Facilitating a Coordinated International Response in Times of Crisis

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Type of Contribution: Policy Brief
Word count: 3,934 (excluding footnotes and references)
Keywords: Transparency, Cooperation and Building Resilience

A contribution to the Policy Hackathon on Model Provisions for Trade in Times of Crisis and Pandemic in Regional and other Trade Agreements

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FACILITATING A COORDINATED INTERNATIONAL RESPONSE IN TIMES OF CRISIS

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Executive Summary

1. This trade policy hackathon aims at “building back better” after COVID-19. We contribute to this objective through a proposed Crisis Management Chapter (Chapter), intended for inclusion in either a new or existing bilateral or regional Free Trade Agreement (FTA), and potentially to also be adapted for use in the World Trade Organization (WTO).

2. Our review of the trade response to the COVID-19 pandemic suggests a need for improved mechanisms and opportunities for coordinating governments’ responses during a time of crisis. The COVID-19 pandemic has revealed a general lack of coordination, with governments taking a variety of approaches, ranging from protectionist measures such as export restrictions on essential goods, to trade liberalising measures such as tariff reductions. We used this experience to consider how treaty provisions can be used to encourage countries to collaborate in a time of crisis.

3. The result of our research is a text proposal for a Chapter that seeks to promote cooperation and transparency in a time of crisis. The provisions are based on the premise that better cooperation (between governments, and with the private sector) and transparency can play a key role in enabling governments to work together to better prepare for, and respond to, future crisis situations, so as to ensure the continued flow of goods and services and minimise disruption to supply chains.

4. The Chapter aims to provide a practical framework to ensure that the collective benefits of trade arrangements are least compromised during a crisis situation and that trade can support recovery efforts. For example, it provides an illustrative list of areas for cooperation both to respond to a crisis situation and to ensure preparedness for future crises. In taking this approach, it is consistent with the 2030 Agenda and the Sustainable Development Goals which similarly value coherence and coordination in the development of policies.

5. We have not limited the scope of the Chapter to a health crisis, such as the current pandemic, neither have we limited the focus to specific sectors or trade measures, or limited the scope of cooperation to the duration of a crisis situation. Instead, the Chapter includes obligations intended to enable governments to better prepare for, and respond to, any type of crisis situation, including through cooperative activities during times of normality.

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1 Submission prepared by Tracey Epps, Danae Wheeler and Georgia Whelan. Tracey Epps is a Trade Law Consultant while Danae Wheeler and Georgia Whelan are lawyers in the firm’s International Law practice.
Chapter on Crisis Management - Overview

Introduction

1 A lack of international cooperation in times of crisis risks hampering the urgently required supply response, as well as medium- and long-term economic activity necessary to support recovery. COVID-19 has revealed a general lack of preparedness and cooperation on the part of governments, which has resulted in disparate responses. Some have implemented temporary export restrictions and import measures, and stockpiled critical supplies. Others have reduced tariffs on essential goods, or have made joint declarations to keep supply chains open (such as the New Zealand Singapore Declaration, and the Joint Ministerial Statement). Most have engaged in a mix of responses. All governments will be faced with critical decisions in the recovery phase, including how to support hard-hit industries and encourage growth in new sectors.

Promoting greater cooperation through a Crisis Management Chapter (Chapter)

2 While we cannot predict how any government will respond in a crisis situation, or in fact even predict what the next crisis might be, we can provide a framework for a more coordinated response through cooperation and transparency.

3 To facilitate better coordination, we have drafted a chapter on Crisis Management that has the key objective of preventing unintended economic and humanitarian harm that may otherwise result from a lack of coordination and parallel actions by governments in responding to a crisis situation.

4 We have drafted the Chapter with a view to its inclusion (with minor adaptations as necessary) into bilateral and regional free trade agreements, both new and existing (e.g. the Comprehensive and Progressive Trans-Pacific Partnership, or CPTPP). It could also be adapted to form a new World Trade Organisation (WTO) agreement.

Overview of Chapter

5 Objectives: The Chapter’s objectives focus on promoting cooperation and transparency to enable Parties to prepare for, and respond to, crisis situations in a manner that prevents unintended economic and humanitarian harm, and ensures that the benefits of economic integration for their populations, including through liberalised trade and investment, are maintained.

6 Article xx.3 (General provisions): Contains two of the core obligations requiring Parties to refrain from trade restrictive measures in a crisis situation, and

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3 New Zealand and Singapore Declaration on Trade in Essential Goods for Combating the COVID-19 Pandemic (15 April 2020); and Joint Ministerial Statement by Australia, Brunei Darussalam, Canada, Chile, Lao People’s Democratic Republic, the Republic of the Union of Myanmar, New Zealand, Singapore and Uruguay affirming commitment to ensuring supply chain connectivity amidst the COVID-19 situation (14 April 2020).
disciplining the use of emergency measures. The latter draws inspiration from the G20 Leaders’ Statement on COVID-19.

7 **Article xx.4: Declaration of crisis situation:** A declaration of crisis made by the FTA’s governing body triggers the Chapter’s core obligations.

8 **Article xx.5: Cooperation to prepare for and respond to a crisis situation:** Sets out the Parties’ core obligations to cooperate to address matters of mutual interest related to their individual and collective preparation for, and response to, a crisis situation. It includes Annexes that set out illustrative lists of cooperative activities which the Parties may undertake in accordance with their obligations.

9 **Article xx.6: Cooperation in other international fora:** Obliges Parties to work with each other in the WTO and other relevant international fora to foster regional and international cooperation in relation to the matters covered in the Chapter.

10 **Article xx.7: Transparency and information sharing:** Establishes a mechanism for Parties to share information about measures being taken during a crisis situation and for the Parties to discuss those measures as required.

11 **Article xx.8: Participation of the private sector:** Requires Parties to promote the active participation of the private sector to promote a coordinated approach in the event of a crisis situation that ensures the continued flow of goods and services and minimises disruption to supply chains in essential goods and services.

12 For this Article, we drew inspiration from Sherry Stephenson’s policy paper which suggests establishing “supply chain councils” to map sector specific supply chains and identify the governance structure of those supply chains. The Chapter requires Parties to consider establishing one or more working groups comprised of representatives of the private sector to map supply chains for essential goods and services.

13 **Article xx.9 (Committee):** Establishes a Committee on Crisis Management which will be the core body tasked with implementing the obligations on cooperation.

14 **Article xx.10 (Contact Points):** Provides for the designation of Contact Points to enable communications and notifications pursuant to the Chapter.

15 **Article xx.11 (Non-application of Dispute Settlement):** Makes it clear that any dispute settlement provisions in the Agreement would not apply to the Chapter.

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Chapter xx

Crisis Management

This model “Crisis Management” Chapter is intended for inclusion in either a new or existing bilateral or regional Free Trade Agreement (FTA). It could also be adapted for the World Trade Organisation (WTO).

The reference in this model Chapter to the “Joint Commission” is based on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which establishes a Joint Commission as the main governance body for the Agreement. Other FTAs will have a similar body that should be referred to in place of “Joint Commission”.

Article xx.1: Definitions

For the purposes of this Chapter:

**crisis situation** means an extraordinary situation that affects more than one territory and which arises from causes including, but not limited to, natural disasters, extreme financial events, wars, or pandemics and which involves the potential for:

a) significant impact on the free flow of cross-border trade in goods and services and investment; or

b) governments to be called upon to respond domestically through measures to prevent economic, environmental or humanitarian harm where that response is likely to have adverse impacts on trade and investment flows,

and includes an associated recovery phase as defined in this Chapter.

**declaration of crisis situation** means a declaration by the [Joint Commission] pursuant to Article xx.4 that a crisis situation exists to which this Chapter applies.

**essential goods and services** means goods and services that are necessary to sustain or support life, health, critical infrastructure or public utilities. These include, but are not limited to, food, water, medical supplies, building materials, modes of transport, suppliers of goods and services essential to national security and provision of health and other public utility services such as distribution of electricity and telecommunications.

**recovery phase** means a period of time that, in a crisis situation, follows on from the immediate crisis as the situation decreases in intensity to a point at which governments in affected territories shift the focus of their attention from responding to the immediate crisis to taking steps to secure the recovery of their economies. The Parties recognise that each of them may move to a recovery phase at different times.
Article xx.2: Context and Objectives

1 The Parties recognise the value of international and regional cooperation in the event of a crisis situation in order to ensure that the benefits of economic integration for their populations, including through liberalised trade and investment, are maintained.

2 The objectives of this Chapter are to:
   
   (a) promote cooperation and transparency among the Parties to enable them to prepare for, and respond to, a crisis situation while ensuring that trade and investment can continue to flow;
   
   (b) through such cooperation and transparency, and associated sharing of information, prevent unintended economic and humanitarian harm that may otherwise result from a lack of coordination by Parties in responding to a crisis situation;
   
   (c) underscore the importance of safeguarding the core values of the global trading system and the overall objectives of this Agreement by seeking to ensure that Parties reject protectionism and do not turn inward in a crisis situation.

Article xx.3: General Provisions

1 The Parties recognise:
   
   (a) that in a crisis situation, a coordinated regional and international response is necessary and desirable to ensure the continued free flow of goods, services, people, and information;
   
   (b) the importance of ensuring that trade lines remain open during a crisis situation, including via air and sea freight, to facilitate the flow of goods, in particular essential goods; and
   
   (c) the important contribution that an open, global market, where innovative goods, services, people and information can flow across borders without unnecessary obstacles, makes to the healthy recovery of economies from a crisis situation.

2 Recognising the right of each Party to set its own policies in a crisis situation (as declared pursuant to Article xx.4(2)) to ensure legitimate public welfare objectives, each Party shall exercise restraint, in such a situation, from imposing export controls or tariffs and non-tariff barriers on essential goods and services, in particular where such measures would compromise the ability of other parties to respond to the crisis, or implementing WTO inconsistent measures to stimulate exports.

3 Each Party shall ensure that emergency measures designed to tackle a crisis situation (as declared pursuant to Article xx.4(2)), if deemed necessary, are targeted, proportionate, transparent, and temporary, do not create unnecessary barriers to
trade or disruption to global supply chains, and are consistent with WTO rules and with the obligations in this Agreement.

**Article xx.4: Declaration of Crisis Situation**

1 On request of one or more of the Parties, the [Joint Commission] shall meet in a timely manner to discuss any situation that the Party or Parties making the request consider may imminently become, or is already, a crisis situation.

2 If, following a meeting held pursuant to paragraph 1, the [Joint Commission] determines that a crisis situation exists or is imminent, it may make a declaration to that effect and obligations in this Chapter that depend upon such a declaration being made shall be triggered accordingly.

3 Following the making of a declaration pursuant to paragraph 2, the [Joint Commission] shall meet at further regular intervals to be agreed by the Parties, to ensure that the objectives and obligations of this Chapter are being met.

4 The [Joint Commission] shall make a further declaration when it determines that the situation has returned to a state of normality such that it is appropriate that the focus of cooperative activities under Article xx.5(3) shall shift to those described in Article xx.5(4) and Annex II.

**Article xx.5: Cooperation to Prepare for and Respond to a Crisis Situation**

1 The Parties shall cooperate to address matters of mutual interest related to their individual and collective preparation for, and response to, a crisis situation.

2 If the [Joint Commission] has made a declaration of a crisis situation pursuant to Article xx.4(2), then the Parties shall:

   a) work together through the Committee to identify trade disruptions that are likely to result from the crisis situation; and

   b) cooperate to develop joint responses to the crisis situation. The matters on which Parties may cooperate include, but are not limited to, those listed in Annex I (Illustrative list of cooperative responses to a crisis situation).

3 The Parties recognise that after an immediate crisis situation has receded, there may be a period of time during which economic and other effects continue to exist and require government action (the “recovery phase”). During the recovery phase, the Parties may, by mutual agreement, reduce or adjust their cooperative activities as they consider appropriate. When the [Joint Commission] makes a declaration pursuant to Article xx.4(4) that the situation has returned to a state of normality, the focus of cooperative activity shall shift to that described in paragraph 4.

4 During a state of normality, the Parties shall cooperate to collectively prepare for future crisis situations, including by reviewing and identifying insights from global, regional and individual government responses to recent previous crises in order to identify insights for responding to future crises and inform future cooperation activities. The matters on which Parties may cooperate include, but are not limited to, those listed in Annex II (Illustrative list of areas for cooperation to ensure
preparedness for a crisis situation).

**Article xx.6: Cooperation in Other International Fora**

1. The Parties shall work with each other in the WTO and other relevant international fora such as the Organisation for Economic Cooperation and Development (OECD) and the International Monetary Fund (IMF) to foster regional and international cooperation in relation to the matters covered in this Chapter.

**Article xx.7: Transparency and Information Sharing**

1. If the [Joint Commission] makes a declaration of crisis situation pursuant to Article xx.4(2), each Party shall promptly notify the other Parties with a list of any measures which it adopts in response to that crisis that may have a significant effect on trade and investment between the Parties. It shall keep its list current for so long as a crisis situation is extant.

2. A Party may request another Party to provide information on any measure notified pursuant to paragraph 1. A Party receiving a request under this Chapter shall promptly provide the information, if possible, by electronic means.

3. A Party may request technical discussions with another Party with the aim of resolving any matter that arises under this Chapter, including as a result of a measure imposed in response to a crisis as notified pursuant to paragraph 1.

4. The relevant Parties shall discuss the matter within 15 days of the date of the request.

5. The Parties shall endeavour to resolve the matter as expeditiously as possible, recognising the importance of the matters set out in Article xx.3 (General Provisions).

6. Notifications and requests for information or technical discussions shall be conveyed through the respective Contact Points established pursuant to Article xx.10 (Contact Points).

7. Each Party shall, promptly following notification pursuant to paragraph 1, publish its list of measures online so that the information is accessible to non Parties.

**Article xx.8: Participation of the Private Sector**

1. Each Party shall take appropriate measures to promote the active participation of the private sector within its territory to promote a coordinated approach in the event of a crisis situation that ensures the continued flow of goods and services and minimises disruption to supply chains in essential goods and services. In considering measures to ensure compliance with this obligation, Parties shall consider measures that can be taken to prepare for potential future crises, as well as to respond to a crisis situation in respect of which a declaration has been made pursuant to Article xx.4(2).

2. Recognising that the smooth functioning of regional and global supply chains is aided by a mutual understanding between governments and their private sectors of
how those supply chains operate and their potential weaknesses in a crisis situation, each Party shall consider establishing one or more working groups comprised of representatives of the private sector to map supply chains for essential goods and services. The functions of the working groups shall include, but are not limited to, conducting studies to:

(a) map regional and global supply chains to identify the nature and origin of inputs, and the bundling of those inputs in the production process; and

(b) identify the governance structure of relevant regional or global supply chains and the most binding regulatory policy constraints that affect the operation of those supply chains.

3 Any Party that establishes one or more working groups pursuant to paragraph 2 shall, subject to appropriate protection of confidential information, share the outcomes with other Parties through the Committee in an effort to further their mutual and individual preparedness for a future crisis situation.

4 The Parties shall, within one year of the entry into force of this Agreement, establish a Private Sector Advisory Board to be comprised of at least one representative of the private sector from each of the Parties. The Private Sector Advisory Board shall have the objective of sharing the perspective of a range of business sectors (including small- and medium-sized enterprises) on what is required to achieve the objectives of this Chapter, including what cooperative activities will be most useful in ensuring the continuity of trade in a crisis situation.

5 The Private Sector Advisory Board shall meet at least once a year and more often as appropriate during a crisis situation, to discuss matters relevant to this Chapter, and shall report, through the Parties’ Contact Points, the outcomes of its discussions to the Joint Commission.

Article xx.9: Committee

1 The Parties hereby establish a Committee on Crisis Management (Committee) composed of government representatives of each Party.

2 The purpose of the Committee is to oversee the implementation of this Chapter. Its functions shall be to:

(a) provide a forum to improve the Parties’ understanding of the likelihood and potential economic and humanitarian impacts of future crises, including on sustainable development prospects and in particular, of developing country Parties;

(b) facilitate the exchange of information between the Parties in areas including, but not limited to, experiences and insights gained through previous crises, and planning for further crises;

(c) in the event of a declaration of a crisis situation, to determine the appropriate means, which may include through ad hoc working groups, to undertake specific tasks related to the functions of the Committee;
(d) coordinate with other committees, working groups and any other subsidiary body established under this Agreement as appropriate; and

(e) perform any other functions as the Parties may decide.

3 The Committee shall meet within one year of the date of entry into force of this Agreement and once a year thereafter unless the Parties agree otherwise or the [Joint Commission] makes a declaration of a situation of crisis in which case paragraph 4 shall apply.

4 If the [Joint Commission] makes a declaration of a crisis situation pursuant to Article xx.4(2), the Committee shall meet within one week of the making of the declaration to discuss the Parties’ response to the crisis situation including through cooperative activities, and regularly thereafter as agreed to oversee that response.

5 Cooperative activities initiated under paragraph 4 shall continue, with adjustments pursuant to Article xx.5(3) as the intensity of the crisis situation decreases, until the [Joint Commission] makes a declaration pursuant to Article xx.4(4) that a situation of normality has resumed. At that time, the Committee shall discuss adjusting the nature and extent of its work pursuant to Article xx.5(4).

6 The Committee shall provide for public input and consultation on matters relevant to the Committee’s work, as appropriate, and shall hold a public session at least once a year.

Article xx.10: Contact Points

1 Each Party shall designate and notify a Contact Point for matters arising under this Chapter.

2 A Party shall promptly notify the other Parties of any change of its Contact Point or the details of the relevant officials.

3 The responsibilities of each Contact Point shall include:

   (a) communicating with the other Parties’ Contact Points, including facilitating discussions, requests and the timely exchange of information on matters arising under this Chapter;

   (b) communicating with and coordinating the involvement of relevant government agencies in its territory on relevant matters pertaining to this Chapter;

   (c) consulting and, if appropriate, coordinating with interested persons in its territory on relevant matters pertaining to this Chapter; and

   (d) carrying out any additional responsibilities specified by the Committee.

Article xx.11: Non-Application of Dispute Settlement

No Party shall have recourse to dispute settlement under Chapter xx (Dispute Settlement) for any matter arising under this Chapter.
Annex 1

Illustrative List of Cooperative Responses to a Crisis Situation

Trade continuity and market access

(a) Committing to not impose new tariffs or new trade restrictive measures during a crisis situation.

(b) Developing cooperative mechanisms to control speculation and hoarding of essential goods, and ensure that scarce essential goods and services are allocated according to priority uses.

(c) Encouraging cooperation among the Parties’ private sectors to ensure some level of excess capacity and the ability to ramp up supply of essential goods, and minimise bottlenecks and frictions that might otherwise reduce supply responses.

(d) Developing measures to ensure the smooth operation of regional and global supply chains, including but not limited to, ensuring that people with key competences can cross borders safely when needed, and that borders are open to guarantee supply chain continuity.

Customs procedures and trade facilitation

(e) Encouraging cooperation among the Parties’ customs administrations to put in place facilitation measures such as acceptance of electronic documentation to ease the burden of moving goods, or waiver of customs duties or taxes to encourage trade in essential goods.

(f) Coordinating emergency programmes for relevant agencies to speed up the clearance and release of essential goods in a crisis situation.

Technical regulations and standards, and consumer protection

(g) Ensuring flexibility of regulatory requirements, recognising that what is required during a crisis situation may vary. This flexibility may include, but is not limited to, making arrangements to relax non-tariff measures (such as technical regulations within the meaning of SPS and TBT measures), so as to temporarily authorise trade in essential goods and services that would otherwise be prevented or slowed down by those measures.

(h) Agreeing to adopt international standards that can apply during a crisis situation so as to increase availability of essential goods and services.

(i) Strengthening legal frameworks and penalties, and developing a harmonized regional and global approach to the criminalization of the manufacture and trafficking of falsified essential products.
(j) Encouraging coordination on consumer protection issues to protect consumers from unfair pricing practices.

**Financial policy**

(k) Developing mechanisms to assist emerging and developing economies gain access to finance during a crisis situation, including through liquidity facilities and programme support.

**Movement of data**

(l) Facilitating the free flow of cross-border movement of data where required to respond to a crisis situation, such as to ensure improved monitoring health data in a pandemic.

**Government support**

(m) Agreeing not to introduce new government support that distorts production and trade or that creates inequitable conditions of competition with unsubsidised producers.

(n) Ensuring that measures to facilitate trade in a crisis situation do not inadvertently subsidise exports of certain products.
Annex 2
Illustrative List of Areas for Cooperation to Ensure Preparedness for a Crisis Situation

Supply chain continuity

(a) Exchanging information and best practices in relation to supply chain management to assist Parties in their responses in a crisis situation so as to ensure supply chain continuity. This may relate to matters including:

(i) development of continuity plans and specific plans for crisis response and management, including development of supply chain plans before a crisis happens;

(ii) regular assessment of supply chain and transport risks as part of procurement, management and governance processes;

(iii) development of trusted cross-border networks, made up of suppliers, customers, competitors and government officials that are focused on risk management;

(iv) improvement of the visibility of network risks through information sharing and development of standardized risk assessment and quantification tools.

Document management and communications

(b) Exchanging information and best practices in relation to:

(i) the development and maintenance of documentation regarding preparations for crises, active management during crisis situations, and responses after crises;

(ii) how best to manage risk communication before and after disruptions to ensure a balanced public and private-sector discussion, and an environment in which trade can continue to flow.

Trade finance

(c) Exchanging views on how international bodies and regulatory authorities can ease constraints on provision of trade finance so as to ensure that financial market stresses arising from a crisis situation do not prevent otherwise viable trade transactions, including for essential goods and services.

(d) Increasing risk sharing to support trade finance.
Financial policy

(e) Ensuring the timely implementation of the financial policy measures contained in Basel 3.

(f) Ensuring banks and regulatory authorities undertake stress tests to assess the overall systemic risk to the banking system and the exposure of individual banks in a potential crisis situation.

(g) Ensuring the central bank and financial regulatory authority assess the liquidity risks and the solvency risks to the banking system and, where appropriate, adopt measures to strengthen liquidity buffers and bank capital.

Digitisation

(h) Supporting the digital transformation of economies with the goal of enhancing the industrial performance of companies, the diversification of the economy, as well as the improvement of the business climate, governance, transport systems, and communication.

(i) Encouraging the private and public sectors to work together to further the use of paperless trading (including through use of e-documentation in processing trade finance transactions and in facilitating customs procedures), develop data exchange systems, and other new initiatives to facilitate trade.

(j) Building on the work already done through e-commerce or digital agreements to which the Parties are party by considering what initiatives would be particularly valuable to assist their response to and recovery from a crisis situation and advancing work on those initiatives.
Reference List

1. Joint Ministerial Statement by Australia, Brunei Darussalam, Canada, Chile, Lao People’s Democratic Republic, the Republic of the Union of Myanmar, New Zealand, Singapore and Uruguay affirming commitment to ensuring supply chain connectivity amidst the COVID-19 situation (14 April 2020).


5. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership.


8. World Bank Group, ‘Do’s and Don’ts of Trade Policy in the Response to COVID-19’


10. World Customs Organisation ‘The Private Sector Consultative Group outlines solutions to humanitarian, government and business needs amidst the COVID-19 pandemic’ 16 April 2020

11. World Economic Forum, ‘Supply chains have been upended. Here’s how to make them more resilient’ 6 April 2020