

4.2 General exceptions and flexibilities of the GPA

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General exceptions and flexibilities of the WTO GPA

I. General flexibilities of the GPA

II. Flexibilities for sub-central and 'other' entities

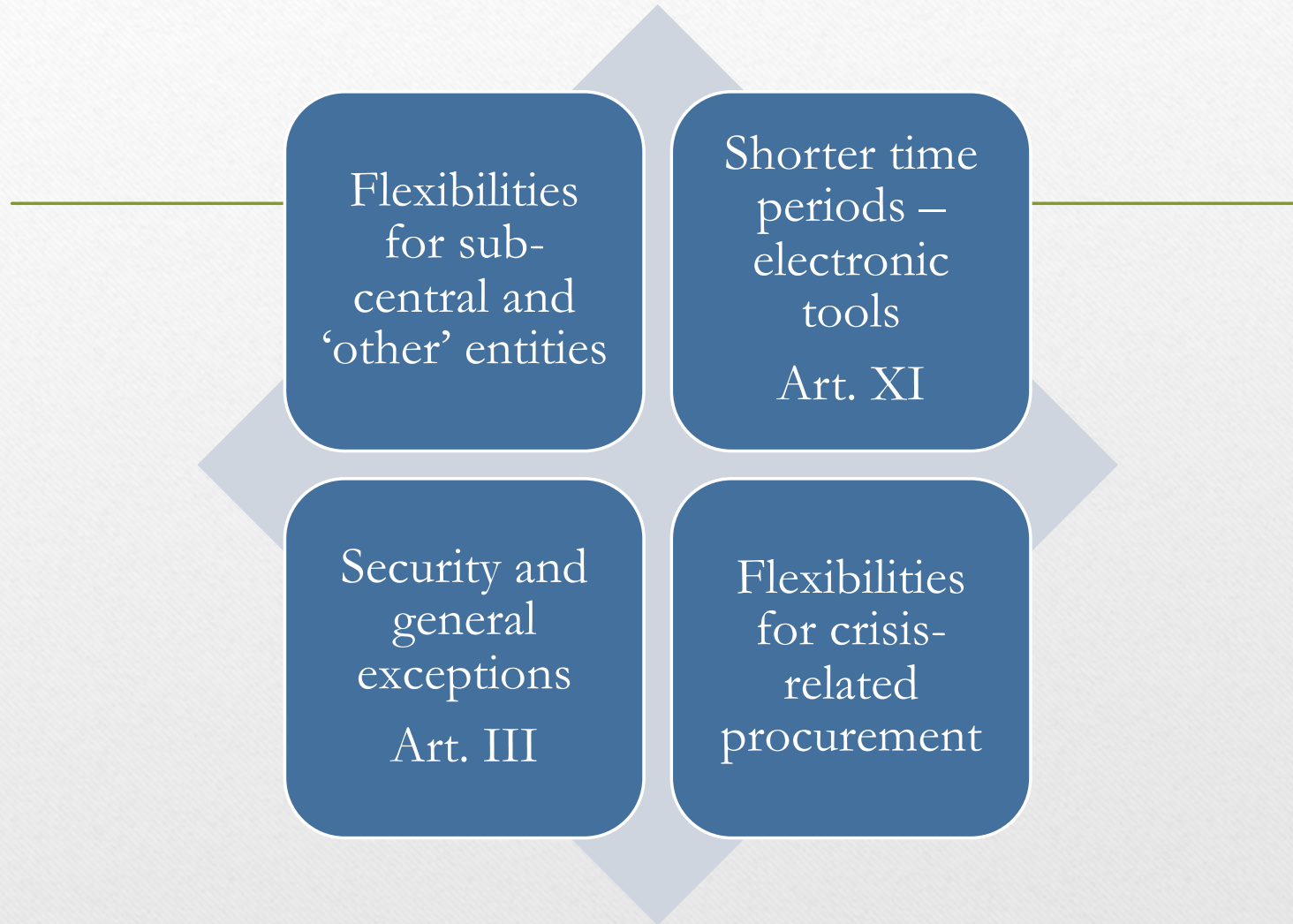
III. Shorter time-periods for procurement through electronic means

IV. Security exception

V. General Exceptions

VI. Flexibilities available to GPA Parties in time of (health) crisis

I. Flexibilities of the GPA...



II. Flexibilities for sub-central and 'other' entities

- Higher GPA thresholds
- Notices of intended procurement
- Multi-use lists
- Collection and reporting of statistics

Additional flexibilities for developing and least-developed economies: *transitional measures*

Article V of the GPA

...the Parties shall give special consideration to the development, financial and trade needs and circumstances of developing countries and least developed countries...

Subject to negotiations, based on development needs

Transparent and non-discriminatory application

III. Shorter time periods for procurement conducted through electronic means – Art. XI:

Additional flexibilities for parties' procurement authorities to **reduce the time-period for tendering by 5 days** for each of the following:

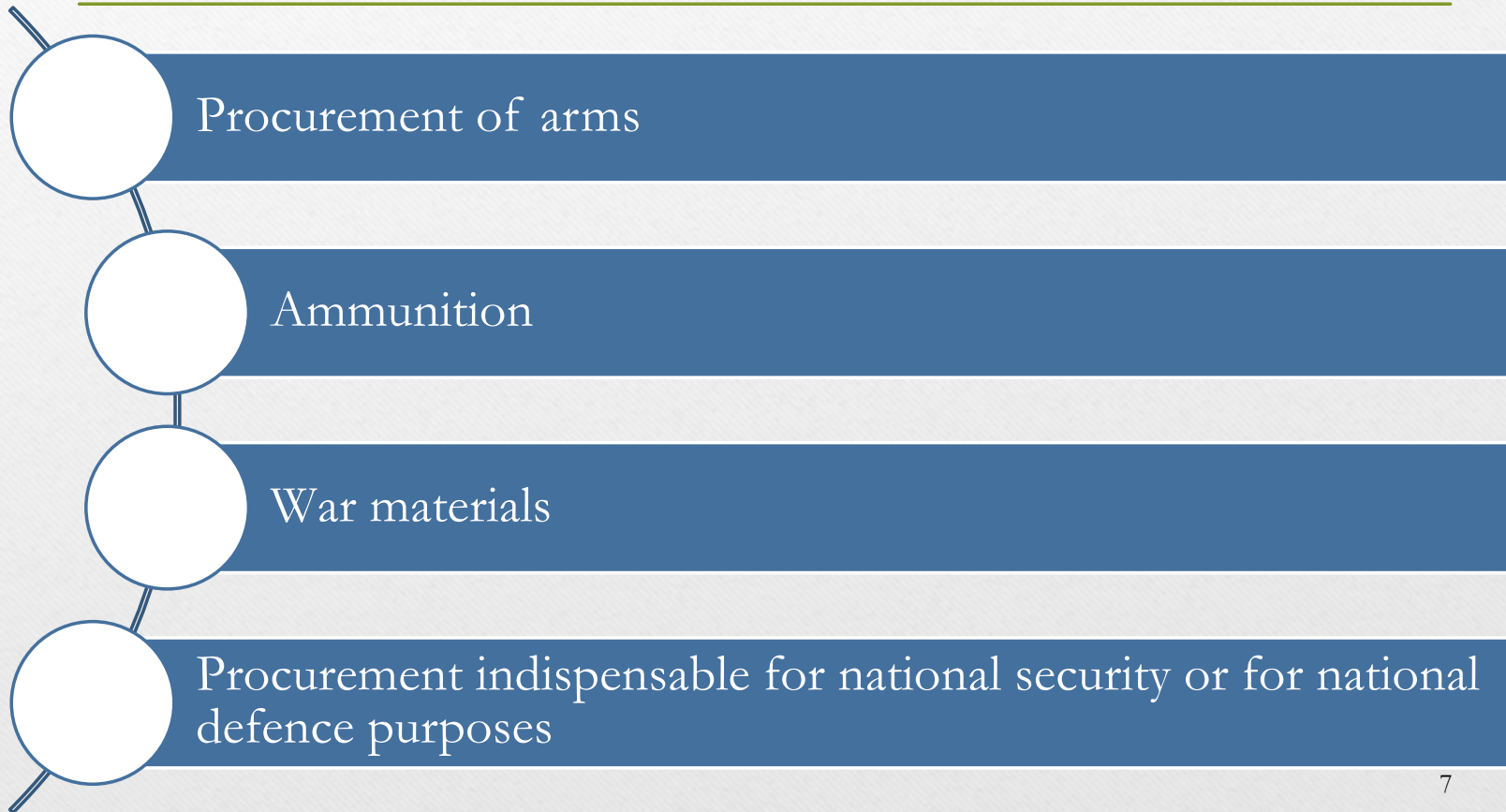
The notice of intended procurement is published by electronic means;

All the tender documentation is made available by electronic means from the date of the publication of the notice of intended procurement; and

The entity accepts tenders by electronic means.

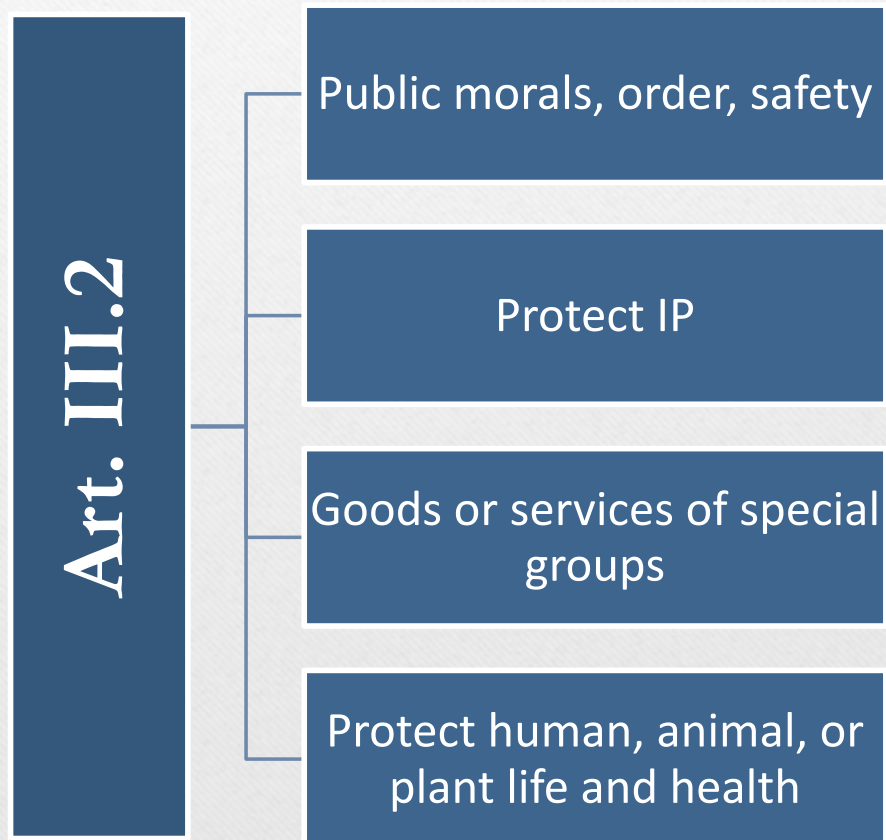
IV. Security Exception – Art. III.1

Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests...

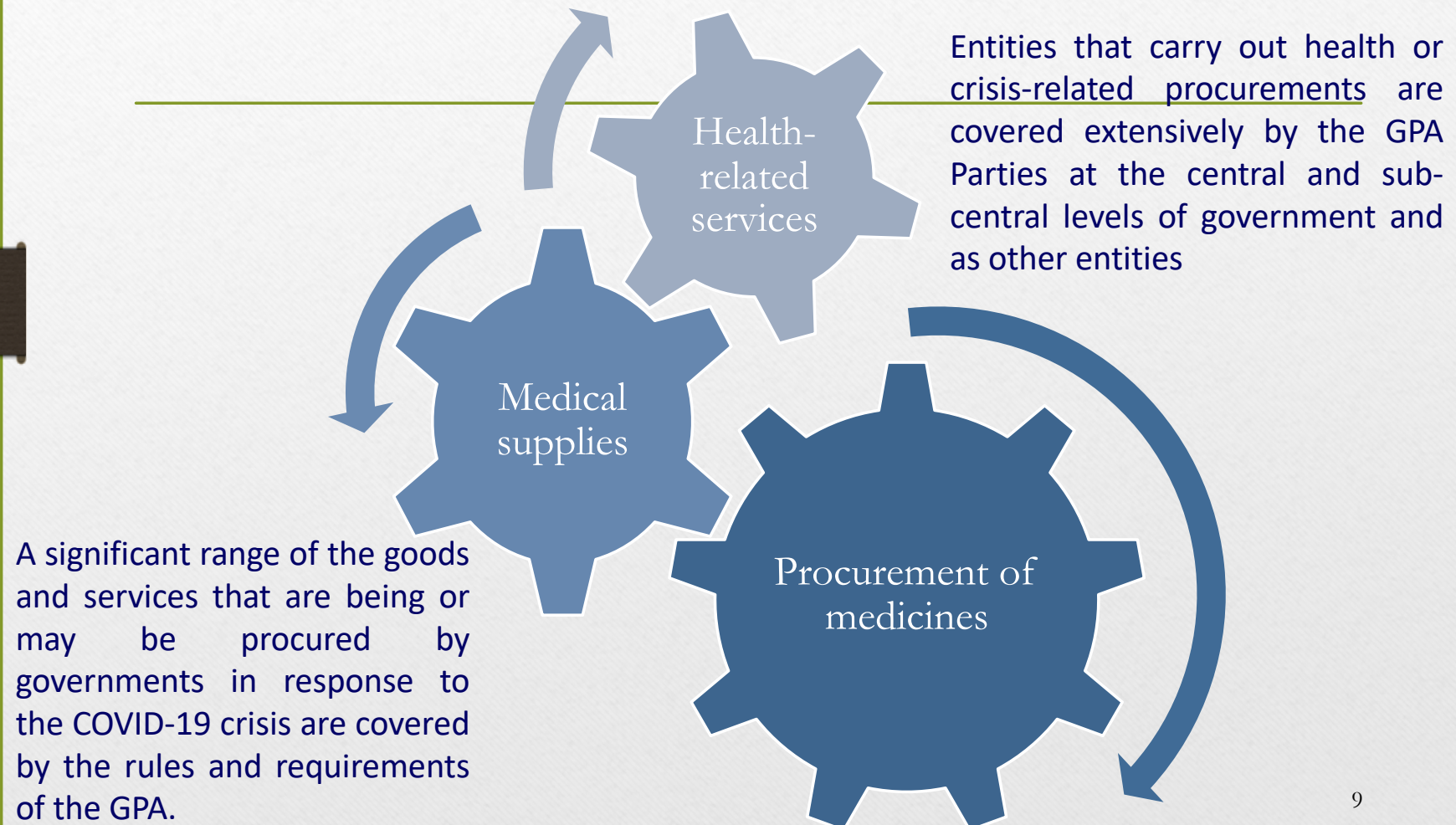


V. General Exceptions – Art. III.2

...nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures:



VI. Flexibilities available to GPA Parties in time of (health) crisis



Flexibilities in time of crisis!

The GPA offers choices that can help policy makers in deciding to what extent and which normally applicable procedural and transparency rules can and should be suspended during a crisis...

General Exception
in Article III:2 for
measures necessary
for the protection
of human life and
health

The availability of
shorter time periods
for tendering
processes in
particular
circumstances;

The use of limited
tendering in
response to public
health emergencies

...these flexibilities ensure that the Agreement does not serve as an obstacle to swift, efficient responses by governments in a time of crisis.

Availability of shorter time periods for tendering processes in particular circumstances:

The GPA provides flexibility in regard to time periods for the procurement of goods, services and construction services where expedited procurement is needed in times of crisis:

Article XI:4 allows to reduce applicable time periods from the baseline minimum of 40 days to not less than 10 days where:

“a state of urgency duly substantiated by the procuring entity renders the time-period for tendering established in accordance with paragraph 3 impracticable.”

All other transparency and procedural requirements remain in place, under this approach!

The use of limited tendering in response to public health emergencies

Article XIII:1(d) - insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time using open tendering or selective tendering”

Procuring entities are exempted from the mandatory application of:

Articles VII to IX— on publication requirements and conditions for the participation and qualification of suppliers;

Article X (7-11) -requiring the publication of documentation setting out technical specifications and evaluation criteria;

Article XI—setting out minimum time periods to be respected;

Article XII—applicable to negotiations;

Article XIV on electronic auctions, and XV on the awarding of contracts.

But... remain applicable:

Art. X 1-6 on Technical Specifications

The use of international standards to the extent possible;

Post-award transparency requirements contained in Article XV.

Permitting at least appropriate ex-post evaluation and monitoring of procurement through basic post-award transparency.

**Additional and very relevant analysis on ensuring flexibility for governments in time of economic and public health crisis:
can be found at:**

Keeping Markets Open While ensuring Due Flexibility for Governments in a Time of Economic and Public Health Crisis: The Role of the WTO Agreement on Government Procurement (GPA)

Robert D. Anderson and Anna Caroline Müller (2020) 29 P.P.L.R., Issue 4

Available at https://publicprocurementinternational.com/wp-content/uploads/2020/09/Anderson-Mueller-2020_29_PPLR_Issue_4_PRINT-PROOF_FINAL-Rob.pdf

Concluding remarks:

The Agreement was modernized in 2012, adding greater flexibility for its Parties!

These include flexibilities for central and sub-central entities and for procurement through the use of electronic means

Article III:2 ensures that GPA Parties retain powers to take exceptional measures in the context of (health) crises

Further flexibilities ensure that the Agreement permits swift, efficient responses by governments in a time of crisis!

*GPA is not intended to impose undue restrictions on the freedom of action of Parties!
Great care has been taken to ensure due flexibility in a wide set of circumstances!*

