Negotiating the New Normal

Measures to Improve Transparency and Cooperation in Government Procurement & Trade in Times of Crisis

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Abstract

The COVID-19 global pandemic has spurred the disintegration of an already frustrating climate for international trade cooperation. The demand for COVID-19 related goods and services has brought to the forefront the crucial challenge experienced by governments having to manage tensions between the sometimes divergent commitments to protecting national health interests and international trade cooperation. This paper highlights government procurement as an underutilized potential lever for addressing the challenge of equitable access to essential medical goods in times of crisis. By reference to policy responses collected by the Global COVID-19 Policy Response (GCPR) research initiative, the paper questions the exclusion of government procurement provisions in trade agreements in times of crisis. The authors argue for (i) the development and inclusion of Model ‘Crisis’ Procurement provisions in trade agreements and (ii) the leveraging of technological solutions like the GCPR in order to improve government transparency and cooperation in times of crisis.
Executive Summary

COVID-19 has catalyzed what is arguably a ‘wild wild west’ in the international trade of medical goods. Countries with varying degrees of success have quickly put measures in place to address the urgent demand for medical goods, including export restrictions and lowering of import tariffs. By July 2020, ninety-four (94) countries had put in place export curbs and restrictions as a result of the pandemic. These measures mostly related to medical goods, but some related to food where there was little correlation with shortage of supply. Some East African Countries such as Uganda and Kenya imposed import restrictions on second-hand clothing including PPE because of the threat of viral spread.

Notably, government procurement activities during COVID-19 were more opaque and difficult to source and track, in large part due to the lack of international and domestic regulation of emergency procurement. This combined with the general paucity of reliable statistics and a lack of an internationally agreed methodology for the collection and recording of public procurement data produces a huge procurement data-gap which stymies rigorous policy assessment.

This paper highlights government procurement as an underutilized potential lever for addressing the challenge of lack of transparency and equitable access to essential medical goods in times of crisis and seeks to make the case firstly for the inclusion of Model ‘Crisis’ Procurement Provisions in trade agreements and secondly for leveraging technological solutions to improve transparency and cooperation.

The central thesis of the paper is that emergency public procurement modes which allow for speed, simplicity and flexibility without entirely compromising transparency and accountability can be a lever and not an obstacle to cross-border access to essential medical goods in times of crisis. To make this case, the authors examine government trade and procurement policy responses and actions collected in the Global COVID-19 Policy Response (hereinafter GCPR) Database, and analyse the history of the inclusion of public procurement in trade agreements. Our two-part solution builds on the recommendations and in particular the research and analysis done by Evernett on the trade in medical goods during COVID-19, Kutlina-Dimitrova on government procurement data, trends and protectionist tendencies, the Open Contracting Partnership Recommendations for transparency in emergency procurement, the OECD taxonomy of measures affecting trade in government procurement processes, and the UNESCAP publication in partnership with GOOGLE on recommendations for governments desirous of implementing artificial intelligence in public service delivery.

Part 1 provides the context for the paper, highlighting some of the experiences and approaches taken with specific reference to COVID-19-related trade and procurement measures in the EU, United States, Canada, Brazil, Latin America & Caribbean and the East African Countries of Kenya, Rwanda and Uganda referencing both primary and secondary data sources and data collected by the GCPR research initiative from March 11th 2020 to July 24th 2020. In Part 2 we provide an overview of the literature outlining the checkered history relating to the inclusion of
government procurement provisions in trade agreements and we query firstly, the rationale for the suspension of all procurement rules in times of emergency and secondly, the exclusion of government procurement provisions in trade agreements in times of emergency. In Part 3 we argue for the development and inclusion of Model ‘Crisis’ Procurement Provisions (Appendix XI) to be included in the menu of possible provisions to be used by governments in negotiating or renegotiating PTAs. In Part 4 we explore the leveraging of technological solutions like the Global COVID-19 Policy Response (GCPR) Research initiative as mechanisms for addressing the procurement data-gap and improving government transparency and cooperation in times of crisis.

We acknowledge that our proposed Model Crisis Procurement Provisions contradicts the dominant emerging narrative that in times of crisis, procurement processes present a stumbling block rather than an enabler of the free flow of essential goods. Nonetheless, we believe that the plethora of country procurement systems which engage best practice emergency procurement systems, provides a basis for our recommendations.

It is conceded that the data to support recommendations herein is inadequate and this substantial procurement data-gap has been referenced in the paper. Whilst real time trade policy and commercial data are readily accessible, procurement policy and commercial data are not due to the lack of harmonized standards and common protocols for the categorization of procurement data. Thus, the demand for courageous experimentation and exploration of new models without a rigorous evidence-basis is paramount.

Our recommendations are not stand alone proposals. Systems of monitoring and mechanisms for enforcement must be developed, while technological solutions to identify, track and coordinate the distribution of essential goods and the development of trans-national collaborative procurement mechanisms such as the novel types of cross-border administrative collaboration developed by the EU and CARICOM will continue to be essential. That said, we argue that the inclusion of Model ‘Crisis’ Procurement Provisions along with the leveraging of technological solutions like the GCPR to address the procurement data-gap are small incremental steps that can advance our collective ability to enhance transparency and cooperation in the cross-border trade in essential goods in times of crisis.

**Introduction**

COVID-19 has exposed the oft-times obscure but nonetheless challenging relationship between public procurement and international trade. Despite the amplified need for the negotiation of equitable access to essential medical goods\(^1\) during the global pandemic, there has been evidence of hoarding, stockpiling and government intervention to disrupt the free flow of medical goods.\(^2\) The pressure for governments to acquire essential medical goods under extreme and urgent

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\(^1\) ‘Medical goods herein defined as “medical equipment including PPE, medicines, and infrastructure for hospitals.”’

\(^2\) S. Everett, ‘**Tackling COVID-19 Together : The Trade Policy Dimension**’, Global Trade Alert, University of St. Gallen, Switzerland (2020).
circumstances makes the process even more vulnerable to corruption, impacts the buyers’ ability to effectively monitor the quality of the products and services, and also diverts supplies away from those who may need it the most.\textsuperscript{3} The lethal combination of the implementation of export curbs along with government stockpiling of local supplies in countries where essential medical goods are produced has disrupted cross-border trade and equitable access during the pandemic.\textsuperscript{4} These types of measures threaten the lives of billions of people dependent on international trade for access to essential medical goods.\textsuperscript{5}

As we move into the non-emergency phases of the COVID-19 pandemic, more troubling is the retreat to nationalist approaches of ‘every nation for itself’ fossilizing as the prevailing approach to the flow of essential goods through international trade. This is exemplified in the emergent threat of ‘vaccine nationalism’ where for example, the governments of the United States through its ‘Operation Warp Speed’ and the United Kingdom are locked in a race to buy up global supplies of vaccines and remedies.\textsuperscript{6}

This ‘wild wild west’ environment for the international trade in essential COVID-19 related goods has exposed the elephant in the room. The effective management of global crises requires global cooperation - and in many respects global regulation with teeth.

That said, the paper does not confront this herculean challenge of ineffective global governance through international institutions such as the World Trade Organisation (“WTO”) directly. Whilst our proposals can form part of a revision and renegotiation of the WTO Government Procurement Agreement (“WTO-GPA”), this is not our first port of call. As we shall demonstrate, plurilateral agreement is not crucial for the implementation of our proposed solution. We propose instead to identify a less direct measure which can be implemented incrementally in a bottom-up way through the government to government negotiation of Preferential Trade Agreements (“PTAs”) combined with the leveraging of technological solutions. This paper highlights government procurement as an underutilized potential lever for addressing the challenge of lack of transparency and equitable access to essential medical goods in times of crisis and seeks to make the case firstly for the inclusion of Model ‘Crisis’ Procurement Provisions in trade agreements and secondly for leveraging technological solutions to improve transparency and cooperation.

The central thesis of the paper is that emergency public procurement modes which allow for agility, innovation and speed without entirely compromising transparency and accountability can be a lever and not an obstacle to cross-border access to essential medical goods in times of crisis.

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\textsuperscript{3} J. Schultz, T., Søreide, T., ‘\textit{Corruption in Emergency Procurement}’, U4 Anti-Corruption Resource Centre, Chr Michelsen Institute (CMI), Norway (2008).

\textsuperscript{4} S. Evernett, ‘\textit{Tackling COVID-19 Together: The Trade Policy Dimension}’, Global Trade Alert, University of St. Gallen, Switzerland (2020).

\textsuperscript{5} In \textit{Tackling COVID-19 Together}, Evernett highlights that only 25 nations export significant amounts of medical ventilators and only one of which is in Latin America. There are no nations in Africa, the CIS region, the Middle East, and South Asia producing ventilators.

make this case, the authors examine government trade and procurement policy responses and actions collected in the Global COVID-19 Policy Response (hereinafter GCPR) Database, and analyse the history of the inclusion of public procurement in trade agreements. Our two-part solution builds on the recommendations and in particular the research and analysis done by Everett on the trade in medical goods during COVID-19,7 Kutlina-Dimitrova on government procurement data, trends and protectionist tendencies,8 the Open Contracting Partnership Recommendations for transparency in emergency procurement, the OECD taxonomy of measures affecting trade in government procurement processes,9 and the UNESCAP publication in partnership with GOOGLE on recommendations for governments desirous of implementing artificial intelligence in public service delivery.10

Part 1 provides the context for the paper, highlighting some of the experiences and approaches taken with specific reference to COVID-19-related trade and procurement measures in the EU, United States, Canada, Brazil, Latin America & Caribbean and the East African Countries of Kenya, Rwanda and Uganda referencing both primary and secondary data sources and data collected by the GCPR research initiative from March 11th 2020 to July 24th 2020. In Part 2 we provide an overview of the literature outlining the checkered history relating to the inclusion of government procurement provisions in trade agreements and we query firstly, the rationale for the suspension of all procurement rules in times of emergency and secondly, the exclusion of government procurement provisions in trade agreements in times of emergency. In Part 3 we argue for the development and inclusion of Model ‘Crisis’ Procurement Provisions to be included in the menu of possible provisions to be used by governments in negotiating or renegotiating PTAs. In Part 4 we explore the leveraging of technological solutions like the Global COVID-19 Policy Response (GCPR) Research initiative as mechanisms for addressing the procurement data-gap and improving government transparency and cooperation in times of crisis.

(i) COVID-19 Procurement & Trade in Medical Goods

COVID-19 has catalyzed what is arguably a ‘wild wild west’ in the international trade of medical goods. Countries with varying degrees of success have quickly put measures in place to address the urgent demand for medical goods, including export restrictions and lowering of import tariffs. By July 2020, ninety-four (94) countries had put in place export curbs and restrictions as a result

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9 Tool: Guidelines for accelerated public procurement procedures, Public Procurement Toolbox. Available at: Tool: Guidelines for accelerated public procurement procedures.
of the pandemic.11 These measures mostly related to medical goods, but some related to food where there was little correlation with shortage of supply. Some East African Countries such as Uganda and Kenya imposed import restrictions on second-hand clothing including PPE because of the threat of viral spread.12

Notably, government procurement activities during COVID-19 were more opaque and difficult to source and track, in large part due to the lack of international and domestic regulation of emergency procurement. This combined with the general paucity of reliable statistics and a lack of an internationally agreed methodology for the collection and recording of public procurement data produces a huge procurement data-gap which stymies rigorous policy assessment.13

As this global pandemic knows no borders, international collaboration should be strengthened and existing trade barriers reduced, yet to protect their nationals and mitigate economic and public health-related impacts of COVID-19, countries have rather adopted a protectionist approach. While some measures may be described as controversies, it is necessary to take into account “different levels of actual or projected COVID-19 outbreaks with varying population sizes, domestic medical equipment/drug manufacturing capacities, public health infrastructure and population demographics”14 and other indicators which may have influenced the introduction of these measures.

In our research we highlight the approaches taken by the United States (US) as representing a microcosm of the uncoordinated and competitive trade in medical goods operating internationally. In contrast we highlight the Trans-EU and the Organisation of Eastern Caribbean States (OECS) & the Caribbean Community & Common Market (CARICOM) collaborative buying mechanisms implemented during COVID-19. Our research collected on Australia, Brazil, Canada, EU, Latin America, Kenya, Uganda, OECS & CARICOM and the United States is hereto attached and marked Appendices I-X.

(ii) Public Procurement in Preferential Trade Agreements (PTAs)

Public procurement, the process by which states acquire goods, works and services accounts for approximately 12% of global GDP.15 On average around the world, public procurement accounts for between 13% - 30% of GDP.16 However, there is great disparity between countries. In the EU

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16 Ibid.
on average it accounts for approximately 13% of GDP, across the OECD countries it accounts on average of 12%, while in some developing countries the percentage of public procurement to GDP varies widely, e.g. Botswana 28%, Sri Lanka, 6%, Kenya, 26% and Madagascar 5%. Variation is also seen in High Income Countries, 16.5% Sweden, 25% Switzerland, 20% Netherlands, 19% Finland. Emerging economies such as Brazil, Vietnam, Turkey, Egypt, South Africa, Pakistan, India, Turkey all have public procurement markets of over 20% GDP (Bosio & Djankov, 2020). Even though there is evidence that governments tend to import less than the private sector in European countries, cross-border public procurement in its various forms, is still considered significant (Trionfetti, 2000).

Given the average size of public procurement markets, its economic significance to international trade should not be underemphasized. On the other hand, the variety of size indicates how inextricably linked public procurement markets are with the nature and structure of domestic economies, developmental stage and political objectives along with the size of governments and levels of accountability.

According to Woolcock, there has been rapid growth in transnational regulation of public procurement through PTAs in the last two decades. This section explores the extent to which these mechanisms can be augmented to facilitate greater transparency and equitable access in the cross-border trade of medical goods in times of crisis.

**History of Inclusion of Public Procurement in Preferential Trade Agreements (PTAs)**

Discrimination in public procurement has been a longstanding and popular “behind the border” non-tariff barrier to trade. Discretionary decision making in public procurement as a tool of industrialization policy and socio-economic development remains strongly present even though

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17 *Ibid.* These stats have been pulled from Bosio & Djankov’s (2020) research in which they note that procurement data relied on may not cover military expenditures and sectors like healthcare, where contracts are created by public private partnerships, concession arrangements and direct awards operating outside regulated procedures. Accordingly the figures are conservative.


the literature on the reliability of theories supporting home bias in procurement have been criticised. For these reasons, the inclusion of Government Procurement in trade agreements has always been a complex challenge with a particularly checkered history. For example, post-colonial states have been cautious about entering into agreements with former colonizing states aimed at liberalising domestic procurement markets because of asymmetrical supplier capacities and levels of industrialization.

The WTO plurilateral Agreement on Government Procurement (“WTO--GPA”) 1994 as revised in 2014 aims to provide an international legal framework for the liberalization and governance of public procurement markets. It is at present the only binding agreement in the WTO focusing on the subject of Government Procurement. However, it’s success at establishing a rules-based order for public procurement in international trade is questioned.

The WTO-GPA negotiation history has been outlined as having started as far back as the late 1960s and progressing through four iterations with versions coming into force in 1981, 1988, the 1994 agreement which came into force in 1996 and the most recent revision WTO-GPA 2014. Notably in developing countries and particularly post-colonial states there has been limited uptake of the plurilateral WTO-GPA. Of the 164 WTO member states only 48 have signed the WTO-GPA. Moreover, to date, of the 47 member states party to the GPA there are no African, Caribbean and/or Pacific (ACP) signatories. Notably, as of February 2020, the post-Brexit, United Kingdom, is recorded as having Observer status only.

Driven by the lack of uptake at the plurilateral level, in the last two decades, there has been a rapid proliferation of PTAs worldwide. In the early 1990s, part of the work of developing the European single market economy included the introduction of cross-border public procurement regulation

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22 Ibid.
23 Here ‘Government Procurement’ is distinguished from Public Procurement and is used to refer to a subset of latter relating in particular to procurement undertaken by centralized government agencies. This usually does not cover procurement by state-owned bodies or the local or municipal level procurement activity.
and in 2004 Council Directives 2004/17 and 2004/18 replaced a suite of previous directives. In 2014 these Directives were repealed and further consolidated, *inter alia*, to introduce a more modern, flexible, commercial approach to procurement and included giving member states broader discretion to use the function of procurement for social and environmental objectives. Since 2000, the European Union (EU) has pursued negotiation of procurement policy with trade partners and has spurred the bottom-up growth of transnational public procurement rules in PTAs, Regional Trade Agreements (“RTAs”), Free Trade Agreements (“FTAs”) and Economic Partnership Agreements (“EPAs”) which include prominent public procurement chapters (Cernat and Kutlina-Dimitrova, 2015).

In 2007 the landmark CARIFORUM EU EPA was signed representing the first trade agreement between former colonizers and post-colonial states which included public procurement provisions. Since then many African countries followed and signed similar EPAs containing public procurement provisions. Heilman Grier (June 2020) examines the exponential growth of EU PTAs with public procurement conditions referencing PTAs with Canada, Japan, Singapore and Mexico with WTO-GPA plus procurement conditions. Plans to implement a similar PTA with Vietnam and an agreement in principle with the members of Mercosur are also underway.

Thus in 2020, the tables have turned and the majority of PTAs notified to the WTO contain public procurement provisions albeit with varying levels of coverage and substantive content. (See Table 1.0 Public Procurement in PTAs below for a list of PTAs including public procurement chapters). This bottom-up and horizontal convergence of common norms in public procurement in PTAs therefore provide a unique field of study for transnational cooperation on commercial matters. Countries have been more effective at negotiating shared supra-national public procurement norms on a bilateral basis than through the plurilateral WTO-GPA.

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31 Woolcock (n-36)

32 Ibid.


Table 1.0: PTAs with Procurement Rules

<table>
<thead>
<tr>
<th>Year</th>
<th>Participants</th>
<th>Year</th>
<th>Participants</th>
<th>Year</th>
<th>Participants</th>
</tr>
</thead>
<tbody>
<tr>
<td>1995</td>
<td>Costa Rica–Mexico</td>
<td>2004</td>
<td>Korea–Chile</td>
<td>2009</td>
<td>Australia–Chile</td>
</tr>
<tr>
<td>1999</td>
<td>Chile–Mexico</td>
<td>2005</td>
<td>EFTA–Chile</td>
<td>2009</td>
<td>Chile–Colombia</td>
</tr>
<tr>
<td>2000</td>
<td>EC–Mexico</td>
<td>2005</td>
<td>Japan–Mexico</td>
<td>2009</td>
<td>Japan–Switzerland</td>
</tr>
<tr>
<td>2001</td>
<td>European Free Trade Association (EFTA)–Mexico</td>
<td>2006</td>
<td>Dominican Republic–Central America</td>
<td>2009</td>
<td>US–Peru</td>
</tr>
<tr>
<td>2002</td>
<td>Chile–El Salvador</td>
<td>2006</td>
<td>South Korea–Singapore</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2002</td>
<td>Chile–Costa Rica</td>
<td>2006</td>
<td>Panama–Singapore</td>
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</tbody>
</table>


Dur, Baccini et al argue that one of the reasons for the successful negotiation and inclusion of public procurement rules in PTAs has been the use of templates. The argument continues that public procurement chapters “have become part of boilerplate PTA language” which facilitate parties not having to start from scratch. Dur, Baccini et al, identify three broad PTA templates of which two contain public procurement chapters.

This is the context for our proposal to strengthen procurement provisions in trade agreements to address transparency and equitable access to medical goods in times of crisis. Whether or not these rules are effective to change buyer behaviour has long been contested. However, recent research has revisited the narrative of the limited impact of PTAs, showing that on average PTAs do increase trade flows. This was found to be the case where the PTAs were viewed as “deep agreements”. Additionally, there is evidence that provisions addressing behind-the-border regulation like public procurement have an impact on trade flows.

There are also the arguments that inclusion of public procurement provisions in PTAs are important drivers for domestic legislative reform. Public procurement has long been viewed as part of a suite of ‘good governance’ protocols, which developing states would have to enact domestically, in order to improve foreign direct investment attractiveness. For example, the

36 Ibid.
37 Rickard, (n-43).
39 See Woolcock (2019) describing PTAs with “deep agreements” as including public procurement conditions
40 Ibid.
negotiation and signing of the CARIFORUM EU EPA incorporated a transnational common public procurement regime. This EPA has been heavily criticized by Caribbean scholars as this was done at a time when CARIFORUM member states at a regional level had not yet implemented a common protocol as between themselves and in some individual member states had no modernized legislative procurement framework. Nonetheless, the EPA did, to a certain extent, drive domestic legislative reform in some member states. While effective implementation, monitoring and enforcement remain challenges, the PTA as a vehicle driving legal change at national levels is demonstrable.

In the remaining paragraphs of this section, we explore the main typologies for the content of public procurement provisions in trade agreements and the extent to which there are any provisions which would apply in emergencies and/or in times of crisis.

What the Provisions Cover

The scope and depth of PTAs including public procurement provisions can range from deep liberalization of procurement markets such as in the EU and the North American Free Trade Agreement (NAFTA) to PTAs with minimum commitments. There are model provisions for the content of procurement rules in the UNCITRAL Model Law on the Procurement of Goods, Construction & Services which serve as soft law guidelines for countries modernizing their procurement system.

There can be as many as twelve (12) elements of analysis of government procurement provisions contained in trade agreements. These are typically: (i) National treatment / non-discrimination (ii) Most Favoured Nation status (iii) Procedural rules (iv) Domestic review / Bid challenge (v) Dispute settlement mechanisms (vi) Use of offsets regulated (vii) Commitments to GPA accession (viii) Further negotiations (ix) Provisions on integrity (x) Cooperation (xi) Joint Committee or other administering body (xii) Coverage commitments. (See Table 2.0 below ‘General Scope of Public Procurement Provisions in PTAs’ for an overview of general procurement provisions.)

Table 2.0: General Scope of Public Procurement Provisions in PTAs

<table>
<thead>
<tr>
<th>Coverage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rules in international agreements generally cover procurement of supplies (goods), works (construction) and services. Coverage is defined by several elements: 1) thresholds (monetary</td>
</tr>
</tbody>
</table>

42 See The Economic Partnership Agreement Act No 9 of 2013 in Trinidad and Tobago, which became a precursor to the Public Procurement Disposal of Property Act 2015.
values at and above which the agreement applies to procurement), which are designed to ensure that the most valuable contracts are open to competition and avoid the significant compliance costs of imposing international disciplines on smaller contracts; 2) the entities covered, as specified in three categories (central government, sub-central governments and other entities, such as utilities and SOEs); 3) negative list of goods, which means that the procurement of all goods is covered except those explicitly excluded; coverage of defence goods is generally based on a positive list; 4) services, including construction services, with coverage based on a positive list (only listed services are covered) or negative list (all services are covered except those listed); and 5) exclusions.

**National Treatment**

A cornerstone of public procurement agreements is non-discrimination. Parties must provide national treatment for all covered procurement. This requires parties to treat the goods, services, and suppliers of other parties no less favourably than domestic goods, services and suppliers. They may not apply domestic preferences and other discriminatory purchasing provisions for procurement covered by an international agreement. National treatment obligations are the main means by which de jure preferences for specific categories of suppliers are tackled.

**Transparency**

Central to the aim of facilitating increased international competition, more efficient purchasing and reduced scope for corruption in public procurement is the provision of information. Transparency and procedural obligations are aimed at ensuring that procurement covered by an international agreement is conducted in a manner that is transparent, predictable, fair and non-discriminatory. This encompasses both information on the procurement system, as well as information on each stage of the specific procurement, including development of technical specifications, publication of notices of intended procurement and invitations to request participation in procurements, provision of tender documentation, tendering process, use of negotiations and contract awards. It also includes post-contract award transparency in which purchasing entities are obliged to explain contract award decisions and publish awards.

*Contract award procedures*

In order to ensure flexibility, procurement rules in international agreements tend to provide for open, selective and limited tendering. Open tendering allows all interested suppliers to participate and may be based on price or most advantageous tenders. Selective tendering is used when the procuring entity invites only suppliers that meet certain qualification requirements to submit tenders. It requires competition and transparent procedures for the selection of qualified suppliers. Limited tendering is when the procuring entity invites specific suppliers to submit tenders. Agreements include more or less detailed rules on how invitations for tender are issued, what information is provided, and what time limits are set for bidding and for awarding contracts. Short time limits may put foreign bidders at a disadvantage, while long time limits may be detrimental to the work of the procuring entity.

*Technical specifications*

Through specifications a procuring entity can tailor the requirements for a procurement to match
the capabilities of certain (local) suppliers. To avoid this outcome, rules encourage the use of international standards and performance standards over design (or prescriptive) standards. Where design standards are used, tenders of equivalent goods or services should be allowed.

Exemptions or exclusions
Agreements generally provide for exclusions of procurement from national treatment obligations for reasons of human health, national security and law enforcement.

Enforcement and compliance
Experience shows that without effective compliance, rules on public procurement have little effect. Given the thousands of contracts are awarded every day, central compliance monitoring is impracticable. Rules therefore provide bidders who believe they have not been fairly treated with an opportunity to seek an independent review of a contract award decision. Penalties in the case of non-compliance may involve project cancellation, requirements to re-tender or financial penalties (limited to the costs of bids or exemplary damages). Rules requiring information on contracts awarded and reasons why bids failed can also facilitate compliance.


Two primary modes for the regulation of procurement in PTAs deserve separate consideration.

(1) Rules Relating to Transparency, and
(2) Rules Relating to National Treatment/Non-Discrimination.

Of significance is that across the board in all PTAs which explicitly include substantive procurement provisions, there is a point of convergence in that transparency provisions are considered the minimum content of the rules. The inclusion of provisions relating to national treatment and non discrimination is far more contested.

For example, the WTO-GPA includes both modalities. The GPA guarantees of National Treatment and Non-Discrimination for the suppliers of Parties to the Agreement with respect to procurement of covered goods, services and construction services as set out in each Party’s schedules and subject to various exceptions and exclusions noted therein. The GPA also outlines detailed requirements regarding Transparency and procedural aspects of the procurement process, in general, designed to ensure that covered procurement under the Agreement is carried out in a transparent and competitive manner that does not discriminate against the goods, services or suppliers of other Parties. Moreover, the GPA includes provision for disputes to be addressed by the WTO Dispute Settlement Understanding. However, despite mechanisms for “special and differential treatment” for developing countries and least developed countries, there has still been limited accession to these types of internationalized procurement norms by these countries.

The EU Directives also include these two modalities. The Directives include rigorous transparency conditions, provisions for non-discrimination, and also provide for the supranational CJEU jurisdiction for disputes. However, the EU has had varying levels of success in its negotiation of
PTAs which include both types of conditions. In the CARIFORUM EU EPA it has been argued by the CARICOM Regional Negotiating Machinery (CRNM) that they only agreed to transparency conditions but not to non-discrimination. This appears to be the case when one looks at the public procurement chapter as a standalone. The EU Japan EPA 2018, on the other side, is said to include both transparency and non-discrimination procurement conditions.

What is clear is that while transparency in procurement provisions is a universally accepted norm, non-discrimination is not.

Emergency Procurement Provisions in PTAs

There are no PTAs including public procurement chapters or other provisions which provide any guidance on the cross-border flow or procurement of essential goods in times of crisis. Neither is there any guidance in the WTO-GPA, nor the UNCITRAL Model Law on the Procurement of Goods, Construction & Services 2011. In fact, Article III s.2 exempts GPA compliance where it is:

“a) necessary to protect public morals, order or safety; [and]
b) necessary to protect human, animal or plant life or health.”

The UNCITRAL Model Law also does not explicitly deal with emergency situations save for Article 29 (b) which allows for restricted tendering procedures where:

“the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement.”

In the CARIFORUM EU EPA, Article 171 s.2(c), provides a general exception in times of emergency

“Article 171 s.2

Procuring entities may award their public contracts by limited tendering procedure, in the following cases:

(c) for reasons of extreme urgency brought about by events unforeseen by the procuring entity, the products or services could not be obtained in time by means of open or selective tendering procedures;”

Article 224 provides a similar exemption as in the WTO-GPA III s.2 and Article 225 creates an exemption from the entire Agreement in times of war and extreme urgency.

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46 However note Article 167 addressing foreign investment the CARIFORUM EU EPA removes all barriers to the establishment of local subsidiaries and they are provided with national treatment regardless of the size of foreign shareholding. These locally incorporated foreign companies are then able to bid side by side with national suppliers. These types of loopholes in PTAs render claims that they are only dealing with transparency less rigorous.
This is in contrast to the position in modern procurement regulatory systems, where best practice guidance is provided for addressing emergency procurement situations transparently and within an accountable framework. *(See Table 3.0: Emergency Procurement Best Practice Systems)*

### Table 3.0: Emergency Procurement Best Practice Systems

|-----------------|----------------------------------|
| European Union  | Art 32(2)(c) of Directive 2014/24/EU  
COVID-19 Emergency Procurement  
Communication from the Commission Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis 2020/C 108 I/01  
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0401(05)&from=EN |
| United Kingdom  | 32(2)(c) of the Public Contracts Regulations 2015  
COVID -19 Emergency Procurement Policy Note : PPN1  
| United States   | Emergency Acquisitions Part 18  
https://www.acquisition.gov/content/part-18-emergency-acquisitions#id1617MA040AX |
| Australia       | Procuring during the COVID-19 emergency  
| Institutional Guidance | Guidelines for Accelerated Procurement  
| OECD            | COVID-19 - Competition & Emergency Procurement  
This lacuna may be explained by the dominant narrative that in times of emergency agility and speed are paramount to ensure that urgent, critical and sometimes life-saving needs are met. Nonetheless, there is ample evidence that emergency procurement is uniquely vulnerable to corruption, fraud, waste and mismanagement which then “reduces the resources available for life-saving operations, lowers the quality of products and services provided, and diverts aid from those who need it most”.  

47 In the EU even in normal times, 28 percent of cases of corruption in the health sector are reported as relating specifically to procurement of medical equipment.  

48 The question arises whether the traditional treatment of emergencies and crises in trade agreements (i.e. excluding their applicability altogether) is the most effective use of the multilateral trading arrangements. The dominant thinking about procurement in the time of emergency or crisis is that we should have as little rules as possible as the bureaucracy of the rules slows down the ability to source essential goods quickly. Accordingly, most procurement systems exempt covered entities from having to comply with the rules in times of emergency. However, best practice emergency procurement continues to require rules around transparency, recordkeeping and appropriate justification for use of the flexible procedures. As we have seen, in PTAs which have public procurement chapters, there is usually a blanket exemption which says these rules will not apply in times of crisis/emergency.

Given the context provided in Part 1 on COVID-19 trade and procurement volatilities experienced across multiple jurisdictions combined with evidence of a rich transnational network of PTAs where states universally agree to transparency in cross-border procurement, we submit that there

is a crucial opportunity to leverage this moment to introduce Model “Crisis” Procurement Provisions. This will be explored in Part 3 hereinbelow.
(iii) Model ‘Crisis’ Procurement Provisions in Future Trade-Related Revisions & Agreements

This Part proposes the leveraging of and building on the existing general international consensus on transparency in procurement norms. Given the increased momentum to include public procurement transparency conditions in PTAs, the negotiation of new Model “Crisis” Procurement provisions, aligned to emergency procurement best practice at country and institutional levels, is posited as the next logical development. The Model “Crisis” Procurement Provisions will evidence parties' commitments to transparency, accountability and equitable access to essential goods in times of crisis, particularly relevant to global public health crises, such as COVID-19.

Below we first provide an overview of best practice emergency procurement at country and institutional levels. This is then followed by our proposed approach to transnational cooperation for procurement in times of crisis.

A. Emergency Procurement Best Practice at Country & Institutional Levels

This section aims to frame the concept of emergency public procurement at the country and institutional levels. We provide a definition of, and explore situations which allow for the use of emergency procurement. It also discusses the need to set out the best practice on issues such as, who has the authority to declare an emergency situation; which procurement arrangements, methods and procedures could be appropriate in emergency procurement; and how they might be implemented, depending on the type/degree of emergency, the kind of procurement to be undertaken, and the degree of complexity and risks involved.

How can emergency procurement be defined?

According to the United Nations Office of Supply Chain Management, an emergency procurement can be defined as a procurement process made to fill an immediate, unexpected urgent need, quickly and accountably in lieu of standard competitive procedures, due to unforeseen circumstances which may result in injury or loss of life.49 This essentially allows simplified processes arising from an urgency that could not be anticipated and that is happening under an uncontrolled environment.

Emergency procurement as an integral part of a country’s procurement system

Emergency procurement is an exception which needs to be encompassed in a country’s or institution’s procurement system from the outset with a clear definition and clearly articulated rules. These pre-set requirements are necessary to avoid improvisation or misuse of emergency procurement because of poor procurement planning practices for instance. Not having a clear framework for “emergency procurement” carries a serious risk that such procurement may become the norm rather than a well-justified exception. Inadequate emergency procurement practices are

more vulnerable to fraud, waste and mismanagement. The overriding consideration here is that ‘emergency procurement’ does not mean ‘no procurement process’. Best practice emergency procurement when justified mandates the implementation of a flexible, rapid, transparent and accountable procurement system.

The legal framework for emergency procurement

Legislation and regulations at the country-level establish parameters for what can qualify as an emergency procurement. They also specify which procurement methods, procedures and arrangements may be used in such circumstances, striking a balance between the need for transparency and competition and the urgency of the situation requiring special measures.\(^50\) If the country has a well-established and well-functioning electronic government procurement (e-GP) system, executing procurement under emergency procedures can be greatly facilitated.

Which situations can warrant the use of emergency procurement?

These would be described in the applicable legal framework. In general, they will encompass threats to public health, welfare or safety. Illustrations of such circumstances would include but would not be limited to, a pandemic, a natural disaster such as an earthquake, flood or hurricane, an armed conflict, etc. Generally, if a need could not reasonably have been foreseen to allow for proper procurement planning, then emergency procurement processes are justified.

Who has the authority to declare an emergency situation in the country?

Applicable legislation (including potentially the country’s Constitution) and regulations will specify who has the authority to declare an emergency situation and how to do it. The emergency might be declared at the highest level of government (country’s President, Prime Minister, Cabinet, etc.), and/or, it might also require a vote in Parliament. Not defining the level of authority and the process to be followed to declare an emergency situation could result in abuses and disturb law and order. In turn, proper declaration of an emergency situation will allow the use of emergency arrangements, methods and procedures for procurement.

Which procurement arrangements can be used in a case of emergency?

Arrangement will be framed by applicable legislation and regulations, the objective being to fill an unexpected dire need urgently. Attending the emergency will require considering different arrangements such as centralizing the emergency procurement at the national level or the regional level or any other level in the country under one specialized government agency. This specialized agency will be responsible for the procurement and contracting process and will get the supplies and equipment to the different levels of government. Another alternative is the outsourcing of procurement to a procurement agent who would essentially carry out the same functions as a specialized government agency during the emergency.

\(^50\) Ibid.
Which procurement methods and procedures can be used in an emergency?

Again, this will be contemplated in legislation in general terms, while regulations will be more specific. According to the OECD, attending to the emergency will require dispensing with some requirements of standard competitive procurement procedures, while still aligning with the principles of transparency and fairness. Operationally, procurement methods may be less stringent resulting, for example, in procurement opportunities not requiring advertisement when there are known and capable vendors willing to provide quotes for goods or services needed to respond to the emergency, or purchasing processes being advertised for a lesser time period than would normally be the case.

In terms of procedures, specific financial thresholds should be set to authorize the use of certain procurement methods. The type of emergency encountered may warrant using less competitive, faster procedures. When the type of emergency considered authorizes foregoing competition entirely, such action must be made known publicly, with governments having negotiated the fairest terms possible to avoid paying “gouged prices”, and the allocation of resources should be made public. Although not encouraged, emergency circumstances may require direct contracting. This method of procurement is permissible, so long as governments indicate they are directly contracting, identify what firm(s) they are engaging with directly, the amount allocated, and other details of the resulting contract are properly exposed to public scrutiny. Choices will depend on specific situations, types of emergency, procurement value, risk, degree of complexity. Ideally, regulations should provide an optimum combination of options. Electronic government procurement can play an enabling role in the use of the emergency procurement procedures. The following examples are merely illustrative, not exhaustive:

i. Examples of relatively fast competitive procedures:
   - Restricted tendering
   - Requests for proposals without negotiations
   - Existing framework agreements (if e-GP is in place)
   - Electronic Reverse Auction (if e-GP is in place)

ii. Example of less competitive faster procedure:
   - Requests for price quotations (shopping)

iii. Non-competitive procedures (under specific justified circumstances):
   - Direct contracting/sole sourcing

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52 Transparency International: Public Procurement During States Of Emergency: Minimum Requirements To Ensure The Integrity Of Contracts Awarded During Crises. Available at: https://www.transparency.org/files/content/event/EN_Latin_America_emergency_procurement_report_Layou.pdf.
B. Principles Approach to Transnational Cooperation in Times of Crisis

The proposal here is not to slavishly copy country or institutional level best practice emergency procurement conditions. The governance of public procurement in times of crisis is a uniquely complex endeavour. Governments, operating under conditions of extreme urgency, must navigate and balance the competing tensions of protecting national health interests whilst honouring commitments to a fair, equitable, rules-based, international trading system that facilitates the free flow of essential goods.53

Step 1 - A Principles Approach

In Tackling Coronavirus Together, Everett (2020) has surveyed the trade in medical goods early on in the COVID-19 pandemic.54 In his recommendations, Everett advocates for a proactive approach to adjusting trade policies now rather than waiting till after the pandemic and advances five (5) key guiding principles to govern the trade in medical goods. We endorse and build on his approach and to this end we have adapted his principles to govern crisis procurement of medical goods and we have included a sixth principle. We posit that this is the starting point in developing Model “Crisis” Procurement Provisions to be included in trade agreements. Our aim is to ensure that Model provisions present procurement policy as an enabler rather than a nuisance to effective acquisition of medical goods in times of crisis. They are:

1. **Coherence** - Procurement policy should enhance rather than reduce the effectiveness of public health interventions. Proper account shall be taken of relevant procurement-health linkages informed by expert advice.
2. **Do No Harm** - Eschew procurement policies which deprive buyers worldwide of equitable access to medical goods.
3. **First Best** - Procurement policy should not be used if a more effective policy instrument exists. Proposed procurement policy initiatives must not be considered in isolation; meaningful alternatives must be considered.
4. **Transparency** - Procurement policy and pandemic era buying decisions should conform to best practice norms for transparency in emergency procurement.
5. **Scrutiny** - Conformity of emergency buying decisions and policies with these principles should be evaluated and measures falling short should be removed; all future emergency procurement policy initiatives should be tested against these principles.

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53 Please note that we have used “essential goods” and “medical goods” interchangeably throughout the paper. Our recommendations are made specifically within the context of equitable access to medical goods in the COVID-19 pandemic. However we see our recommendations for Model ‘Crisis’ Provisions as having more general application as well.

6. **Proportionality** - Public Procurement should be based on careful and responsible analysis of the inputs needed to combat the emergency, so that they are proportional and reasonable when contracting.

**Step 2 - Addressing Practical Considerations**

As noted, emergency procurement in a global pandemic presents unique practical challenges. If constrained by bureaucratic rules and processes, procurement can put the lives and livelihoods of citizens at dangerous risk.

Following on from the five (5) key trade policy principles Everett (2020) proposes a **bold and aggressive** package of ten (10) practical recommendations to give effect to the principles. They are:

1. Immediate elimination of tariffs on all COVID-19 goods identified by the World Customs Organization and on soap.
2. Immediate elimination of export curbs, including export authorisation schemes and those relating to parallel exports, on all COVID-19 goods identified by the World Customs Organization. This applies to transhipped goods as well.
3. For **two years suspension of all national public procurement regulations and state-required localisation measures that frustrate the cross-border sourcing of COVID-19 goods identified by the World Customs Organization.**
4. No new limits on the import or export of COVID-19 related goods referred to in points 1-3 above will be introduced.
5. Immediate review within one month of all non-tariff policies, regulations, and practices that have the potential to limit the import or export of COVID-19 goods, parts and components thereof, and of soap.
6. So long as the medical supplies and vaccines implicated are made available expeditiously to buyers worldwide, a suspension for two years of WTO and regional rules on state aid whose specific purpose is: increasing the production of medical supplies or the expansion of production capacity of medical supplies, or research and development, testing, and distribution of relevant vaccines.
7. No attempt to limit via commercial contract or other state means a medical supplier’s, medicine supplier’s, or vaccine supplier’s rights to deliver to any buyer worldwide a product or service needed to tackle the COVID-19 pandemic.
8. No impediment to the cross-border movement of healthy personnel necessary to scale up the production of COVID-19 medical supplies, develop, test, produce, and distribute vaccines, and transport internationally such products.

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9. Ensure access to critical transportation, communication, and legal infrastructures that facilitate the cross-border movement of
   - COVID-19 goods and supply chain-related parts and components, and
   - vaccines and medicines, including the data, ideas, and intellectual property associated with the development thereof.

Immediate review of steps to improve facilitation of cross-border trade of COVID-19 medical goods and related parts and components.

10. This Package of measures shall not be thwarted or circumvented by the acts of sub-national levels of government or other state bodies notionally or actually independent of central government.

We are of the view that some of the practical recommendations are quite troubling from the normative perspective of fair, transparent and accountable governance. Addressing these troubling elements is outside the scope of this paper but we highlight Package Recommendation 3 and we query the evidence-basis of such a recommendation. Part of the rationale for advancing the recommendation can be found at page 7 of the report, where Everett states:

   “Fourth, a nation’s export ban is a political gift to nationalists and populists in harmed trading partners. Calls for discriminatory industrial policies ensue—as demonstrated by the recent remarks of the Mr. Peter Navarro, the Director of President Trump’s Office of Trade and Manufacturing Policy—implying that the nation that imposes the initial export ban will find that conditions of competition abroad have worsened after the COVID-19 pandemic has abated. The ongoing and widely-leaked deliberations in the U.S. administration over whether to strengthen Buy America public procurement rules on medical supplies in response again makes the point that the drawbacks of export curbs are real.”

It is our view that, to propose implementation of Recommendation 3 - “the suspension of all national public procurement regulations which frustrate cross-border sourcing” in response to cited or like behaviour on behalf of political officials, is to throw the baby out with the bath water.

We acknowledge the problem in the space of cross-border procurement, evident from the volatile ‘wild wild west’ we have experienced during the first peak period of the COVID-19 pandemic. However to suspend all national public procurement regulations which frustrate cross-border sourcing of medical goods is to allow governments to continue with hoarding and stockpiling, very much like the panic buying we experienced by individuals on toilet paper and food, none of which was in short supply.

In our view, there must be a better way. Our proposal for new Model “Crisis” Procurement provisions makes an attempt at articulating a better way for transnational cooperation for the flow and equitable access of essential goods in the time of crisis.
Step 3 - Model “Crisis” Procurement Provisions for Inclusion in PTAs

In addition to Everett’s (2020) five guiding principles, in making these proposals we have relied on the following:

➔ Open Contracting Partnership 10 Recommendations for Emergency Procurement During COVID-19,
➔ The World Bank Emergency Procurement Guidance for Recovery & Reconstruction,
➔ The OECD Toolkit & Guidelines for Accelerated Procurement,
➔ European Emergency Procurement Directive: Article 32(2)(c) of Directive 2014/24/EU,

Notably we are proposing Model “Crisis” Procurement provisions and not Model “Emergency” Procurement provisions. This is deliberately done as we are taking a broader conceptual approach to cover procurement in times of crisis, of which, emergency procurement is but a subset. Thus, our sample Model provisions are submitted either for inclusion and revision of existing PTAs or to be included in future trade-related agreements and will cover the periods of (1) extreme urgency - Immediate Response Stage (2) stabilizing period - Relief and Reconstruction Stage and (3) future-facing preparedness - Crisis-resiliency Stage. The Model Provisions are set out as draft provisions to be refined during negotiations and as a menu of options. Parties may agree to certain minimum standards or deeper cooperation based on the assessment of mutual interests.

Model Crisis Procurement Provisions are hereto attached and marked Appendix XI.

(iv) Leveraging Technology for Transparency and Interdisciplinary Research

Model provisions without appropriate implementation, monitoring, and enforcement systems become nomenclature without teeth. Here is where we propose the second part of our solution.

The public procurement data-gap presents the opportunity to leverage technology to support the development of a global public procurement database. The implementation of the Open Contracting Data Standards (OCDS) for the collection and reporting on contract award data and developing common standards for data comparability and harmonisation cross-indexed against

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57 See Kutlina-Dimitrova (2018) (n- ) who identifies important attempts made to establish a global procurement database like the digital whistleblower project (DIGIWHISHT) funded under the EU Horizon 2020 and which has been credited as successfully collecting and assessing micro-level procurement transaction data, matched with successful bidders finance and ownership structures. According to Kutlina-Dimitrova, this is so far the largest attempt with respect to country and micro procurement-data coverage.
policy data will strengthen research efforts to evaluate and develop more robust procurement policy responses.

The lack of reliable procurement data is evident in

(i) the measurement of the size of procurement markets which varies from country to country, suffers from lack of harmonization of definitions, and varied practices for on and off book contracting measures.

(ii) discrepancies arising out of diverse approaches to capturing and comparing data eg. data collected may be macro-level through the System of National Accounts (“SNA”) or micro-level through capturing of contract award data

(iii) difficulties in assessing protectionist procurement tendencies due to conflicting approaches to the categorization of cross-border procurement which have been pointed out by Cernac as having three modes:

- **“Direct cross-border international procurement.”** Foreign companies participate in public procurement tenders directly from abroad (mode 1)
- **Commercial presence procurement.** Domestic subsidiaries of foreign companies may be awarded locally public contracts (mode 2).
- **‘Value-added’ indirect international procurement.** Foreign companies participate indirectly along the value chain as subcontractors in a tender which can be won by a foreign or a domestic company (mode 3).”

Thus the inclusion of the Model Crisis Procurement Provisions in PTAs to develop common protocols for the collection and categorization of procurement data is essential.

Moreover, the analysis of historical experiences of recovery in times of disaster can be used as a trigger to create more resilient societies, and lend to heightened resilience in the future. Through the implementation of disaster risk reduction measures and restoration processes, the holistic concept of ‘Building Back Better’ is applied, yet the success of this concept depends upon the capacity to assess different aspects of the crisis, identify correlations, and evaluate causations.

Global COVID-19 Policy Response (GCPR) Research Database

In an effort to form a solid foundation for such an evaluation process, our Networked Community of Practice (“NCoP”) for the Global COVID-19 Policy Response Database (“GCPR”) has conducted meta-legal research and developed an open architecture for emergency preparedness plans and restoration actions driven by experts, policymakers, organizations, academia, and media worldwide.\(^5^8\) GCPR researchers, a collective of now over 180 legal professionals and domain experts, have observed the erosion of the rule of law and the lack of coherent and unified policy

creation, as well as the disorderly promulgation processes that governments have enacted globally in this time of crisis. Our collective has taken numerous steps to address the present data-gap challenge and made significant strides by contributing policy measures from selected jurisdictions and regions.

The GCPR Database collects original sources of policies and provides access to advanced policy searches, while utilizing machine learning techniques. It functions similarly to Oxford COVID-19 Government Response Tracker (“OxCGRT”), which collects information on common policy responses that governments have taken, scores the stringency of such measures, and aggregates these scores into a common Stringency Index.

To date, the GCPR database contains about 400 entries of international trade measures taken by various nations and international organizations. Upon the completion of the extensive task that is the collection of trade measures, as well as the preliminary classification of such measures, the GCPR Database will undergo a more refined process that places trade measures and policies into suitable subcategories. These subcategories have been identified in sifting methodology and domain-specific taxonomy.

The information accumulated by the GCPR Database allows for the potential of policymakers and regulators to apply machine learning techniques to data and to build response mechanisms that strike a balance between national interest and international coordination. The ways in which machine learning techniques can be utilized is extensive — from the identification of records and observation of patterns, to the recognition of correlations between different policies. It may also be used to determine whether meanings in the system differ from what they mean in specific contexts and geopolitical domains.

Existing Platforms for Policy Analysis and Comparative Research

There are already a handful of digital platforms that offer the possibility of extraction of key provisions from legal documentation, and conduct in-depth analysis and comparative research from the information collected. Platforms such as the Global Trade Help Desk, COVID-19 Trade

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60Michael Veale: Artificial Intelligence In The Delivery Of Public Services, UNESCAP and Google Report, 2019. Available at: Artificial Intelligence in the Delivery of Public Services.

Facilitation Resource Repository\textsuperscript{62}, Global Trade Alert\textsuperscript{63}, Trade Map\textsuperscript{64}, and the World Trade Organization’s RTA Database Repository\textsuperscript{65} provide public procurement and trade negotiation analysis to some extent. Additionally, Trade Intelligence and Negotiation Adviser\textsuperscript{66} ("TINA") provides insight into the negotiation of trade agreements of UNESCAP member states through the process of gathering trade data, which allows questions such as who to negotiate with, what commodities to negotiate over, and what the benefits of entering into certain negotiations are.\textsuperscript{67}

These platforms equip procurement professionals with access and insights to timely information on state interventions, as well as offer visual presentations of indicators on export performance, international demand, stages of the market, and repositories. However, these platforms fail to provide researchers and policymakers with access to original policy resources, which is incremental for rigorous policy investigation and the development of ‘crisis’ procurement provisions that strive towards an adequate distribution of essential goods. Using a selection of advanced digital tools, the GCPR Database takes a structured and standardized approach to the identification and collection of policy measures on local, regional, and transactional levels. Governmental procurement and trade procedures rely upon original policy sources, which the GCPR Database provides.

\textit{Advanced Information Technology in Emergency Procurement}

The methodological approach of the GCPR Database has the ability to stack the source documents of original policies and translate the documents into a machine readable form. This enables thorough analysis and the facilitation of information exchange and data collection in the public sphere. Furthermore, it creates an adequate response in times of crisis.

The compilation of original source documents in machine readable formats is necessary for the ability to use Natural Language Processing\textsuperscript{68}, or the recently released Generative Pretrained Transformer 3 (GTP-3)\textsuperscript{69}, in order to decipher complex linguistic meanings in a data heavy

\textsuperscript{63} Independent Monitoring of Policies That Affect World Commerce, Global Trade Alert, Available at: https://www.globaltradealert.org.
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\textsuperscript{67} Ibid.
\textsuperscript{69} Luke Dormehl, OpenAI’s GPT-3 algorithm is here, and it’s freakishly good at sounding human, June 12, 2020. Available at: https://www.digitaltrends.com/features/openai-gpt-3-text-generation-ai/.
environment. Complex linguistic meanings may include public comments and links between
government actions and emergency measures, so that important issues are able to be flagged and
acted upon by procurement professionals. There are many other advanced tools that can be utilized
if original source documents are made readable, as this is just a preview of the technology that
could potentially be utilized.

As emergency circumstances require various forms of procurement, the utilization of advanced
information technologies may be necessary. The practice of direct contracting with lack of
adequate transparency measures poses a high risk of inadequacy and unfair distribution of essential
goods and services. Although not encouraged, this method of procurement should only be
permissible when governments engage in maximum transparency. Transparency would call for
governments to be able to indicate what goods or services they are directly contracting, what
firm(s) they are engaging with directly, the amount allocated, and other details of the resulting
contract.

The directness and closeness of interactions between the private sector and government officials,
along with inadequate record keeping and low public accountability, may render governmental
procurement opaque and vulnerable to corruption, which prevents the success of restoration
processes.

It is for these reasons that the World Economic Forum has recently partnered with Colombia’s
Inspector General’s Office and the Inter-American Development Bank to create a procurement
system based on blockchain infrastructure. Blockchain as distributed ledger technology or peer-
to-peer digital networks have the ability to enable the tracking of products throughout the supply
chain processes. This technology also allows buyers and sellers to verify and validate transactions
throughout the chain in a decentralized and transparent manner, thus, offering a clear path to the
dismantlement of procurement corruption, as it ensures that everyone in the chain maintains
visibility on procurement processes at all times.

Blockchain technology can be coupled with prediction markets. Prediction markets are efficient
tools that have the ability to predict whether particular legislation is likely to be passed and can
forecast inflation or deflation in sales in a certain area at a specific time. This tool helps to
contextualise quotations from experts on the future of the market through the efficient aggregation
of a variety of information and beliefs, and creates the incentives for truthful revelations. Prediction

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71 Ibid.

markets are different from predictive analytics, which help to manage costs during emergencies, or even work to reduce fraud when supply and demand vary widely. Predictive analytics use machine learning to evaluate data and determine cost versus price fluctuations and predict demand, as well as identify which suppliers or countries might be in the best position to respond to a nation’s needs.

Governments must be willing to move quickly to digitize their interactions with the public, as advancements in technology accelerate at great speed. The incorporation of digital tools and technologies will allow for heightened public trust, paired with open-data centric innovations. The high-level automation that Artificial Intelligence brings to digital tools will allow for predictive maintenance, unit readiness, and may even be useful for tools that serve to improve humanitarian aid and disaster relief.

The union of these various technologies, if the compatibility of their licenses permit, have the ability to create advanced ecosystems where data is transferred, once conditions are met and protocol requirements are satisfied. At times when conventional procurement methods offer less than optimal solutions to novel problems, it is critical that advanced technology is utilized in procurement in order to cut red tape, ensure transparency and accountability, and capture data, which can then be used in a timely manner.

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Conclusion

We acknowledge that our proposed Model Crisis Procurement Provisions contradicts the dominant emerging narrative that in times of crisis, procurement presents a stumbling block rather than an enabler of the free flow of essential goods.

It is conceded that the data to support recommendations herein is lacking and this substantial procurement data-gap has been referenced throughout the paper. Whilst real time trade policy and commercial data are readily accessible, procurement policy and commercial data are not due to the lack of harmonized standards and common protocols for the categorization of procurement data. Nonetheless, the plethora of country procurement systems which engage best practice emergency procurement systems provide a basis for our recommendations. Moreover, in times of crisis, the demand for experimentation and exploration of new models without a rigorous evidence-basis requires openness on the part of governments, international organisations, businesses and civil society.

Our recommendations are not stand alone proposals. Systems of monitoring and mechanisms for enforcement must be developed, while technological solutions to identify, track and coordinate the distribution of essential goods and the development of trans-national collaborative procurement mechanisms such as the novel types of cross-border administrative collaboration developed by the EU and CARICOM will continue to be essential. That said, we argue that the inclusion of Model ‘Crisis’ Procurement Provisions along with the leveraging of technological solutions like the GCPR to address the procurement data-gap are small incremental steps that can advance our collective ability to enhance transparency and cooperation in the cross-border trade in essential goods in times of crisis.
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Whistleblower claims Commodities Reserves Agency victim of political pressure, STA, April 24, 2020.


Appendix I: Australia

Procurement procedures and regulations in Australia exist at both the Commonwealth level and the State and territory level. Australia’s Commonwealth Procurement Rules provides exceptions for times in which procurement is in the name of public health, which would allow for exemptions from the Rules or accelerated procurement processes. To further simplify procurement procedures during the COVID-19 crisis, the Commonwealth developed a document creation website, Commonwealth Contracting Suite (“CSC”), for businesses to contract with the government for procurement under 1 million USD. This program provides uniformity amongst government procurement contracts. For most contracts under 200,000 USD, the use of CSC is mandatory.

State and territory governments have additional layers of procurement procedures. In South Australia, the State Procurement Board released the COVID-19 Major Emergency Procurement Policy in order to address the unique procurement challenges that faced the State, and allowed for standard procurement requirements to be waived when they interfered with necessary COVID-19 procurement operations. Similarly, Tasmania released the Procurement Framework – COVID-19 Emergency Procurement Measures in order to address alternative procurement procedures for procurement impacted by COVID-19, or measures taken in response to the pandemic. As for Victoria, its market approach for goods and services policy provides that in critical incidents, “an organisation may adopt streamlined and flexible procurement processes to facilitate an immediate response to an emergency, crisis or disaster” and “all other

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80 Ibid, see Section 2.6: “These CPRs do not apply to the extent that an official applies measures determined by their Accountable Authority to be necessary for the maintenance or restoration of international peace and security, to protect human health, for the protection of essential security interests, or to protect national treasures of artistic, historic or archaeological value.”; See Section 10.3: Conditions for limited tender.
82 Ibid.
supply policies do not apply to the extent that the critical incident makes it impractical to apply them.”

Appendix II: Brazil

The Coronavirus electronic public procurement panel ComprasNet is an initiative of the Brazilian government, which provides information about the public purchases to combat COVID-19. The objective of this panel is to provide greater transparency to public procurement processes, tackle corruption and facilitate the analysis for the distribution logistics of health supplies and Personal Protective Equipments (PPE).

Through the portal, civil society, governments, and companies obtain a clear and organized overview of the public procurement processes carried out to combat the pandemic, in all spheres of power and federative entities. Information provided on this portal includes period of the purchase, modality of the process, format, laws related to the subject, type and description of the items purchased, suppliers, and other relevant information. The portal provides real-time and up-to-date information on public procurement, and ensures greater efficiency and integrity in the performance of public agents in these matters.

Brazil is among those States that have provided a ban on exports of medical, hospital and hygiene products essential to fighting the COVID-19 pandemic in the country. The Secretariat for Foreign Trade of the Special Secretariat for Foreign Trade and International Affairs of the Ministry of Economy may, exceptionally, authorize the export of the products listed in the Annex, considering humanitarian reasons, the country's international commitments, conditions of domestic supply, distribution and access to products appropriate to the needs of the Brazilian population at the time of authorization, impacts on the Brazilian supply chains, and provision of diplomatic missions, consular offices or other offices maintained by the Brazilian State or by autonomous social services abroad.

Another trade related reform was introduced by the Law 13.979/2020, which refers to a simplified public procurement process related to PPE. While MPV 926/2020 introduced

86 Ibid, see Section 2.1: Mandatory requirements for critical incidents.
88 https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2239385
procedures for the acquisition of goods, services and supplies dealing with public health emergencies, waiver of bidding procedures for the public administration on the acquisition of goods, services and supplies to respond to public health emergencies. Purchasing goods and contracting services by the Public Administration are, however, not restricted to new equipment, if the supplier guarantees the condition, use and operation of the acquired product and service.

Appendix III: Canada

In Canada, multiple approaches to public procurement in response to COVID-19 have been established. The federal government has centralized procurement processes in place and the provincial governments have implemented additional procedures to control the supply chain. On March 20, 2020, Prime Minister Trudeau announced his plan to mobilize Industry to Fight COVID-19, which builds upon a 1 billion USD government response fund to support Canada’s healthcare system and encourage innovative, domestic companies to develop supplies and technologies. On March 23, 2020, the Treasury Board of Canada Secretariat implemented Contracting Policy Notice 2020-1: Response to COVID-19 (“CPN”), which approved time-limited increases to emergency contracting limits. This law provides that Public Services and Procurement Canada (“PSPC”) will centrally purchase medical necessities, such as personal protective equipment, on behalf of the federal government and the provincial governments.

There is ongoing collaboration between the federal government and its provinces and territories to ensure that their needs and purchase requirements are met. Canada has obtained its emergency supply both domestically and internationally by ordering bulk on behalf of provinces and territories and promptly restocking immediately when qualified supplies are made available.

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91 Ibid.
93 Id.
96 Id.
Additionally, through Buyandsell.gc.ca, the Canadian government has put out a call to suppliers and accepts emergency medical goods and services. It is interesting to note that through the Defence Production Act (“DPA”), the Minister of Public Services and Procurement Canada (“PSPC”) could be given broad powers to mobilize Canadian resources. In addition to the DPA, the Emergencies Act could delegate expansive powers to the federal government in order to control Canadian supply chains and order the supply of medical goods from the private sector. However, the Canadian government assessed the risk of the crisis and decided that they would not invoke either of these laws.

At the provincial level, different supply management plans have been put into effect. Ontario enacted the Supply Chain Management Act, which gave the Ministry of Government and Consumer Services and the Ministry of Health the power to “manage public sector supply chains.” Other public entities could also elect to participate in centralized procurement of necessary supplies. In Quebec, the government gave the Minister of Health Services and Social Services the authority to enter into any contracts and make any expenses necessary in the name of public health and safety. As for British Columbia, the government issued the Local Authorities and Essential Goods and Supplies Order on March 26, 2020, which empowered the government and gave it more control over supply management through the new Provincial Supply Chain Coordination Unit. The approach taken by Canada has been to utilize the procurement procedures that were already in place and to mix them with the implementation of new procurement mechanisms.

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97 Supplying the Canadian healthcare sector in response to COVID-19, Public Services and Procurement Canada, July 23, 2020, Available at: https://www.tpsgc-pwgsc.gc.ca/comm/aic-scr/provisions-supplies-eng.html
99 Id.
100 Defence Production Act, RSC 1985, c D-1, Available at: http://canlii.ca/t/530sv.
101 Emergencies Act, RSC 1985, c 22 (4th Supp), Available at: http://canlii.ca/t/hxzt.
102 Supply Chain Management Act (Government, Broader Public Sector and Health Sector Entities), SO 2019, c 17, s 37, Available at: https://www.ontario.ca/laws/statute/19s15b.
105 Emergency Program Act, RSBC 1997, c 111, s 10, Available at: https://www.bclaws.ca/civix/document/id/mo/mo/2020_m084.
Appendix IV: European Union

European Commission played a significant role in COVID-19 crisis with regard to public procurement of the PPE. As individual Member States imposed several export restrictions on the PPE\textsuperscript{107}, the European Commission strengthened its role by, first, providing Communication From The Commission To The European Parliament, The European Council, The Council, The European Central Bank, The European Investment Bank And The Eurogroup; Coordinated Economic Response To The COVID-19 Outbreak on 13th of March 2020 (hereinafter the Communication)\textsuperscript{108} and then adopting special Guidance on using the public procurement framework in the emergency situation related to COVID-19 crisis (hereinafter the Guidance)\textsuperscript{109}.

The Communication provides for initiation of joint public procurement procedure as described below. In Annex 2 of the Communication, a list of national measures relating to medical products and devices and of personal protective equipment has been provided.\textsuperscript{110} This list includes, amongst others, a measure limiting protective gear in state of necessity. The Communication specifies that in order to ensure that protective equipment on the market is reserved and channeled to those who need it the most, national measures may be necessary.\textsuperscript{111} However, any such restriction must be communicated to the Commission and shall not “prevent or discourage the participation of companies established on the national territory to the participation of joint procurement procedures at EU level.”\textsuperscript{112}

\begin{itemize}
  \item [\textsuperscript{107}] https://ec.europa.eu/growth/single-market_en
  \item [\textsuperscript{112}] Ibid.
\end{itemize}
On March 15th, the European Commission adopted Implementing Regulation (EU) 2020/402 (1) (the Implementing Regulation) making the exportation of certain PPEs, subject to the production of an export authorization.113 Export authorization is required for all goods listed in Annex I114 of the Implementing Regulation and is aimed at all exports destined for outside of the Union with the exception of countries stated in Art.2, para.4 of the Implementing Regulation.115 This measure is temporary and therefore cannot be considered as a ban on export.116

On March 19th, the Commission adopted an amendment to the Implementing Regulation due to the insufficient levels of PPE within EU117, exempting additional countries from the export restriction; i.e. EFTA, and the UK.118 On the following day, the Commission adopted another Guidance (i.e. Guidance note to Member States related to Commission Implementing Regulation (EU) 2020/402 making the exportation of certain products subject to the production of an export authorization, as last amended by Commission Implementing Regulation (EU) 2020/426119) this time in order to clarify the above mentioned Implementing Regulation.

As both Implementing Regulations (i.e. adopted on March 15th and 19th) has ceased to exist after 6 weeks, European Commission replaced these with COMMISSION IMPLEMENTING REGULATION (EU) 2020/568 of 23 April 2020, making the exportation of certain products subject to the production of an export authorization120 on April 24th, prolonging the established export measure as described above. The measure has been valid for 6 weeks.

Public procurement framework, as currently established within the EU, provides all necessary flexibility to public buyers and thus all PPE shall be purchased within the framework

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114 Annex I enlists protective equipment; i.e. protective spectacles and visors, mouth-nose-protection equipment, protective garments,
115 Ibid.
117 OJ EU; l. 84 1/1; 20.3.2020; Available at: https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158671.pdf
120 COMMISSION IMPLEMENTING REGULATION (EU) 2020/568 of 23 April 2020 making the exportation of certain products subject to the production of an export authorisation; OJ EU; 1.129/7. 24.4.2020; available at:
of the public procurement\textsuperscript{121} as reinforced in the Guidance. The Guidance was adopted on April 1st, 2020 and focuses on outlining three options for Member States for conducting public procurement in state of emergency:

- Accelerated procedure (reduction of deadlines);
- Negotiated procedure; and
- Alternative and innovative solutions.\textsuperscript{122}

Buyers should also consider direct contact of potential contractors, hiring agents, and contact potential suppliers in order to interact with the market as efficiently as possible.\textsuperscript{123} Member states are also encouraged to "look for alternative and possibly innovative solutions which might be already available at the market."\textsuperscript{124} It is important to note that there is no possibility to pass over the public procurement framework when buying PPE. Member States have to ensure full respect for the public procurement principles established, and comply with the legal framework.

Additionally, in order to ensure adequate supply of PPEs across Europe, the European Commission launched a joint procurement procedure.\textsuperscript{125} This procedure initially included 26 Member States, but has now grown to 37 Member States including Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, Serbia, and Kosovo.\textsuperscript{126} The procedure is based on Joint Procurement Agreement and enables Member States to place orders for:

- Personal protective equipment (coveralls, gloves, goggles, face-shields and masks);
- Ventilators;
- Laboratory equipment.\textsuperscript{127}

\begin{thebibliography}{99}
\bibitem{121} Guidance note to Member States related to Commission Implementing Regulation (EU) 2020/402 making the exportation of certain products subject to the production of an export authorisation, as last amended by Commission Implementing Regulation (EU) 2020/426; OJ EU; 2020/C 91 I/02. Available at: https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158668.pdf
\bibitem{123} Ibid.
\bibitem{124} Ibid.
\bibitem{125} https://ec.europa.eu/health/preparedness_response/joint_procurement_en
\bibitem{126} Ibid.
\end{thebibliography}
So far the Commission has launched five calls for tender from 28th of February till 17th of June.\textsuperscript{128} The joint procurement is based on Art.5 of Decision No. 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health, repealing Decision No 2119/98/EC.\textsuperscript{129}  

\textsuperscript{128} \url{https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/public-health_en}  
Appendix V: Kenya

During the course of the COVID-19 pandemic, Kenya has taken vital steps to revise its taxation system to grant exemptions for overall investments in various industries across the board.\textsuperscript{130} However, with reference to the trade treaties, there is evidence of the lack of proper implementation of these instruments following the pandemic. There is the absence of adequate provisions that can cater to the progression of the African economy and alleviate or solve the trade problems and restrictions brought by COVID-19. It is essential that best practice provisions of international and regional trade are included in treaties. The legislative discrepancies surrounding trade and accessibility to imported medical PPE in Kenya is very concerning.

The COVID 19 pandemic is on the verge of injuring the socio-economic sectors of Kenya. One of the most impacted fabrics of the economy is the health sector. The Competition Authority of Kenya took a commendable step and ordered the regulation of prices by local markets selling PPE such as hand-sanitizers, gloves, masks and other COVID-19 related medical supplies to protect consumers from exploitation. The East African Community (EAC) must similarly fast-track trade through green lanes for PPE and other medical supplies and exhibit price control mechanisms, as PPEs are becoming exceedingly scarce and unavailable.\textsuperscript{131}

Kenya adopted lockdown measures in March 2020 at the same time the World Health Organization declared COVID-19 as a pandemic. Therefore, March marks the starting point of trade related issues and challenges for Kenya. The exportation of goods to the US and Europe from Kenya were negatively affected in April following the suspension of aircraft transitions and the fall of demand for goods. The governing legislation for these trade relationships is largely entrenched in the Africa Growth Opportunity Act which exempts Kenya from paying duties on exports to promote its economic growth.\textsuperscript{132}

Kenyan institutions have taken the initiative to solve the trans-national trade crisis by using aircrafts to protect the lucrative exports. This, however, is very costly but would be necessary for the reception of COVID-19 related supplies. On the regional scale, the trade transactions for COVID-19 PPE must be made accessible and effective as challenges and hindrances have been seen through the problematic issuance, recognition and acquisition of

COVID-19 certificates for truck drivers moving to transboundary areas. Trade is therefore limited and slowed down by clearance procedures in East Africa.\textsuperscript{133}

African Continental Free Trade Area (AfCFTA) must remove and dismantle intra-African tariffs according to its modalities as an immediate priority for medical and PPE supported by custom green lanes. Kenya further intends to implement the WTO Trade Facilities Agreement in its bilateral and multilateral treaties to set equilibrium to mitigate the economic and social impact following the rising trade costs of PPE. It also draws aspiration from the TRIPS Agreement which enables the local government to exclude medical items related to COVID-19 from patent subjections. The removal of intellectual property rights on PPE grants the use of equipment without necessarily having to obtain the consent of the patent holder.\textsuperscript{134}

\begin{footnotesize}

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Appendix VI: Latin America

Argentina has an electronic procurement system called ComprAR, but in the beginning of the pandemic, public purchasers skipped the electronic government procurement system, and pursued direct contracting with invitations to vendors sent via Email. This form of invitation to bid not only lacked transparency, but also limited the participation of many suppliers, and exposed the State to overpaying for goods, as well as fraudulent vendors. Further, this purchase modality did not include a formal act of opening bids or an evaluation stage, and did not allow the possibility of challenging the decisions on the award. Transparency International’s Argentina branch accused the government of only publishing 20% of the contracts awarded under a special administrative procurement decree created for COVID-19 purchases, and has asked the Auditor General of the country to investigate.

In Colombia, the Colombia Compra government procurement agency developed a legislative decree with the central government in March 2020, outlining how public procurements were to be conducted by all agencies. According to the Datasketch report for Colombia and Panama, Colombia has spent 10 million USD on direct contracting since March 17th, and the report indicates that the data from the official website of the Colombian Public Procurement Agency cannot be downloaded, and therefore, future modifications to the contracts will only be known once they are finalized. There is also a growing scandal surrounding contracts awarded to funeral homes for managing COVID-19 deaths with exorbitant prices. The good news is that some local entities are using the country’s improved e-procurement system, and competition and efficiency are increasing in those entities.

In Honduras, HonduCompras collaborated with the Inter-American Development Bank to help the country create a database with an electronic catalogue of suppliers providing emergency equipment, and even has an entire webpage dedicated to COVID-19 procurement for every agency in Honduras to use. Catalogues include certifications, technical details and availability of PPEs for immediate purchase.

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138 https://www.colombiacompra.gov.co/sala-de-prensa/comunicados/nuevas-normas-ante-covid-19
142 http://oncae.gob.hn/covid19
The government of Peru, for its part, has created a National Emergency Mitigation Fund for the COVID-19 emergency, providing for additional healthcare funding, faster direct contracting for services associated with the emergency response (e.g., procurement of medical supplies), additional credit lines for certain businesses, some cash assistance, and delayed tax and pension contribution collection. The nation’s national purchasing agency, Peru Compras, also created an electronic dashboard to publish all COVID-19 related purchases. Nonetheless, Peru is under scrutiny for purchasing masks and ventilators at double market prices from unscrupulous firms, including one company registered with the Peruvian government as a provider of almost 150 different activities that range from spraying homes to offering tourism agency services.

Mexico and Brazil also have electronic procurement systems, but both have opened themselves up to potential scrutiny and investigations because of expedited processes where they may have been subject to overpricing or fraudulent suppliers. Both countries have also seen federal investigations concerning how funds have been appropriated to certain firms connected to powerful officials for COVID-19 related goods or services.

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Appendix VII: OECS & CARICOM

The Organisation of Eastern Caribbean States (OECS)\textsuperscript{150} established in 1981 by the Treaty of Basseterre, with a cumulative population of approximately 570,000 people, stands out as an example of successful regional integration. Functional cooperation in the area of procurement is also quite advanced. In the area of public procurement, significant non-legislative reforms and practical initiatives have been embarked upon to maximize the OECS regional pool with the operation of a Pharmaceutical Procurement System, and an ePPS Sourcing Platform has been fully operational since 2013.

The OECS/Pharmaceutical Procurement Service (OECS/PPS) is a self-financing public sector monopsony or buyers’ cartel that covers its operating cost from a 15\% surcharge.\textsuperscript{151} Political will was an essential ingredient for OECS/PPS’s success because the Prime Ministers of the OECS agreed to establish the OECS/PPS in 1986. The countries deposited one-third of their annual pharmaceutical budget to individual country drug accounts at the Eastern Caribbean Central Bank (ECCB) in order to assure prompt payment to suppliers and to maintain a revolving drug fund. This was a manifestation of the political and financial commitment. Established under a project funded by USAID, the core function of the OECS/PPS is the pooled procurement of pharmaceuticals and medical supplies for nine Ministries of Health (MOHs) of the OECS countries. Cost savings demonstrated that regional prices were approximately 44\% lower than individual country prices. The continuous annual cost-savings accrued after 16 years of the joint purchasing arrangement have reinforced OECS/PPS as an excellent cost-benefit model of economic and functional cooperation among OECS member countries.

The e-PPSS is a web-based, collaborative system to facilitate the full lifecycle of a tendering process, for both buyers and suppliers. It offers a secure, interactive, dynamic environment for procurements of any nature, size, complexity or value, enforcing and encouraging best practices. The e-PPSS supports the process of procuring works, services and supplies electronically. Different public procurement procedures are supported for both one-off or repetitive purchases through several dedicated sub-modules providing facilities for user registration, competition notification, tender preparation and submission, online tender evaluation, contract awarding, creation and management of catalogue-based information, placement of electronic purchase orders, electronic Invoicing and order tracking.

\textsuperscript{150} Anguilla, Antigua & Barbuda, British Virgin Islands, Dominica, Grenada, Monsterrat, St. Kitts & Nevis, St. Lucia and St. Vincent & the Grenadines.

\textsuperscript{151} See more at: http://www.oecs.org/our-work/units/pharmaceutical-procurement#sthash.0QsZt20c.dpuf
The e-PPSS can also support the PPS specific procurement model for the procurement of pharmaceutical products on behalf of all OECS Member States. e-PPSS facilitates the achievement of efficiency gains, while promoting core principles and regulations following international standards on public procurement such as transparency, security, availability, non-discrimination and equality of treatment.152

Notable here, is its use in the time of COVID-19 pandemic, when the funding provided by World Bank for the purchase of critical supplies, including PPE for healthcare workers, medical equipment, laboratory equipment and tests, and goods and services to enhance preparedness and surveillance systems and other crisis related equipment was provided through the Contingent Emergency Response Component of the OECS.153 Funding has also been provided for health-care capacity building, agriculture and climate resilience improvements.

The CARICOM COVID-19 Response has been exemplary worldwide.154 CARICOM Member States have been ranked among the best in the world in their response to the pandemic in many global assessments. The CARICOM took a coordinated regional approach across the 20-member grouping, with rapid and deliberate actions taken by regional institutions.

*Below see excerpt from News Feature : Caribbean Community successfully keeps low COVID-19 infection rates*

“CARICOM Heads of Government began their engagement from January 2020 when regional interest in the disease first began to develop) and continued to collaborate on best approaches to combat the spread, as the first cases reached the Region in March. Their Ministers of Health began a series of Special Emergency Meetings from 3 February from which a regional protocol establishing minimum standards for dealing with the COVID-19 virus emerged.

This work was guided by the CARICOM Secretariat and the Community Institutions and their international partners led by the Caribbean Public Health Agency (CARPHA) and including the CARICOM Implementing Agency for Crime and Security (IMPACS), the Regional Security System (RSS) and the Caribbean Disaster Emergency Management Agency (CDEMA). The Pan American Health Organisation (PAHO), continues to be a major partner.

As Member States’ Ministries of Health steadily built up their own testing capacity, the Regional Security System facilitated the transportation of their samples to CARPHA’s Trinidad and Tobago-based testing facilities that uses World Health Organization (WHO) recommended procedures for testing, verification or validation.

152 https://procurement.oecs.org/epps/home.do
The Community’s evidence-based response efforts to COVID-19 were heavily underpinned by
daily surveillance and modelling from the George Alleyne Chronic Disease Research Centre at
the University of the West Indies. The Centre worked closely with CARPHA to provide critical
scientific statistical analysis used to guide Member States understanding of the disease processes
(cases, deaths, outbreak growth rates etc) and non-pharm interventions to determine management
of measures to restrict or re-open. The daily monitoring also helped to guide changes to national
responses including decisions by governments on easing the controls they put in place.

Direct presentations were made to special emergency meetings of CARICOM Heads of
Government, and to CARICOM Health Ministers through the Council for Human and Social
Development (COHSOD).

CDEMA, through its long-standing Regional Response Mechanism, has been coordinating the
logistical arrangements for critical COVID-19 related supplies. A specialised Core Coordination
Cell (for Health), which also includes CARPHA, the CARICOM Secretariat and PAHO was
established for this this purpose.

In May, as Region began preparing to ease COVID-19 restrictions, CARPHA and CARICOM
IMPACS teamed up to train front-line security officers across Member States on measures to
protect themselves in the line of duty.

The virtual training equipped the officers on the use of Personal Protective Equipment (PPE)
particularly in the conduct of their daily duties at ports of entry and with investigations. The
training, hosted in collaboration with the Caribbean Basin Security Initiative – Connect
programme, reached more than 500 frontline workers from various security divisions – police,
prisons, customs, immigration and military.

CARICOM IMPACS and the Regional Security System further teamed up to help Member
States prevent and mitigate the spread of the COVID-19 to prisons and correctional facilities,
with air-lifted supplies of sanitary and other COVID-19 related supplies during May and June.
The donated items included infrared thermometers, and cleaning products including bleach and
hand sanitisers. The Region has to date avoided outbreaks of the disease among its prison
populations.

Going forward, the Caribbean Community has been offered access to the African Union Medical
Supplies Platform, a procurement system for additional supplies and equipment in the fight
against COVID-19. The Platform provides immediate access to an African and global base of
vetted manufacturers and procurement strategic partners at more competitive costs.

CARPHA, through its Tourism/Travellers and Health Programme, has facilitated training
sessions in the critical tourism sector while also using the programme to help restore visitor
confidence in the Region’s tourism product. It has also published other guidelines to assist with
facilitating reopening of Member States, including Interim Guidance for Domestic Workers and an Interim Guidance document on Resuming Office Operations.

The IMPACS operated Joint Regional Communications Centre, which provides advanced passenger information, has been allowing for better management at the ports of entry across the region though collaboration with port health authorities."\textsuperscript{155}

\textsuperscript{155} ibid
Appendix VIII: Rwanda

Despite the demerits mentioned, Rwanda has been successful in its trade and procurement transportation of goods and medical supplies. A warranted strategy and flexibility of traditional transport corridors and utilization of various modes of transport has been put in place especially for PPE and medical supplies. In the region, Rwanda has proven the effectiveness of administrative action in emergency cross border trade. Ports, Free Zones Authority and the country’s inter-ministerial committee on COVID-19 coordination has proven effective in keeping the country’s cargo movement open with minimal health risks.\(^{156}\) The regional trade agreements do not fully cater for situations that include closure of borders. As a result, Rwanda has similarly adopted measures outside of the trade agreements primarily to facilitate trade and prioritize cargo mitigating the effects of the COVID-19 pandemic.\(^{157}\)

The pandemic has highlighted the need for interdisciplinary coordination to allow trade flow whilst adhering to WTO’s guidelines. This, however, calls for harmonization of trade restrictions across the region to ensure common interpretation and application of the same. Rwanda is urged to keep its borders open to facilitate the movement of cargo on a transboundary basis.\(^{158}\)

In an effort to mitigate issues encapsulating trade and procurement, UNCTAD, TradeMark East Africa (“TMEA”) and other regional stakeholders have taken to aiding the committees to improve their skills and subsequent effectiveness in light of the pandemic. The East African Community Administrative Guidelines have been set up to facilitate trade by proposing the gazettement of trade routes. This will ideally supplement the coordination of border control and other disciplines involved in mitigation of the pandemic. Member states have been advised through this supplementary instrument to gazette routes within their borders to ease containment of infection as well as unclog trade blocs in the region.\(^{159}\)

\(^{156}\) https://www.comesa.int/37212-2/
Appendix IX: Uganda

Uganda’s balance of payments were valued at 2585.31 million USD in exports and 379.67 million USD in import receipts by January 2020 before entering into a full lockdown in March 2020. Food items, especially coffee, cocoa beans, maize and non-food items like cotton and flowers were majorly exported to the East African region, Middle East, African countries and Europe. Uganda mainly imported machinery, base metals, accessories, beverages from majorly Asia (39.4%), East African Region(18.8%) and middle East. When Uganda initiated the first national wide lockdown on 30 March 2020, all borders were closed to any persons entering Uganda except cargo and persons entering the country from the Organization of the United Nations. This greatly reduced the balance of payments as Uganda registered a drop in imports to 492 million USD in April from 548.2 million USD in March and exports from 356.1 million USD in February to 315.5 million USD in March during the lockdown.

Uganda further adopted non-tariff measures of prohibition especially on imported second hand used clothes and footwear in an effort to control the spread of COVID-19. This greatly affected the reliance on importation of goods into the country and created the need for import substitution on medical supplies which were essential during the lockdown. For example, by 20 July 2020 the Uganda National Bureau of standards had certified and allowed 45 domestic companies to produce non-medical face masks, while over 136 domestic companies had been certified to manufacture hand sanitisers, items that have been essential in the fight against COVID-19.

Furthermore, the President Yoweri Museveni has continuously made calls for import substitution in Uganda with the latest being made on 27 May 2020 during the launch of Lida packaging products Ltd., a Chinese company that produces medical and non-medical face masks.

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161 Ibid, Pg 11.
162 Ibid, Pg 13.
The president encouraged Ugandans to borrow funds from the Uganda Development Fund and invest in projects seeking to promote import substitution.\(^{169}\)

The Lockdown gave a lee way to the government to manipulate the procurement process and selectively adhere to some procurement principles. During the lockdown, the government adopted majorly two procurement methods, that is; restricted domestic or international bidding,\(^{170}\) and direct procurement\(^{171}\) especially for the medical supplies and other necessities. Regardless of the fact that the medical supplies and COVID-19 were part of the donations received by the government from both external donors such as Amref,\(^{172}\) as well as Ugandan private entities in Uganda such as Movit Skin guard cosmetics,\(^{173}\) Baraj group of companies among others,\(^{174}\) other items like masks, and gloves that the government has given to public servants like the army, police, and members of parliament were procured without disclosing how the suppliers were awarded those contracts and whether there were any lists of qualified able suppliers.

Despite several calls from the different stakeholders including Transparency International\(^{175}\) and the public at large\(^{176}\), requesting the government to ensure transparency during the procurement process of the essential items relevant in the fight against COVID-19, the government seems to have turned a deaf ear to this call as the government is yet to furnish the public with details of every concluded contract related to COVID-19 medical supplies and other items used in the fight against COVID-19 as well as the breakdown of how the funds received from both the private sector and external donors were used, which actions have led to the continued public outcry for the government’s need to be more transparent during this pandemic.\(^{177}\)


\(^{177}\) Ibid.
Appendix X: United States of America

In the United States, the government faced many challenges regarding the procurement of emergency medical supplies. In efforts to prevent the hoarding of health and medical resources such as sanitizer, face masks, and personal protective equipment, the federal government invoked the Defense Production Act (“the Act”). The Act gives the executive branch emergency powers and functions to compel US companies to produce emergency medical supplies and support domestic production. The invocation of the Act led to the issuance of the Executive Order No. 13910: Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19. Executive Order No. 13910 sought to protect “threatened materials,” which included raw materials, such as metals, as well as any other items of supply. The order made it a crime to stockpile medical resources and materials in excess in efforts to protect these supplies, as well as to prevent price gouging on health essentials.

However, it is the task of state governments to regulate pricing in times of public health emergencies and it has been up to the state attorney generals and governors to implement price gouging restrictions. For states that do not already have price gouging laws in place, they have either enacted new legislation or decided to pump out executive orders. This state-by-state approach to regulation means that businesses in each state are faced with different standards of supply decisions and pricing, while interstate commerce is governed by federal law. Since states cannot prosecute out of state businesses, the state price gouging laws are mostly limited to retail sales.

179 Ibid.
181 Ibid.
182 Ibid.
186 Ibid.
A particular challenge that emerged in efforts to combat price gouging was the ability to crack down on large digital marketplaces that sell goods through third parties. It is oftentimes difficult for online marketplaces to regulate price gouging, as many companies utilize pricing tool technology that automates competitive pricing based on shifts in demand.187 Regardless of the challenges that digital marketplaces face, they have been advised to be on the lookout for unreasonably high-priced essential items listed on their platforms.188 Attorney General Xavier Becerra of California was amongst the group of state leaders that called for large online marketplaces to take “immediate and vigorous steps to eliminate predatory behavior, which they know is illegal, from their platforms.” Vigorous steps would include the implementation of meaningful human review to replace algorithmic management and the ban of third-party sellers who are caught in the engagement of price gouging.190

Even greater than the challenge of supply management were the challenges of procurement of medical supplies – especially due to the fact that the federal government moved away from a top-down federal system of procurement and informed state governments and local hospitals that they are to rely on themselves to obtain their supply needs.191 The states only received fractions of the supplies that they needed when the federal government did distribute from its stockpile,192 which led to states bidding against one another in the global marketplace for expensive supplies193 and looking out in the best interests of their own local governments and constituents – all while driving up prices of supplies. Simultaneously, hospital procurement officers have faced an onslaught of challenges obtaining affordable and authentic supplies.194

189 Ibid.
190 Ibid.
192 Ibid.
193 Ibid.
Although the overall federal response to assisting the states and local hospitals with procurement of essentials supplies has been extremely slow and confusing, in an effort to ease the burden of procurement of expensive supplies, the federal government pushed out the Coronavirus Aid, Relief and Economic Security ("CARES") Act,\(^\text{195}\) which distributed $30 billion of funding to eligible hospitals.\(^\text{196}\) The CARES Act also provides funds in the forms of loans and grants to businesses and has become the largest economic stimulus package in history. However, with such a mammoth stimulus package comes the fear of fraud, abuse, and mismanagement of funds without transparent due diligence mechanisms in place.

The COVID-19 crisis highlighted the challenges of American federalism in times of crisis, as the nation responded to the pandemic with a patchwork approach. This competitive and uncoordinated approach to crisis procurement in the United States can stand to make a universal statement as to how the global community has struggled to manage the procurement of medical goods in a time of crisis. If the state of international trade of medical supplies is to be viewed as a ‘wild wild west,’ an analysis of the United States’ struggle of procurement of emergency supplies is a microcosm of the total lack of cooperation needed for effective crisis management.

The impact that the COVID-19 crisis has had on supply chains will be felt as the nation anticipates the production of vaccines and beyond. It is a reflection of the American practice of medical supply procurement generally, as medical providers source their own products and are overseen by a patchwork of federal and state regulations.\(^\text{197}\) The Food & Drug Administration ("FDA") has taken measures to speed up the development of a vaccination to treat the COVID-19 virus,\(^\text{198}\) but the desire to rush to create a vaccine bears many consequences and tends to lead to lack of transparency. The United States has already been accused of data manipulation, as two prestigious medical journals had to retract papers that made use of an allegedly fabricated database provided by Surgisphere, a small data analytics company.\(^\text{199}\) This scandal has highlighted the need for transparency in emergency procurement of COVID-19 treatments and vaccinations. It is of the utmost importance that quality and safety is not sacrificed for speed.


\(^{197}\) Ibid.


\(^{199}\) Martin Enserink, Kelly Servick, A mysterious company’s coronavirus papers in top medical journals may be unraveling, Science Mag, June 2, 2020, Available at: https://www.sciencemag.org/news/2020/06/mysterious-company-s-coronavirus-papers-top-medical-journals-may-be-unraveling.
As the United States accelerates to secure drug supplies, there is a threat of “vaccine nationalism” – the nationalist ‘every nation for themselves’ approach to vaccine solutions is reminiscent of the ‘every state for themselves’ approach that the U.S. took to procure emergency medical supplies. The United States has already managed to purchase the full supply of remdesivir (a drug that is used in the treatment of COVID-19)\textsuperscript{200} and attempted to purchase an entire German biotech company, CureVac, in order to secure exclusive access to a vaccine that is being developed by the firm.\textsuperscript{201} The thought alone that the United States would be able to purchase exclusive access to a COVID-19 vaccine is an immense threat to the ability to combat this global pandemic with a global solution.


\textsuperscript{201} Aitor Hernández-Morales, Germany confirms that Trump tried to buy firm working on coronavirus vaccine, March 19, 2020. Available at: \url{https://www.politico.eu/article/germany-confirms-that-donald-trump-tried-to-buy-firm-working-on-coronavirus-vaccine/}. 

APPENDIX XI

Model Crisis Procurement Provisions

Preamble

Whereas, the Parties are committed to the principles of cooperation and solidarity in times of crisis and to participating in a fair, rules-based, international trading system which facilitates the free flow and equitable access to essential goods

IT IS AGREED as follows:

Part 1

Procurement Cooperation in Times of Crisis

Article 1

Objectives

The Objectives of this Agreement are:

(a) To ensure the free flow and equitable access to essential goods in times of crisis.
(b) To strengthen existing relations and trade cooperation between the Parties on the basis of solidarity and mutual interest.
(c) To create shared systems for effective preparedness in times of crisis to mitigate extreme damage and harm.

Article 2

Principles

1. This Agreement is based on the Six Guiding Principles for Procurement in Times of Crisis:
Principle 1 - Coherence - Procurement policy should enhance rather than reduce the effectiveness of public health interventions. Proper account shall be taken of relevant procurement-health linkages informed by expert advice.

Principle 2 - Do No Harm - Eschew procurement policies which deprive buyers worldwide of equitable access to medical goods.

Principle 3 - First Best - Procurement policy should not be used if a more effective policy instrument exists. Proposed procurement policy initiatives must not be considered in isolation; meaningful alternatives must be considered.

Principle 4 - Transparency - Procurement policy and crisis procurement decisions should conform to best practice norms for transparency in emergency procurement and Open Contracting Global Principles.

Principle 5 - Scrutiny - Conformity of emergency buying decisions and policies with these principles should be evaluated and measures falling short should be removed; all future emergency procurement policy initiatives should be tested against these principles.

Principle 6 - Proportionality - Procurement should be based on careful and responsible analysis of the inputs needed to combat the emergency, so that they are proportional and reasonable when contracting.

2. The Parties agree that the [insert existing PTA], the Principles above and the terms of this Agreement shall be implemented in a complementary and mutually reinforcing manner.

Article 3
Scope of Application

For the purposes of this Agreement:

(a) “Crisis” is defined as a sudden unforeseen event and/or prolonged circumstances and/or slow-onset, chronic ongoing crises, which result in injury, loss of life or critical damage to property or infrastructure. “Crisis” situations may include:

natural or manmade disasters: such as earthquakes, cyclones, tsunamis, volcanic eruptions, flooding, fires or contamination;

failures of critical infrastructure or equipment: such as failure of a prison security system, or critical hospital or transportation infrastructure;

drought, severe malnutrition, and famine;

critical health or environmental emergencies: such as a pandemic or food safety incident;

political emergencies: such as a war, coup, or civil insurrection in either of the Parties state;

critical security emergencies: such as a terrorist attack, serious crime or major cyber security emergency;

unanticipated events that make it impossible for public agencies in a Party’s State to perform a statutory or critical function in the necessary timeframe: for example the destruction of critical election supplies immediately prior to an election would be an emergency for the Electoral Commission.

(b) Urgent situations that are created by the actions of a Party through a lack of planning or risk mitigation do not constitute a crisis.

(c) “Crisis Stages” include:

(i) Immediate Response Stage - Extreme Urgency
(ii) Relief & Recovery Stage - Moderate & Stabilizing
(iii) Future-Crisis Preparedness Stage - Phasing Out & Feedback Loops

Part 2

Immediate Response Stage

Article 4

Operational Agreements for Immediate Response

The Parties agree:

1. That crisis procurement undertaken by covered entities must be justified, recorded and made public;
2. That crisis procurement is the exception, not the rule, and should be judged on a case-by-case basis;
3. That crisis procurement can be undertaken by restricted tendering procedures and flexible direct awards to ensure speed, simplicity, and agility in response;
4. That crisis procurement decisions are proportional and reasonable depending on the Crisis Stage
5. That all crisis procurement data collected by covered entities shall be centralised on national e-procurement portals and updated in the shortest possible time frame;
6. To full publication of crisis procurement data in order to maintain mutual trust and cooperation
7. To commit to implementing the Open Contracting Global Principles and the Open Contracting Data Standard (OCDS) to enable disclosure of data and documents at all stages of the contracting process by defining a common data model.
8. To implement standards to mitigate the harmful impacts of price gouging, strengthen supplier due diligence and to prevent fraud, mismanagement and abuse

Part 3
Relief & Recovery Stage

Article 5
Operational Agreements for Relief & Recovery Stage

1. Parties agree to work toward establishing and implementing the following:
   a. A Joint Committee to coordinate ongoing Crisis procurement response
   b. Development of a Shared ‘Accelerated Procurement’ Protocol which introduces agreements on notification dates, procurement methods, non-discrimination against suppliers in Party States and dates for reversion to normal procurement practices.
   c. Collaborative buying mechanisms for essential goods to improve efficiency and value for money outcomes.
   d. Systems for OCDS
Part 4
Crisis Preparedness Stage

Article 6
Operational Agreements for Crisis Preparedness

1. Parties agree to establish
   a. coordinated administrative mechanisms and develop effective preparedness plans and systems to address future crisis
   b. coordinated systems for research and capacity building for the assessment of future risks
   c. coordinated systems for evaluation and assessment
   d. supra-national oversight mechanisms