties (BITs), perhaps the best analogy for preferential trade agreements (PTAs), it also becomes clear that how treaty-related disputes will be resolved is the most important aspect of the agreements (Allee and Peinhardt 2014).

PTAs increasingly dominate the trade policymaking landscape as they continue to be negotiated and their numbers rise. The increasing acknowledgement that PTAs are not only prevalent, but that they vary in important ways, has resulted in the current wave of scholarship on PTA design (e.g., Dür et al. 2014; Hicks and Kim 2012, Kucik 2012). Recent studies have focused on certain design features of PTAs (such as depth and flexibility) and how these features interact (i.e., depth with flexibility). What has received relatively less attention, however, is how states decide on the architecture of dispute resolution provisions. This is surprising given the importance of dispute settlement mechanisms in other international institutions (e.g., WTO, the European Union (EU), regional human rights bodies) as well as the greater-than-realised use of

dispute settlement mechanisms in regional PTAs.<sup>1</sup> Dispute settlement design in regional PTAs was actually one of the first aspects of PTAs to be unpacked and explored (McCall Smith 2000). Yet despite one other attempt to update this early study (Jo and Namgung 2012) and valuable descriptive contributions from international law scholars on variation in dispute settlement processes (e.g., Chase et al. 2013, Donaldson and Lester 2009, Porges 2011), we argue that our understanding of dispute settlement provisions (DSPs) in PTAs needs substantial revisiting, both in terms of conceptualisation and data collection.

This chapter aims to broaden our conceptualisation and to illuminate the richness of the agreements' DSPs using a much more complete universe of PTAs and showcasing far more variables than have been employed in earlier analyses. In the remainder of the chapter we first discuss how the IR literature has conceptualised dispute settlement solely in terms of 'legalisation,' thus misclassifying dispute settlement in PTAs into a binary categorisation between legal versus diplomatic. Second, we present new empirical evidence on the considerable variation in DSPs across PTAs, relying on novel data from the design of trade agreements database (Dür et al. 2014). We show data on 30 dispute settlement variables, for nearly 600 PTAs, and discuss patterns and trends. In the third and final section, we draw upon these new data and put forward general concepts that might characterise DSPs, such as enforceability, settlement promotion, and (dispute settlement) flexibility, as well as expanding upon concepts such as delegation.

### **A. Previous research on PTA dispute settlement**

Since the end of the 1990s, scholarship on international institutions has often focused on the question of how 'legalised' international cooperation has become over time (Abbott et al. 2000).

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<sup>1</sup> PTA dispute settlement procedures have been actively used across the Americas, for instance. The North American Free Trade Agreement (NAFTA)'s dispute settlement mechanisms related to investment, trade remedies, and disputes generally have been used multiple times, and many trade-related conflicts in Mercosur and the Andean Community, and to a lesser extent the Central American Common Market, have been resolved through the organisations' legal dispute settlement procedures. Additionally, and by contrast, the EU has addressed several disputes with its trading partners through formal consultations, the first step of formal dispute settlement procedures. Similarly, multiple European Free Trade Association (EFTA) disputes have been resolved at the level of Committees, which is part of the agreement's dispute settlement procedures.

This is a logical starting point because the rich legalisation framework emphasises treaty design elements such as obligation, precision, and delegation that can be linked to in some way to DSPs. The result is that virtually all scholarship that attempts to understand dispute settlement in PTAs thinks in terms of a single dimension of legalisation. That is, is a DSP ‘legal’ or is it instead merely ‘political’ or ‘diplomatic’ (McCall Smith 2000, Jo and Namgung 2012; also Chase et al. 2013, Porges 2011).

The literature on the ‘rational design’ of international institutions (Koremenos et al. 2001) likewise has informed existing scholarship on dispute settlement in indirect ways that reinforce the focus on a single dimension of dispute settlement. Two of the design features, ‘centralisation’ (Koremenos et al. 2001) and ‘delegation’ (Koremenos 2007) can be used as ways to classify DSPs in PTAs or other agreements (see Allee and Peinhardt 2014). Despite the differing nomenclatures, the conceptual focus remains on a one-dimensional conceptualisation of whether disputes shall be settled by the parties informally or are to be addressed more formally using a (legal) third party (see Koremenos 2007).

One major challenge lies in moving these conceptualisations from abstract theory to empirical reality. One limitation is the lack of rigorous empirical testing of these otherwise thoughtful conceptualisations of international institutions (Duffield 2003; also Allee and Peinhardt 2014; Copelovitch and Putnam forthcoming). Moreover, the empirical tests we observe tend to measure dispute settlement in a fairly simplistic way. For instance, Koremenos (2007) conducts a basic multivariate regression analysis to predict whether or not a random sample of all international treaties contains a DSP. This is somewhat problematic in the PTA context, since nearly all PTAs, like most other important treaties, contain such a provision. The more important question, then, is what is contained in those provisions?

By far the most important study that informs this chapter is that of McCall Smith (2000), who was the first to open up the black box of DSPs in PTAs. He focuses on 62 regional trade pacts and differentiates levels of legalism ranging from diplomatic to legalistic types. He collects data on five specific elements, all of which are tied to the dimension of legalism. The first three emphasise the existence and basic form of third-party, legal dispute settlement:

- i. Are states able to utilise legal, third-party dispute settlement without being blocked (third-party review)?
- ii. Is the judgment by a third party is binding (third-party ruling)?
- iii. Is the body is ad hoc or standing (judges)?

The fourth variable captures whether actors beyond the state have standing in legal proceedings (standing), and the fifth captures whether rulings have direct effect (type of remedy).

It is important to note that Smith's fourth and fifth variables seem less relevant today and in the more general context of PTAs (as compared to RTAs). One reason is that regional agreements have become highly integrated political and legal entities, and thus direct effect is a common feature of regional agreements. Furthermore, relatively few PTAs provide private standing and when they do, it is typically for investment arbitration, which almost always is derived from a BIT as opposed to a PTA. Interestingly, a more recent study, which builds directly on Smith, effectively collapses his five-factor indicator into three elements. Following McCall Smith's (2000) lead, Jo and Namgung (2012) similarly code:

- i. whether third-party review is allowed (third-party review),
- ii. whether the review has any legal effect (bindingness of decisions), and
- iii. whether there are institutionalised bodies such as standing courts (institutionalisation).

From this coding they derive three degrees of legalism (low, medium, high) – maintaining the same overall dimension as Smith – and put forward an expanded theoretical discussion and conduct more extensive quantitative tests.

McCall Smith's study, and Jo and Namgung's more recent update, are essential contributions and directly inform our efforts. However, we identify some possible limitations of their approaches. The first is that the three common variables (third-party review, bindingness, institutionalisation) are highly correlated and overlap in important ways. For example, a system with a standing body, which captures the degree of institutionalisation, certainly comes with the right to third-party resolution. At the same time, this standing body is almost certain to render verdicts that are binding. A second concern is with the concept of 'bindingness' as a variable, which we suggest is actually more of a constant. From a legal standpoint, we would expect any ruling that arises from an arbitral or adjudicatory body to be legally binding on the parties unless explicitly stated otherwise. As we discuss later, we find virtually no cases in which the parties agree that a panel ruling is not binding. A third issue is with the exclusive focus on legalism. Although this concept is undoubtedly important, we believe its overuse obscures other important concepts and other components of the dispute settlement process. A related concern is with the overall lack of variables that are coded. Coding data is a time intensive process, but we suggest that more than three, or even five, variables are relevant to DSPs. A fifth and final issue is the

narrow scope of the cases in Smith's study, which is not necessarily a criticism of Smith's work but rather a concern about generalisability. RTAs are clearly important in international affairs, but there are only 62 of them in Smith's study. Jo and Namgung (2012) broaden the focus to all PTAs and analyse 221 of them, yet a pervasive concern is that they, like the rest of the literature, are missing a significant number of PTAs in their samples.

Recent descriptive studies from legal scholars address some of these gaps. Some research has looked comparatively at DSPs in PTAs from a primarily legal viewpoint (Donaldson and Lester 2009; Morgan 2008; Porges 2011). Porges (2011), for instance, discusses a broad set of DSPs in PTAs while continuing to conceptualise dispute settlement along a unidimensional scale from diplomatic to legal (with a distinction among the latter made between ad hoc and standing arbitration). The most noteworthy recent study is an exhaustive WTO working paper from Chase et al. (2013). The majority of their paper is a careful cataloguing of all of the major DSPs in PTAs. Despite the richness of their study, we see two possible limitations of their approach. First, at a broader analytical level, they default to thinking about PTAs on a familiar three-part continuum from 'political' to 'judicial', in which nearly all recent PTAs are classified in the middle category of quasi-judicial. Second, they consider an incomplete set of 226 PTAs – only those notified to the WTO – compared to the nearly 600 for which we have compiled and analysed data. Nevertheless, all of the aforementioned valuable studies push scholarship on PTAs, and institutional design, in a useful direction.

## **B. Dispute settlement in PTAs: The data**

Our new data on DSPs in PTAs is part of a larger project to systematically collect detailed data on PTAs (Dür et al. 2014). The dataset currently includes 589 PTAs concluded between 1947 and 2009. The collection of agreements includes customs unions, free trade agreements that promise to liberalise substantially all trade, and partial trade agreements. In the following section we present data focused specifically on DSPs; that is, those variables that capture the ways treaty-makers foresee the solution of future disputes when they arise. Significant steps have been taken to ensure the validity of these data.<sup>2</sup>

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<sup>2</sup> All coders are trained in advance to ensure appropriate knowledge of the coding scheme. Given that many of the original treaty texts are in languages other than English (e.g., Spanish, French, Arabic, Russian) we relied on students with the necessary language skills to code non-English language treaties. All variables on dispute settlement were double-coded during two waves of coding. Inter-coder reliability has been found to be high: 92.2% is the average

Our data on dispute settlement currently includes 30 variables related to how dispute settlement is designed across PTAs. These capture a multitude of dimensions ranging from types of mechanisms envisaged, the use of multiple fora, procedural issues, the scope of dispute settlement (i.e., exclusions and exceptions), and instruments to improve implementation (i.e., sanctions). Sizeable literatures across international law and international relations inform the coding scheme, as do discussions with legal experts and trade negotiators. Our coding overlaps to some degree with the taxonomy offered by the WTO Secretariat in its recent staff working paper (Chase et al. 2013). A distinguishing feature of our research on dispute settlement is that we move beyond the single dimension of *legalisation* and instead consider how the dispute settlement components can be characterised by the degree to which they: aid *enforceability*, entail greater *delegation* (as compared to *control*), specify *flexibility*, or *promote overall settlement* of the dispute (see the final section).

### I. *Dispute settlement provisions*

Digging into the data, the first question we explore is whether DSPs are typically included in PTAs. That is, are there any explicit rules to regulate potential conflicts that may arise out of the interpretation of treaty and, more importantly, parties' behaviour? The answer is a resounding yes.

**Table 12.1: PTAs with a dispute settlement provision**

Provision	Number	As a % of all PTAs
Dispute settlement	488	83

Table 12.1 shows that more than 83% of PTAs (488 of 589) in our dataset include a provision on dispute settlement, and among the newest and most relevant PTAs, this number approaches 100%.<sup>3</sup> More than 97% of PTAs in the 2000s, for instance, explicitly mention how

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overlap for the variables. A referee (one of the authors) has acted as a judge regarding which coding prevails in the cases of different interpretation by coders.

<sup>3</sup> Often there is an explicit article on dispute settlement, yet in some cases the relevant language can be found in chapters on committees (e.g., 'joint committees') that are mandated to manage the implementation of the treaty obligations or to serve as a forum in case of disagreement or dispute.

disputes should be resolved, whereas only 5 of 212 fail to include a DSP. The percentages are similarly striking if one considers ‘meaningful’ agreements; that is, PTAs that move in at least modest ways towards trade liberalisation. Using a simple, 0–7 index of PTA ‘depth’ drawn from Dür et al. (2014), we see that among PTAs at or above modest levels of depth (2 or higher), more than 98% contain a DSP. In contrast, almost all (more than 90%) of the PTAs without a DSP are concentrated at the bottom of the depth scale, with either a score of 0 (40 of 73) or a score of 1 (26 of 73). To sum up, PTAs almost universally specify some type of rules for settling disputes – which means attention now turns to understanding important differences between these rules.

## *II. Types of dispute settlement*

### 1. Consultations

As a starting point, nearly all DSPs encourage parties to engage in *consultations* at the first stage of a dispute. In total, 450 PTAs specify a consultation mechanism for responding to problems and disputes arising from the agreement (see Table 12.2), which represents more than 76% of all PTAs in our dataset, and more relevantly, 92% of all PTAs with a DSP (450 of 488). Almost universally, then, having the parties discuss the issue without formal third party involvement is therefore seen as an integral first step in the dispute settlement process – an attempt to exchange viewpoints and potentially resolve all or at least some issues before the dispute goes to a more formal channel. Oddly, many of the 38 PTAs that do not explicitly mention consultations, and instead directly guide members towards legal dispute settlement, are customs unions. Given their otherwise extensive dispute settlement operations, it seems that in many of these cases consultation is probably seen as too obvious an initial step to need to put it into the DSP explicitly.

**Table 12.2: PTAs with a consultation provision**

Provision	Number	As a % of all PTAs	As a % of PTAs with a DSP
Consultation	450	76	92

## 2. Mediation

An obvious next place to look is for language on what we label as mediation, which entails bringing in a third party to assist the parties in reaching a negotiated solution.<sup>4</sup> Mediation is the first of four types of third-party dispute settlement, and the only one that relies on assisted negotiations instead of legal proceedings. Eighty-eight PTAs include a mediation provision, always in conjunction with a consultation provision. Sometimes the treaties list titles of leaders of international organisations to serve in their capacity. Table 12.3 depicts the frequency of mediation as well as the percentage of DSPs that include mediation (along with similar data on the three other types of third-party settlement, which we will discuss shortly). Provisions usually stress that mediation is undertaken voluntarily, can be terminated at any time, and that positions taken by the parties during these proceedings shall be confidential and without prejudice to the rights of either party in any further proceedings under these procedures.

**Table 12.3: PTAs with various types of dispute settlement**

<b>Provision</b>	<b>Number</b>	<b>As a % of PTAs with a DSP</b>
Mediation	88	18
Arbitration	224	46
Standing body	31	6
Reference to external body	113	23

In terms of patterns, mediation is a relatively new innovation. Although mediation in PTAs dates back to 1969, half (50 of 100) of PTAs with mediation provisions are in the last five years of our dataset (2005–2009). This upsurge is due not only to the preponderance in the dataset of PTAs signed in the past 10–15 years, but perhaps also to increasing emphasis in legal circles on alternative dispute resolution (ADR) and the prominence of mediation in other domestic and international settings. There are important regional differences. European states rarely rely on mediation procedures, yet by contrast, mediation is a prominent tool in PTAs in Asia (22 of 67; 33%) and the Americas (38 of 143; 27%) as well as treaties involving the US. It is

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<sup>4</sup> This category also includes ‘good offices’ and ‘conciliation’.



possible that the motivation might differ across these treaties. In the US treaties it might reflect a general trend in US legal circles towards alternative dispute resolution or multiple dispute options, while in Asian agreements it might be interpreted as an ‘Asian way’ of attempting to settle conflicts without resorting to legalism. An important caveat, which we discuss later, is that some of these same treaties (Asia, Americas, US) also include resort to legal dispute settlement – an indication that dispute settlement venues are not zero-sum and the multiple types of dispute settlement often co-exist.

### 3. Arbitration

The first, and most frequently specified, of three legal dispute settlement options is arbitration, typically using ad hoc panels of three or sometime five panellists. Any of the parties may request the establishment of an arbitration panel, and its establishment cannot be blocked by the defending party. Usually, the award (decision) by the panellists is final and binding for the parties. Arbitration provisions can be quite lengthy and may include specific information, for example, on time frames, the selection of panelists, rules of procedures, cost distribution. A total of 224 PTAs include an arbitration provision, which represents 38% of PTAs and 46% of DSPs (see Table 12.3). Arbitration dates back to the very earliest PTAs, but has become a more common feature in recent years. About 20–25% of PTAs before 1995 include an arbitration provision, a figure which jumps to 35–40% for the years between 1995 and 2004. Since 2005, nearly 80% of PTAs have specified ad hoc arbitration as an option.

The patterns across the globe are notable, and mirror those for mediation. Seventeen of 18 PTAs involving the US include arbitration, as do two-thirds of North–South PTAs – a far greater percentage than for North–North and South–South agreements. Forty-five per cent of PTAs in both Asia and the Americas include arbitration provisions, and cross-region agreements include ad hoc arbitration 55% of the time. Half of EU agreements include arbitration. The laggard this time is Africa, since only 2 of 35 African PTAs allow for arbitration.

### 4. Standing body

In contrast to the more common option of ad hoc arbitration, some PTAs also specify the creation of a standing dispute settlement body to which disputes are delegated. These agreements generate some of the most notable dispute settlement bodies around the globe, like the European Court of Justice, Court of Justice of the Andean Community, East African Court of Justice, or the

Caribbean Court of Justice. Only 31 PTAs, however, specify the creation of such bodies (see Table 12.3). The clearest pattern is that standing bodies emerge out of regional economic integration agreements. Twenty-seven of the 31 standing bodies are spawned by regional efforts at greater economic cooperation.

In general, the patterns for standing body creation are very different from those for arbitration as well as the other third-party options. In this case, Northern (6 of 44; 18.2%) agreements are more likely to generate standing bodies than Southern agreements (6.4%) or North–South PTAs (2.1%). Noteworthy is the trend towards adoption by African countries: PTAs in Africa have by far the highest rate (11 of 36; 31%) of standing body creation. All of this probably reflects that agreements among certain subsets of states reflect those states’ desires to build deeper institutions among regional or similar peers.

#### 5. Reference to external body

A final scenario is one in which PTAs encourage parties refer to an outside dispute settlement mechanism, body, or court. A total of 113 PTAs do so (all of which also include consultation), which represents just under 20% of PTAs and more than 23% of those with DSPs. By far the most common external body specified is the WTO (and the former General Agreement on Tariffs and Trade (GATT)) and its dispute settlement mechanism (DSM). This reference can take different forms, such as suggesting that certain WTO provisions and their interpretation through WTO DSMs (e.g. on anti-dumping) be incorporated in the PTA obligations, or encouraging the use of WTO dispute settlement in certain issue areas. Some PTAs also make a reference to the use of other treaties’ dispute mechanisms to which contracting states are party (which can also mean other PTAs). In earlier PTAs, such as the Benelux Economic Union of 1958, reference is made to the International Court of Justice (ICJ), for instance.

There are some interesting and familiar patterns in terms of reference to an external body. Not surprisingly, there is an upward trend over time, driven largely by the creation of the WTO DSM as an obvious outside option from 1995 onward. A total of eleven PTAs in force before 1994 made reference to external dispute settlement institutions (to the ICJ or the GATT), whereas since 1994 an average of 11 PTAs annually have specified that disputes could be referred to bodies like the WTO DSM. Similar to ad hoc arbitration, reference to an external body is more likely among North–South agreements (55 of 141; 39%) and within US agreements (16 of 18).

Among regions, about one-third of cross-regional agreements include these possibilities, as do approximately one-quarter of PTAs in the Americas and Asia.

## 6. Overlap

The preceding patterns raise the important issue of overlap in types of dispute settlement. For each of the four types of third-party dispute settlement (mediation, ad hoc arbitration, creation of standing body, and reference to external dispute settlement body), Table 12.4 shows how many PTAs that include a given type of dispute settlement also allow for each of the other types of dispute settlement.

**Table 12.4: Overlap between types of dispute settlement**

Provision	Number that include the provision	Number (percentage) that also include:			
		Mediation	Arbitration	Standing body	Reference to external body
Mediation	88		81 (92%)	6 (7%)	70 (80%)
Arbitration	224	81 (36%)		7 (3%)	108 (48%)
Standing body	31	6 (19%)	7 (23%)		2 (6%)
Reference to external body	113	70 (62%)	108 (96%)	2 (2%)	

One clear pattern is the considerable overlap between arbitration provisions and those on mediation and reference to an external body. PTAs that allow for mediation also specify the option of ad hoc arbitration 92% of the time (81 or 88 agreements) and frequently also make reference to external bodies (80% of the time). Similarly, nearly all PTAs that refer to an external body such as the WTO allow for ad hoc arbitration (108 of 113; 96%). Arbitration provisions are by far the most popular dispute settlement option in PTAs, occurring in 224 agreements, yet a

sizeable number of PTAs that allow for arbitration also specify mediation (36%) as an option or refer to an external body (48%). These patterns suggest that for many PTAs, both mediation and legal dispute settlement will be an option, and multiple venues for legal dispute settlement may be available.

A second clear pattern in Table 12.4 is that standing bodies tend to ‘stand alone’ compared to other types of PTA dispute settlement. Only 7 of 224 PTAs that specify ad hoc arbitration also provide for settlement before a standing body. Or, fewer than one-quarter (7 of 31) of the agreements that create a standing body also allow for ad hoc arbitration. Thus these two types of dispute settlement – ad hoc arbitration and the creation of an internal, standing body – function more as substitutes than as complements. Moreover, only 6 of the 31 also allow for the relatively common option of mediation (see Table 12.4). In fact, not only is there little overlap between the creation of a standing body and other options, but the discussion in the preceding pages suggests very distinct patterns for PTAs that create standing dispute settlement bodies. Overall, then, PTAs that channel dispute settlement to an internal, standing body look quite different from the majority of PTAs that rely on other, overlapping types of dispute settlement.

## 7. Legal dispute settlement

Table 12.4 also suggests the need to consider the total number of PTAs that allow for any type of *legal dispute settlement*; that is, which allow ad hoc arbitration, the use of a standing dispute settlement body, or suggest WTO or other outside dispute settlement mechanisms. In total, 252 PTAs contain a provision allowing some type of legal dispute settlement. Once again, put in the proper context, this number appears even more sizeable. Overall, since 1990, between 5 and 20 PTAs that include legal dispute settlement have been signed annually. Moreover, among PTAs of moderate or higher (greater than or equal to 3) integration on the 0–7 depth index noted earlier, five-sixths include at least one form of legal dispute settlement. Thus, one conclusion is that to really understand contemporary dispute settlement, one must unpack the ‘legalisation’ that characterises many DSPs in PTAs to uncover what options are available, how they are chosen, the rules governing proceedings, and how awards are implemented. Most of the following variables, then, use the total number of PTAs with legal dispute settlement (252) as the reference point or baseline.

## II. *Forum choice*

The earlier discussion about overlapping legal dispute options raises the issue of forum choice, particularly as related to intra-PTA mechanisms and outside options (e.g., Busch 2007; Pauwelyn 2009). Building on the discussion in the previous section, we identify 109 PTAs that contain an internal dispute settlement mechanism (through arbitration or a standing body) and also specify an external option such as the WTO DSM. The question becomes one of whether and how these agreements address the fact that they specify multiple legal fora for settling disputes? An initial answer is seen in the number of PTAs that include a provision on the choice of forum. A sizeable number of agreements, 104 in total, include such a provision (see Table 12.5). This suggests that treaty designers are quite conscious of the multiple-fora issue and attempt to address it with provisions on forum choice.

**Table 12.5: Forum choice in PTA dispute settlement**

<b>Provision</b>	Number	As a % of PTAs that specify multiple venues
Forum choice	104	95
Restrictions on multiple fora	100	92

Digging a little deeper, it is interesting to note that all 104 of these agreements allow the complainant to choose the forum, seemingly giving the complainant state significant power to choose a favourable venue. However, nearly all PTAs with forum choice provisions (100 of them, see Table 12.5) also place restrictions on the use of more than one forum at any given time. Thus in the overwhelming majority of potential forum shopping situations, the forum choice provision significantly curtails the complainant's ability to 'shop' between the PTA and an external venue in a manner that might be disproportionately advantageous.

## III. *Proceedings*

We now explore several variables that address how dispute settlement proceeds after it has been set in motion, an aspect of DSP design that also has been largely overlooked. All of these 'proceedings' variables are depicted in Table 12.6.

### 1. Joint committee action

The first issue is whether there is a provision allowing for a Joint Committee comprising representatives of PTA partners to address the dispute before the establishment of the arbitral panel. This can be thought of as an additional procedural step between consultations and the actual panel process, the intent of which is to resolve the dispute without litigation. All in all, 138 PTAs include this type of joint committee measure, which represents about 55% of agreements with some form of legal dispute settlement (see Table 12.6). There is relatively little variation in the inclusion of this provision over time, and it does not correlate highly with depth or type of agreements. Most notable is the relatively high rate of inclusion in US PTAs (14 of 18).

**Table 12.6: Features of dispute settlement proceedings**

<b>Provision</b>	Number	As a % of PTAs with legal dispute settlement
Joint committee action	138	55
Chairman selection (through consultations)	114	45
Chairman selection (by third party)	89	35
Chairman selection (by lot)	69	27
Chairman selection (jointly by arbitrators)	35	14
Interim report	74	29
Separate opinions	28	11
Time limits	203	81
Refer to MAS (total)	106	42
Refer to MAS (pre-award)	76	30
Refer to MAS (post-award)	104	41

## 2. Chairman selection

At the outset of any arbitral proceedings, the selection of the chairman becomes important because arbitration panels take decisions by majority and the chair often plays a pivotal role. In ad hoc arbitration with a three-person panel, a common scenario is for each side to appoint one panellist and then there must be some process for determining who will serve as the additional, (seemingly neutral) panellist who will also chair the panel. There are four potential, not mutually exclusive, methods of doing so:

- i. existing arbitrators select the chairman *jointly*,
- ii. chairman is selected *by lot*,
- iii. chairman is selected by *third party*, and
- iv. chairman is selected through *consultation* of the parties.

The basic data for each of the selection methods, shown in Table 12.6, illustrates that ‘consultation’ (114) is the most common method of chairman selection, followed by ‘third party’ (89) and ‘by lot’ (69), with ‘jointly by arbitrators’ (35) being the least common. In total, 169 agreements contain a provision on chairman selection. All four methods are evident throughout the time period covered by our dataset. If anything, we observe a pattern of third-party selection becoming less common and selection by lot and through consultation becoming relatively more prevalent. Since chairman selection is a consequential and politically-charged decision, there may be some learning going on which is leading designers take this power out of the hands of individuals actors and international organisations (third party) and instead allow it to be determined randomly (by lot). Among the cross-sectional patterns that stand out, the EU tends to use third-party selection, whereas the US, and agreements across the Americas, tend to specify first consultations and then selection by lot (in that order). Some potential explanations for these patterns would be possible regional diffusion and/or a US aversion to delegating authority to international organisations.

Multiple methods of chairman selection can be specified, and the combinations and sequencing are quite interesting. Overall, the three most common outcomes for this variable are:

- i. consultations, then by lot (27% of cases in which a method is specified),
- ii. consultations, then by third party (20%), and
- iii. third party only (16%).

The first two outcomes reflect that selection by consultations is the starting point in 60% of instances for selecting arbitral chairmen. It is viewed as an initial and hopefully amicable attempt, which if unsuccessful, is followed by a more definitive method of selection, either by drawing lots or allowing a third party to choose. Interestingly, among the four options, lot and third party exhibit the least overlap and seem to function as ‘last resort’ substitutes.

### 3. Interim report

Once the legal proceedings are well under way and arguments have been presented, the next question is whether the panel issues some type of interim (draft, initial) report prior to issuance of the final report. Such a report conveys an initial determination of whether measures are inconsistent and whether the party has failed to meet its obligations, resulting in the nullification or impairment of benefits otherwise due. It potentially helps parties to learn from and possibly correct parts of the report and to prepare for the overall decision that is now expected. In general, this *interim report* variable is the first of two indicators of whether additional, clarifying information is conveyed during the proceedings. A total of 74 agreements call for this type of interim report, which represents approximately 30% of PTAs with legal dispute settlement (see Table 12.6). Interim reports are a relatively new phenomenon, with all but three instances occurring since 1995, possibly reflecting the influence of the WTO DSM or NAFTA, both of which also provide for interim panel reports. Another clear pattern is that interim reports occur overwhelmingly in connection with arbitration (72 of 74 positive codings) rather than standing bodies (two positive codings). There is also a heavy regional concentration: all but one of the cases of an interim report provision occur in Asian, Americas, or cross-region PTAs. In contrast, none of the 134 European PTAs (including but not limited to EU agreements) allows for interim reports.

### 4. Separate opinions

Whether the arbitration process allows separate opinions is the second of two variables that capture whether additional information is provided during the dispute settlement proceedings. This variable is coded as present when members of the panel are allowed to form and draft separate, anonymous opinions that are to be included in the panel report. Twenty-eight agreements allow for separate opinions (see Table 12.6). This relatively rare provision is found only in agreements that specify ad hoc arbitration. The lack of separate opinions in standing



bodies is not particularly surprising because many standing bodies are based on the EU model, and the ECJ does not allow separate opinions and the EU is suspicious about allowing separate opinions in WTO dispute settlement (Flett 2010). As such, separate opinions are the exclusive domain of cross-region (8) and Americas (20) agreements, although only a minority of US PTAs (4 of 14) includes them.

## 5. Time limits

The next variable captures whether the DSP in a given treaty sets time limits for the dispute settlement process, whether overall and/or for particular stages (i.e., pre- and post-award). The specification of time frames encourages a (comparatively) faster dispute settlement process and should aid enforceability of obligations. A total of 203 agreements specify time limits (see Table 12.6). Some familiar, emerging patterns are evident. Region–region and region–country agreements include them at a higher rate, as do North–South agreements and those across Asia, the Americas, and multiple regions. This time the EU, and European agreements more generally, tend to include them with greater frequency, as does the United States.

## 6. Mutually agreeable solution (pre-award, post-award)

The final set of variables captures how many times the parties evoke the concept of reaching a ‘mutually agreeable solution’ (MAS) throughout the text of the dispute settlement chapter, both before and after the award is rendered. A high count is an indication of the parties’ commitment to reaching an amicable settlement to the dispute throughout the entire litigation process. A total of 106 agreements (out of 252 with some form of legal dispute settlement) make some reference to trying to conclude a MAS, even while the litigation process is pending or an award has been rendered (see Table 12.6). Table 12.7 further shows that the total number of MAS references is quite high, ranging from 1 to 11 per agreement, with a relatively uniform distribution between 1 and 5 references. We further distinguish between references to amicable solutions prior to the award and after the award.<sup>5</sup> Slightly more agreements mention post-awards MAS (104) than similar, pre-award settlements (76), although more than two dozen agreements make four or more of each type of reference (see Table 12.6).

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<sup>5</sup> More information on the coding can be found at [www.designoftradeagreements.org](http://www.designoftradeagreements.org).

**Table 12.7: Number of references to mutually agreeable solutions (MAS)  
(by number of agreements)**

Provision	Number of references									
	1	2	3	4	5	6	7	8	9	10+
<b>Total MAS</b>	14	16	18	13	11	5	10	9	5	5
<b>Pre-award MAS</b>	29	19	9	12	5	2	0	0	0	0
<b>Post-award MAS</b>	24	24	25	18	6	5	1	0	0	1

There are very clear regional patterns for these MAS variables. Agreements in Africa (0) and Europe (3), even those that include legal dispute settlement, rarely evoke MAS. In contrast, more than half of the PTAs with some legal dispute settlement process within Asia (20 of 31; 65%) and the Americas (38 of 69; 55%) do so. PTAs in the Americas focus mostly on pre-award MAS references (38 agreements) rather than post-award MAS (22 agreements). All Asian agreements with MAS (20 agreements) include the language for the pre-award phase; in fact, 16 of the 20 of them make three or more references to pre-award MAS. Yet 18 of these 20 also include post-award MAS references, suggesting that Asian PTAs encourage parties to reach an amicable solution throughout the dispute settlement process.

#### *IV. Implementation*

In thinking about implementation of arbitration and adjudication awards, the first issue to consider is whether an award is legally binding – which is the default – or whether the treaty specifies that rulings are explicitly non-binding. As noted earlier, the question of whether a ruling is legally binding has been an integral part of previous, legalisation-based conceptions of PTA dispute settlement.

According to our data, 224 PTAs, which includes the overwhelming majority of those that contain legal dispute settlement (89%), have a provision on bindingness. Among these 224 cases, a near-universal 222 (99%) of them include language that explicitly states that tribunal decision

are binding.<sup>6</sup> In fact, there are only two agreements that explicitly state that a panel or tribunal ruling is not binding (Jordan–US 2000 and Israel–US 1985). Moreover, for the relatively few instances in which there is no provision at all on bindingness, one would consider any legal award to be legally binding based on customary international law. Thus, by our count, in only two cases, representing less than 1% of all PTAs, should one consider any outcomes not to be binding. We therefore conclude that the past focus on bindingness is misguided, and that efforts should be directed elsewhere, such as at the procedures for actually carrying out and enforcing awards.

### 1. Sanctions provision

Next we consider the various sanctioning tools that are available in the case of non-implementation of a legal award. Sanctions are a prominent and largely unexplored component of PTA dispute settlement design, one which has attracted great attention in the WTO context (Bown and Pauwelyn 2010).<sup>7</sup> As a starting point, the data reveal that 163 PTAs have a sanctions provision that spells out the rules governing how retaliation can be used to try and address non-compliance with an award (see Table 12.8). This represents more than 65% of agreements that contain legal dispute settlement. Overall a sanctions provision is present in nearly 60% of agreements reached during the past decade. This may be partly attributable to a learning or diffusion effect from the prominent WTO sanctions mechanism. Yet sanction clauses are not entirely a new phenomenon: they are included in PTAs dating back to the 1950s, and 40 agreements signed before the WTO came into being included a sanctions provision. As for other patterns, sanctions provisions appear to a notable degree in all types of agreements, but are virtually absent in North–North agreements (13 of 186, or 7%) as compared to North–South and South–South agreements. They also appear to a greater degree in US agreements (16 of 18), cross-region agreements, and PTAs across all regions except Africa.

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<sup>6</sup> While in some treaties the language unambiguously states that the awards are final and binding, many PTAs are worded less strongly, saying that the parties shall agree on the resolution of the dispute, which shall be in conformity with the determinations and the recommendations of the panel. Nevertheless, we interpret both types of obligations as binding.

<sup>7</sup> In international law, the expression more widely used for sanctions is retaliation. We use these expressions interchangeably.

**Table 12.8: Sanctions in PTA dispute settlement**

<b>Provision</b>	Number	As a % of PTAs with legal dispute settlement
Sanctions provision	163	65
Retaliation determined jointly by parties	91	36
Retaliation chosen by complainant	152	60
Retaliation chosen by third party	115	46
Same-sector retaliation	88	35
Cross-retaliation	83	33
Monetary sanctions	20	8

## 2. Selection of sanctions

Perhaps the single biggest issue within sanctions-provision design is who determines the appropriate level of retaliation? Across PTAs we see three options, in which retaliatory sanctions are: i) determined jointly by the two parties, ii) chosen by the complainant, and iii) chosen by a third party.<sup>8</sup> Each method appears with some regularity, as each is included in 91, 152, and 115 agreements, respectively (see Table 12.8). Moreover, the options are not mutually exclusive (see below on sequencing). In terms of geographical patterns, cross-region and pan-American PTAs allow the complainant to choose sanctions at a slightly higher rate. North–South (83 of 141; 59%), EU (30 of 67; 45%) and US (16 of 18; 89%) PTAs also allow complainants to choose sanctions in the large majority of cases, although US agreements also typically allow for joint (13 of 18; 72%) and third-party-determined (13 of 18; 72%) sanctions as well.

Table 12.8 suggests that when one particular method is specified for ‘who chooses’, it is also highly likely that either or both of the other methods of selection will be specified, thus raising the issue of sequencing. Most PTAs with sanctions provisions (114 of 163) also specify an order. A large majority of US agreements (14 of 18; 78%) contain language on sequencing, as

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<sup>8</sup> The third party is usually the original panel that is being reconvened.

do sizeable numbers of North–South (53 of 141; 38%), Asia (21 of 67; 31%), cross-region (46 of 155; 30%), and Americas (41 of 146; 28%) agreements.<sup>9</sup> The most common sequencing pattern is that after receiving the award the parties jointly try to come up with mutually accepted compensation in case of non-implementation; if this fails, the complainant may choose the level and type of retaliation. Likewise, if the defendant party considers the amount to be disproportionate, the original panel is often called upon to make a recommendation regarding the right value.

### 3. Forms of sanctions

We now consider the different forms of sanctions that may be used. The most common type of retaliatory measure is called the ‘suspension of benefits of equivalent effect’, which means that the complainant is encouraged to suspend benefits (by raising tariffs) in the same sector (goods or services). Retaliation in other sectors (cross-sector) also may occur if same-sector retaliation is impractical or likely to be ineffective. Despite this conceptual distinction, in reality agreements that specify one form almost always also specify the other. Table 12.8 shows that 88 PTAs include same-sector retaliation and 83 of them also include cross-sector retaliation, which is never specified in isolation. Considering these two forms as a ‘package deal’, we see an increase in the specification of both in recent years, which is a logical outgrowth not only of the greater number of agreements, but the increasing diversification of retaliation described earlier. Among various patterns, the most notable is that cross-retaliation is most common in Asian PTAs – perhaps surprisingly – with 21 of 58 (36%) allowing for it.

Monetary sanctions, in contrast, are far less common. They are included in only 20 PTAs (see Table 12.8), and are almost exclusively found in US and EU agreements. In fact, two-thirds of US agreements specify the use of ‘monetary sanctions’, which comprises sixty per cent of the universe of cases. In EU agreements, this type of sanction is used in intra-EU integration, but not in EU agreements with outside parties. In a number of agreements monetary sanctions are related to labour and environmental obligations, and so-called financial compensation payments may go into a special fund for addressing regulatory concerns.

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<sup>9</sup> The EU, for instance, includes sanctions in just under half of its agreements. But it tends to specify that the complainant should choose the appropriate level of sanctions, and thus it has less need to include language on sequencing given its emphasis on a single method of selection.

### V. *Exceptions and exemptions*

Nearly 100 PTAs also include some form of exception and/or exemption in terms of what can and cannot be subject to dispute settlement (see Table 12.9). There are two types of exceptions: negative exemptions, in which the areas not subject to dispute settlement are explicitly listed, and positive inclusions, in which specific mention is made of the areas for which there is a theme-specific dispute settlement mechanism. Overall some form of exception is included in 96 agreements, with 62 PTAs including positive and negative exceptions and 34 specifying only one type. Most agreements with positive inclusions specify one unique area, whereas negative exceptions specify one, two, three, or four areas with roughly equal regularity. Areas most commonly excluded from dispute settlement are trade remedies, safeguards, some forms of services, temporary entry of workers, sanitary and phytosanitary measures and technical barriers to trade, competition policy, and investment. As to positive lists indicating substantially different dispute settlement procedures, investment stands out. Also, labour and environment-related cases often receive a special process.

**Table 12.9: Exceptions in PTA dispute settlement**

<b>Provision</b>	Number	As a % of PTAs with legal dispute settlement
Any type of exception	96	38
Positive and negative	62	25
Positive only	17	7
Negative only	17	7

Exceptions tend to be included in US (16 of 18), North–South (51), cross-region (43), Americas (36), and Asian (16) agreements. In terms of the first two of these, one important question is whether the exceptions are inserted by Northern states like the US to exclude certain sensitive sectors from dispute settlement. This also raises the broader issue of whether these exceptions, which tend to coincide with strong sanctions and a choice among legal venues,

represent a weakening of the ability of states to enforce obligations in the PTAs. Future work is needed to investigate these dynamics more thoroughly.

### C. Conceptualising dispute settlement in PTAs

We now take a step back to contemplate what these variables can tell us about the role and function of dispute settlement, in PTAs and other types of agreements. Although interesting in their own right, these 30 variables can serve as building blocks for higher-level theorising and corresponding empirical measures. We identify several theoretical concepts to which our data can speak, many of which are the subject of lively debates in the dispute settlement literature in international relations and beyond. For instance, selected variables from our dataset can be combined to tell us something about: the degree of *flexibility* within dispute settlement, the amount of *delegation* of dispute settlement authority states are willing to grant, or the degree to which the DSP facilitates *enforcement* of treaty obligations or promotes an effective *settlement* of the dispute. In the following section we put forward five theoretical concepts, discuss their relevance, and identify the variables from our data that reflect each concept. The ultimate goal is to generate composite empirical measures of important concepts that can be used – by us and by others – to test important arguments within international relations, economics and law.

#### I. Delegation

In existing work on dispute settlement, one sometimes encounters the concept of ‘delegation’, a subcomponent of legalisation (Abbott et al. 2000) that has been applied previously to dispute settlement design (e.g., Allee and Peinhardt 2010, Koremenos 2007, Koremenos and Betz 2013). Delegation entails placing authority for settling disputes into the hands of a third party that pursues resolution according to defined processes and following legal principles. In simple terms, any PTA that contains a provision on arbitration, creates a standing body, or makes reference to the WTO or ICJ is effectively ‘delegating’ dispute settlement authority. Yet as our data show, a more complete way to think about delegation is to consider not just whether legal dispute settlement is allowed, but rather how much power or authority is given (‘delegated’) to a third party throughout the process.

This expanded notion of delegation speaks directly to realism-inspired debates about state power as well as scholarship on principal-agent approaches to international organisations. The

frequency of delegation in PTAs calls into question realist assertions that states will be hesitant to delegate authority to third parties to resolve interstate disputes. Perhaps a better course of action, then, is to examine how much (as opposed to whether) control over important issues is ceded by states and which states are most likely to delegate. Moreover, as applied to dispute settlement in trade institutions (e.g., Elsig and Pollack 2014), the principal-agent approach suggests that designers are aware of the possible lack of control that delegation through legal dispute settlement might entail. When countries are concerned about the distributional consequences of third-party treaty interpretation, we might expect to see *ex ante* control (selection of panellists or court members) or on-the-spot control mechanisms (e.g., interim reviews) become more important. In principal-agent terms, then, what is important is not just the absolute ‘size’ of delegation, but the relative ‘size’, which is affected by the amount of control designed into the treaty.

**Table 12.10: Conceptualising degree of *delegation* in PTA dispute settlement provisions**

Concept	Variables
DELEGATION (simple)	<i>Legal dispute settlement</i> (yes)
DELEGATION (expanded)	<i>Legal dispute settlement</i> (yes) <i>Chairman selection</i> (third party or lot) <i>Sanctions selection</i> (third party)

Drawing upon our new variables, we propose a more comprehensive empirical measure to capture the amount of *delegation* in PTAs. It builds upon a simpler notion of delegation, reflected in the extant literature, which captures whether the PTA allows for any type of delegation (ad hoc arbitration, reference to external body, standing body). The expanded conceptualisation also considers: whether the states or a third party select the panel chairman, and whether the states or a third party choose the level of sanction. All of these variables capture whether third parties hold primary authority for important decisions or whether states maintain a degree of control over the process.



## II. *Information provision*

The next two concepts reflect important theoretical debates about the role of dispute settlement within international cooperation. A common distinction, which we follow here, is that dispute settlement institutions serve either to provide information to the states parties (e.g., Johns and Rosendorff 2009) or as enforcement devices (e.g., Downs, Rocke and Barsoom 1996, Yarborough and Yarborough 1997). They might also perform both functions (Sattler and Bernauer 2010) or a type of hybrid function (Johns 2012), perhaps in a manner that addresses incomplete contracts (Maggi and Staiger 2011). Nevertheless, this distinction between ‘information’ and ‘enforcement’ is also at the heart of long-standing debates on treaty compliance.<sup>10</sup>

From the information provision perspective, the dispute settlement process is designed to provide new information to the parties and clarify state obligations. In this respect, the DSM is seen, first and foremost, as a source of new knowledge. It might provide clues to the parties to help them resolve a current dispute, but it can also provide information about how courts deliberate and how they balance different legal principles in general (Pauwelyn and Elsig 2013). This may affect the cost–benefit calculations of actors when launching new cases and influence how parties comply with treaty obligations overall. While the content of legal opinions conveys direct information from courts to states, the design of the DSM with regard to certain variables gives indirect clues about the possibility of increasing the amount and quality of information.

**Table 12.11: Conceptualising amount of *information provision* in PTA dispute settlement provisions**

Concept	Variables
INFORMATION PROVISION	<i>Legal dispute settlement</i> (yes) <i>Interim report</i> (yes) <i>Separate opinions</i> (yes)

A few variables in our dataset capture the extent to which the DSP in an agreement truly fulfils an *information provision* function. For a DSP to be considered one that encourages the

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<sup>10</sup> See von Stein (2013) for an excellent overview.

provision of a large amount of information, a necessary condition is that it must include some type of legal dispute settlement, since the arbitration or adjudication body is a necessary actor in information provision. One important variable that indicates information provision is whether the treaty allows for an *interim report* prior to the issuance of any final report. The interim report serves primarily an informational function by providing facts to the parties about the panel's initial judgments, to which they may respond. A second variable that reflects this information provision function is whether the agreement allows members of the panel to form and draft *separate or concurrent opinions* that are to be included in the panel report. This indicates the extent of unanimity of the panel members and also provides additional viewpoints on the matters in question apart from what is provided in the panel report. A common thread between the interim report and separate opinion is that although neither has any legal effect, they may have an impact due to the factual information they provide.

### *III. Enforcement*

A quite different perspective on DSMs is to think of them primarily as enforcement devices. The enforcement concept as applied to international agreements is often linked with formalised arguments about the need to include strong, legal enforcement as a way to ensure compliance with deep, meaningful treaties (e.g., Downs, Rocke and Barsoom 1996; Yarbrough and Yarbrough 1997). The purpose of a DSM, then, is to ensure that state signatories fulfil their trade obligations as enshrined in the trade agreements. Any resulting 'disputes' will revolve around claims by one signatory or member (a complainant) that another is not meeting its obligations. The litigation process and the prospect of it working swiftly and effectively by inducing the non-complaining party into compliance is what constitutes enforcement. From an enforcement standpoint, PTAs should work well when they provide complainants with the tools to push their claims and make important decisions, and facilitate a relatively swift resolution to the dispute.

**Table 12.12: Conceptualising level of *enforcement* in PTA dispute settlement provisions**

Concept	Variables
ENFORCEMENT	<i>Legal dispute settlement</i> (yes) <i>Forum choice</i> (yes) <i>Restrictions on multiple fora</i> (no) <i>Sanctions selection</i> (complainant) <i>Sanctions provision</i> (yes) <i>Same-sector retaliation</i> (yes) <i>Cross-retaliation</i> (yes) <i>Monetary sanctions</i> (yes) <i>Chairman selection</i> (by lot, third party) <i>Time limits</i> (yes)

Once again, the precursor to all of this is that the PTA must allow for some type of legal dispute settlement, or ‘enforcement process’. Assuming this exists, several additional features would reflect a strong enforcement provision within the PTA. The first is when the complainant is explicitly given power over *forum choice*, namely when the treaty specifies that the complainant is allowed to choose the venue. This would be particularly true when there are *no restrictions on multiple fora*, although as noted above this is relatively rare. Retaliatory sanctions are another powerful tool that can enhance enforcement. In the simplest terms, enforcement in a PTA will be more effective, *ceteris paribus*, when the agreement contains a *sanctions provision*. The strength of enforcement might also depend in part on who selects the retaliatory measure. When the form of *retaliation is selected by the complainant*, and to a lesser extent by a third party, we expect the enforcement effect to be greater due to the potential for larger sanctions. Furthermore, sanctions devices that allow for tangible, cost-imposing measures to be levied should enhance enforcement even more. These would include the potential for *same-sector and cross-retaliation* as well as *monetary sanctions*. Overall, treaties that proscribe the use of sanctions give the complainant the legitimacy to drive the enforcement process, and greater choice in the use of sanctions allows the complainant to use targeted sanctions that will increase the likelihood of compliance. Likewise, enforcement might also depend on who chooses the all-important panel chairperson. Unless the treaty specifies selection by lot or third-party, the respondent may block the composition endlessly. A final component of enforceability would be the ability to carry out the process in a relatively swift manner, since one of the greatest

impediments to enforcement is the ability to delay. PTAs that impose *time limits* reflect agreements that are more easily enforced.

#### *IV. Settlement promotion*

The next concept captures the idea that the purpose of a dispute settlement mechanism should be to promote the effective *settlement* of a dispute; that is, to specify a set of rules that are most likely to resolve the disagreement in a way that is acceptable to both parties. This may seem obvious, yet the idea of a DSM trying to promote settlement should be contrasted with the previous ideas about a DSM as an enforcement device or as an institution that provides information – neither of which necessarily promotes settlement. The key distinguishing feature of a settlement-promoting DSM is that the rules are agnostic about how and when the dispute is settled as long as an effective and acceptable resolution is reached. States may wish to specify a range of options and pathways to a resolution because they have limited knowledge about how future dispute settlement fora will work. Having recourse to multiple fora, both internal (consultations, mediation, arbitration) and external (e.g. WTO, ICJ), will provide the greatest opportunity in the future to seek out settlements in the venue that seems most appropriate to the parties at the time a particular dispute occurs.

A core component of this idea of the DSM as a settlement-promotion device is the ability of the parties to reach an informal or negotiated settlement at any point in time. Most disputes, trade or otherwise, are resolved through a negotiated settlement, even well after legal proceedings have been launched. These ‘out of court’ or ‘mutually agreeable’ settlements may be preferable because they reduce tensions and consume fewer legal resources. Past research tends to label these settlements as ‘diplomatic’ or ‘political’ and to consider them the opposite of ‘legalisation’ in terms of dispute settlement design. But an amicable settlement can happen at any time; indeed, many WTO disputes are settled in this manner, often well after the formal ‘legalised’ process has begun. Therefore, we consider the potential for such settlements at all stages of dispute settlement.

**Table 12.13: Conceptualising *settlement promotion* in PTA dispute settlement provisions**

Concept	Variables
SETTLEMENT PROMOTION	<i>Types of dispute settlement</i> (number specified) <i>Joint commission</i> (yes) <i>Pre-award references to MAS</i> (number) <i>Post-award references to MAS</i> (number) <i>Total references to MAS</i> (number)

The starting point for measuring the extent to which the DSP in a PTA *promotes settlement* of disputes is to count the *total number of types of dispute settlement* that are specified (consultation, mediation, ad hoc arbitration, standing body, mentioning of external bodies), which captures the range of dispute resolution options that may be pursued. Within the context of legal dispute settlement, another important variable is whether the agreements specify a *Joint Committee* or *Association Commission* composed of high-ranking officials of the PTA member governments to address the dispute before the establishment of a legal panel. This provides for a mandatory step during which an acceptable resolution might be reached. The final collection of variables is for the number of references in the DSP to *mutually agreeable solutions, pre-award, post-award, and overall*. These are perhaps the most direct and most novel indicators of the degree to which the parties have tried to design a mechanism that promotes the settlement of disputes.

#### V. Flexibility

The final way to conceptualise dispute settlement in PTAs is to contemplate the degree to which the contents of the DSP provide flexibility to the parties. The general idea of flexibility has been central to studies of trade agreements (Kucik and Reinhardt 2008, Pelc 2009) and other types of international agreements (Helfer 2013, Koremenos et al. 2001), with the basic idea being that providing some flexibility or ‘wobble room’ to the parties will help them to make costly commitments. In relation to trade agreements flexibility is typically portrayed as tools ‘...that allow states to anticipate and respond to domestic contingencies or to adjust their policies for other purposes without violating the terms of an agreement’ (Baccini et al. 2014). When applying the concept of flexibility to dispute settlement, we see two interesting flexibility tools. One way to think about flexibility in dispute settlement is in terms of the number of ways that

states can pursue a resolution to the dispute, or the number of types of dispute settlement. This notion of ‘procedural’ flexibility was discussed in the previous subsection as part of the concept of settlement promotion, but could also be incorporated here as part of the general idea of flexibility.

A second way to conceptualise flexibility, and the one we emphasise here, is to consider which areas are excluded from (or included in) dispute settlement. Flexibility understood as exemptions may be demanded by import-competing firms, which, if they cannot derail the agreement, may wish to exclude a certain area from dispute settlement (e.g., standards, trade remedies). To sum up, flexibility provisions help maintain the overall stability (and balance of commitments) and are conducive to concluding the agreements.

**Table 12.14: Conceptualising *flexibility* in PTA dispute settlement provisions**

Concept	Variables
FLEXIBILITY	<i>Dispute settlement exceptions</i> (yes) <i>Negative list of exemptions</i> (yes) <i>Count of negative exemptions</i> (number) <i>Positive list of exemptions</i> (yes) <i>Count of positive exemptions</i> (number)

To examine the degree to which the DSP of a PTA provides this type of *flexibility*, we turn to our new variables on exceptions within dispute settlement. All three *exceptions* variables should be relevant. In the simplest terms, whether a PTA lists any *exemptions* at all provides an initial indicator of flexibility. The next is whether there is an explicit list of *negative exemptions* from dispute settlement (and if so, how many?). The removal of certain areas from dispute settlement, particularly sensitive ones, would reflect greater flexibility in dispute settlement. Finally, a *positive list of inclusions in dispute settlement*, either in the form of explicit mentions or theme-specific dispute settlement mechanisms, might also indicate flexibility to tailor dispute settlement towards specific issue areas.

## **D. Next steps**

The most obvious immediate step is to engage more fully the operationalisation of the aforementioned five concepts – for their ultimate inclusion in empirical tests. The list of variables associated with each concept is currently somewhat broad, and it is possible that some variables might be deemed to reflect the overarching concept more closely than others. In terms of measurement, many of the variables that comprise the concepts discussed previously are indicator variables, which makes using simple, additive indices an obvious option. More nuanced methods of variable aggregation, such as types of factor analysis, are also an option, but this is complicated by the binary form of many of the variables.

Another issue is to determine how any empirical strategy maps on to the most obvious differences between treaties in terms of their DSP. It is apparent that a major dividing line exists between those now rare PTAs that have no legal dispute settlement whatsoever and the increasing number that specify some form of legal dispute settlement, which to us are by far the most interesting and relevant. One way to this is with various two-stage models. The first step would be to predict which PTAs are in the first group rather than in the second group, which is likely to be a simple function of treaty depth and time. This initial ‘sorting’ would allow us to concentrate on the richer and more important variation among treaties in the second group. In other words, it would allow us to focus on the unpacking of ‘legalisation’ in dispute settlement. Most of the variation we have discussed in this chapter, for both variables and the broader concepts, is variation among PTAs with some form of legal dispute settlement.

Another important task is to contemplate possible explanations for some of the variation we see across both variables and concepts. We are particularly interested in explaining variation across DSPs in PTAs in terms of the amount of delegation, information provision, enforcement, settlement promotion and flexibility. One starting point is to probe further some of the differences we uncovered when examining variation across individual variables. There we identified some initial patterns across different types of treaties and treaties with varying degrees of depth. Regional and North–South differences were also apparent. These could reflect several mechanisms, including but not limited to regional norms, diffusion, or contracting problems among dissimilar actors. Country-specific patterns for the US, and to a lesser extent the EU, might also play a role, and may be distinct from or a part of the same dynamics that characterise the regional variation.

There is also room for the inclusion and refinement of other dispute settlement concepts beyond the five presented in the second half of this chapter. One possible addition is the idea of whether the DSP contains elements that make dispute resolution *adversarial* as compared to more cooperative or *amicable*. This overlaps somewhat with the concept of *settlement promotion*, yet we consistently see that some dispute rules reflect a more adversarial approach whereas others attempt to have the parties cooperate on issues such as the selection of sanctions and panel chairmen. Another direction is to think in terms of *interest group* influence, or a *pluralist* conceptualisation of DSPs. If we take a political economy view of PTA design, we might expect to see DSPs reflect the influence of powerful interests (in powerful countries), which should be apparent in variables such as dispute settlement exceptions.

### **E. Conclusion**

Our goals in this chapter were threefold. The first was to consider dispute settlement across a wide range of PTAs, which we are able to do by being part of a broader effort to systematically collect data across a much more comprehensive collection of agreements (Dür et al. 2014). The second was to collect data on a wide range of variables from all aspects of the dispute settlement process. We compiled data on thirty variables, many of which have been acknowledged as important but had been neglected from an empirical standpoint. The third goal was to reorient the conceptual discussion away from a myopic emphasis on legalism and instead to consider what other concepts might characterise the DSPs of PTAs. We believe this ‘unpacking’ of legalisation is an important part of the future research trajectory, particularly as more DSPs are being used with greater frequency.

Overall this work on dispute settlement is part of a more general move to identify differences among seemingly similar treaties such as PTAs. This trend towards differentiation is likely to continue and to spread to the study of other types of international agreements. For us, distinguishing between DSPs in PTAs is more than an empirical endeavour or data collection exercise. Indeed, we view this collection and presentation of data as a first step towards thinking about how PTAs are designed, and linking those differences in the practical negotiation of treaties to academic debates about the purpose of dispute settlement institutions in international affairs.



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