



**1st ESCAP-ASEAN Regional Capacity Building Workshop:
“Preserving Connectivity for Efficient and Resilient Supply Chain**

Proposals for crisis-response provisions in regional and bilateral transport agreements

Presented by: Virginia Tanase

Date: 7 April 2021



**COVID-19
RESPONSE**

Background

- Transportation services are vital for all the aspects of our lives, because exchanges with immediate or more distant neighbors or partners are essential;
- The spread of Covid-19, a health issue, generated an unprecedented general crisis, challenging successful concepts developed in decades such as "globalization" or "partnerships" because of
 - the initial reactions to this pandemic disease; and
 - the ways of dealing with pandemics' consequences, under the economic, social, or environmental angles.

Legal framework for international transport

A complex mix of

- international multilateral treaties, elaborated under the auspices of global organizations;
- regional and sub-regional treaties, negotiated and concluded under the auspices of regional (UNESCAP, UNECA etc) or sub-regional (ASEAN, EU, SCO etc) organizations; and,
- bilateral treaties/agreements.

Legal framework for international road transport

- Bilateral agreements remain the most impactful instruments in a wide array of sectors, with transport as a top example, for the unhindered international movement of goods, services and people;
- They produce effects only if clearly and comprehensively formulated;
- The negotiation and conclusion of agreements is the exclusive competence of sovereign nations willing to be bound by their provisions.

UNESCAP: a pioneer!

Assisted the member economies in their development and regional integration efforts;

- “Towards a Harmonized Legal Regime on Transport Facilitation in the ESCAP Region” (2007);
- “Monograph Series on Facilitation of International Road Transport in Asia and the Pacific” (20011);
- Database of Agreements Related to International Road Transport;
- Model Bilateral Agreement on International Road Transport;
- Model Subregional Agreement on Transport Facilitation;
- Model Multilateral Permit for International Road Transport;

Force Majeure (1/2)

“An event that no human foresight could anticipate or which, if anticipated, is too strong to be controlled. Depending on the legal system, such an event may relieve a party of an obligation to perform a contract”
(Collins Dictionary of Law (W.J. Stewart, 2006))

“An event that is a result of the elements of nature, as opposed to one caused by human behavior”
(West's Encyclopedia of American Law, edition 2)

Force Majeure (2/2)

Examples

- i) war, act of terrorism or serious threat of terrorist attacks,
- ii) civil riot, sabotage or piracy, strike or boycott,
- iii) act of government, requisition, nationalization, or any other acts of authority whether lawful or unlawful, blockade, siege or sanction,
- iv) accident, fire, explosion,
- v) natural disaster such as, but not limited to, storm, cyclone, hurricane, earthquake, landslide, flood, drought,
- vi) plague, epidemic, pandemic, other viral outbreak, including any acts or orders of governments or public authorities based thereon,
- vii) any event similar to the ones listed under i) to vi) above.

Force Majeure clause in existing international agreements (1/2)

- Few international agreements include a reference to force majeure; these focus on the commercial implications of breaking a contract: force majeure clause protects the debtor from liability for non- performance if their non-performance is caused by an external, unforeseen and unavoidable event
- Performance under the contract must have become physically or legally impossible for the party invoking the force majeure defense.
- Force Majeure is NOT defined in these agreements.

Force Majeure clause in existing international agreements (2/2)

Examples

- ASEAN Framework Agreement on Multimodal Transport (2005)
- Greater Mekong Subregion Cross-Border Transport Facilitation Agreement (1999)
- Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention, 1975)
- International Convention on the simplification and harmonization of Customs procedures (revised Kyoto Convention)

Force Majeure clause in existing bilateral agreements

- Only five out of almost 200 treaties analyzed include a force majeure clause
- The description of the nature of force majeure or emergencies remains general, covering “issues affecting public health, public order and national security”
- Lack of precision may give room to parties to decide suspending the implementation of the agreement for any subjective (minor) reason that could be interpreted as affecting the crucial sectors of health, order and security.

Force Majeure clause in future bilateral agreements (1/12)

- Pandemics are not the only threats to the continuity, predictability and reliability of transport operations
- Other major events disrupting "normality" in transport may occur in the future; for example, emergency situations generated by climate change: increased frequency of extreme events (hurricane, tornadoes etc), wildfires, flooding, extreme draught
- These are reasons to include detailed clauses in agreements.

Force Majeure clause in future bilateral agreements (2/12)

The main elements to be tackled when formulating a detailed force majeure clause could be the:

- definition of the scope
- human element
- transport mean (vehicle, wagon etc)
- infrastructure
- procedures/processes
- documents
- cooperation and mutual assistance

Definition of the scope

Detailed practices for a force majeure clause could cover only the unexpected cases, those which occur without intention/willingness of any of the parties.

More specifically:

- accident, fire, explosion, or
- natural disaster such as, but not limited to, storm, cyclone, hurricane, earthquake, landslide, flood, drought,
- plague, epidemic, pandemic, other viral outbreak.

The force majeure clause could also include cases of:

- war, act of terrorism or serious threat of terrorist attacks,
- civil riot, sabotage or piracy, strike or boycott,
- act of government, requisition, nationalization, or any other acts of authority whether lawful or unlawful, blockade, siege or sanction.

Force Majeure clause in future bilateral agreements (3/12)

The human element

The force majeure clause could contain a commitment by the parties to specific protection measures, including but not limited to:

- providing their respective transport workers with instructions and
- adequate personal protection equipment
- providing, on their respective territories, safe and secure parking and rest spaces, with decent sanitary facilities
- training their personnel on behavior and elementary rules to follow for cases of force majeure

Some parties may wish to go in further detail:

- minimising unnecessary contact at all points by using electronic advanced information or pre-booking e.g., for passport control, loading and unloading etc.
- where possible having the same small groups of workers load or unload vehicles

Force Majeure clause in future bilateral agreements (4/12)

Force Majeure clause in future bilateral agreements (5/12)

The human element (cont'd)

- enabling each other's drivers to access health and social facilities
- transport workers should not be subject to mandatory quarantine or similar travel restrictions, without prejudice for competent authorities to apply measures aiming to minimise the risk of contagion
- defining a minimum necessary health check at borders
- reminding transport workers the basic rules to follow while they are on the territory in which the force majeure occurred.
- procedures for repatriation of transport personnel

The transport mean (vehicle, wagon, etc.)

- agree on a set of minimum technical and safety features to be inspected at origin, and commit to recognize these inspections at border crossing and destination
- setting norms of compliance with environmental legislation in force in their respective territories
- agree on possible derogations for force majeure situations
- jointly design and implement cleaning and disinfecting protocols at origin, border crossing points and destination (establishing disinfecting stations, etc.)
- defining procedures for safe temporary storage of transport means and goods transported, in case drivers become unable to drive (because of disease or natural disaster)

Force Majeure clause in future bilateral agreements (6/12)

The infrastructure

- designating specific routes (“green lanes”) to be used in case of force majeure, with attention to the actual connectivity of the route, the time reasonably necessary to transit the territory, condition of infrastructure, existence of rest areas, food supply and facilities, possibilities of control *en route*
- dedicated entry/exit border points where parties might have mobilized capacity for carrying out border and health checks, in terms of facilities, equipment and human resources.
- designating specific loading/unloading places in connection with the “green lanes”

Ideally, all these should be part of the major networks agreed as priorities for development by all ESCAP members: Asian Highway, Trans-Asian Railway, Dry Ports, and major multimodal transport corridors.

Force Majeure clause in future bilateral agreements (7/12)

The procedures

- notifying each other acts or orders of governments or public authorities based on force majeure cases
- simplifying procedures, while keeping control of the operations
- agree on measures to be taken on their respective territories, for example using a convoy system on the designated routes
- parties may agree on jointly developing/encouraging the development of e-platforms where freight and transport would meet
- defining a list of transports which should be given priority in case of force majeure: medical supplies, fresh food, transport of people for medical assistance, etc

Force Majeure clause in future bilateral agreements (8/12)

The documents

- jointly developing e-documents (such as e-consignment notes) and simplified templates for documents required for control purposes
- drivers should be allowed to fill-in the required documents at control points without leaving the cabin
- recognizing and accepting documents with validity expired during the crisis, such as ID cards, driving licenses, certificates of professional competence. This should be done only for a short, limited period of time and upon confirmation of exceptional extension of validity by the issuing party

Force Majeure clause in future bilateral agreements (9/12)

Cooperation and mutual assistance

- agree on the obligation to timely inform each other of acts or orders of governments or public authorities based on force majeure cases
- include lines of reporting, possibly by thematic area or subject
- include, to the extent possible, contact persons with name, position and contact details
- set rules for communication: direct contact between ministries, diplomatic channels, etc
- assistance for repatriation of transport personnel, transport means and goods and persons transported, in case of force majeure

Force Majeure clause in future bilateral agreements (10/12)

Two **basic principles** to be considered when drafting and negotiating such a clause:

- The availability of goods and essential services must be ensured in any circumstances. For that, international transport flows must be reliable, effective and efficient; these cannot be achieved if procedures and processes are improvised at the very time of the crisis (pandemics, natural disaster, humanitarian emergency etc). Be prepared!
- Holistic approach: the transport process from origin to destination is made of sequential stages, with various stakeholders involved: government authorities (public health, customs, border police, inspection/certification etc), manufacturers, transport and logistics companies and, of course transport personnel: drivers, mechanics, crew etc. The chain is as strong as its weakest element!

Force Majeure clause in future bilateral agreements (11/12)

Force Majeure clause in future bilateral agreements (12/12)

Ways forward

- revising existing agreements
- adding an annex to existing agreements
- negotiate and conclude new agreements

Whichever solution is chosen, please remain aware of the principle that every treaty in force is binding upon the parties to it and must be performed by them in good faith (“pacta sunt servanda”)!

ESCAP's data base on agreements

ESCAP database is very useful and an important source of information. for the present study report. However, it seems not enjoying yet the appreciation and recognition it would deserve. This may be because:

- the page is difficult to find for a reader who does not know this database exists
- availability of some treaties in one language only, which may prevent access of a large category of readers including researchers
- old formats of the documents, that are not the most user-friendly
- a certain focus on road transport

ESCAP's data base on agreements (1/5)

A few actions could be considered, in order to make the database become a reference product of ESCAP and a public good, to a larger extent than it currently is:

- consultation with selected stakeholders
- structuring the database around main thematic
- areas covered by the existing agreements
- re-vamping the database but keeping the country-centered approach

ESCAP's data base on agreements (2/5)

Consultation

- launching a consultation process with selected governments and private sector entities, as well as with experts who are part of ESCAP's networks.
- such consultation should not be excessively
- bureaucratic and formal
- focus on identifying the needs of the public when they would be consulting the database.

ESCAP's data base on agreements (3/5)

Main thematic areas of cooperation (examples)

Transport permits for goods
Transport permits for passengers
Transport of dangerous goods
Conditions for transport
Representative office(s) or branch(es) of carrier
Driver's license
Weights and dimensions of vehicles
Prohibition of internal transportation(cabotage)
Taxes and charges
Customs formalities
Transport control and monitoring of compliance
Application of national legislation
Infringements
Intergovernmental mechanisms for road transport facilitation
Relationship with other treaties and agreements
Tariffs
Safety and security
Insurance
Sanctions
Simplification and Harmonization of Customs Procedures
Environment

ESCAP's data base on agreements (4/5)

ESCAP's data base on agreements (5/5)

Keeping the country-centered approach, but revamping the site

Database on Road Transport Agreements														
Party A	Party B	Region A	Region B	Date of	Date of entry	Traffic Eurostat	Share Tot	Traffic transtools	Share Tot	Weblink			PDF	Extra
				Signature	into force	2005 load-unload (million tonnes per year)	=Traf Euro	2005 Load-unload	Traf Transtool					
Afghanistan	France	EECA	OECD	17-04-78									pdf	
Albania	Belarus	EECA	EECA										pdf	
Albania	Denmark	EECA	OECD										pdf	
Albania	Finland	EECA	OECD	26-05-83	31-01-85									
Albania	France	EECA	OECD	16-01-71	01-04-71	N.D	N.D	N.D	N.D	http://www.doc.diplomate.gouv.fr/				
Albania	Netherlands	EECA	OECD	14-09-94	01-05-95								pdf	
Albania	Spain	EECA	OECD	10-04-03	25-06-04								pdf	
Albania	Sweden	EECA	OECD	31-03-95	04-05-05					http://treaties.un.org/doc/Publication			pdf	
Albania	Switzerland	EECA	OECD							http://untreatv.un.org/unts/144078.1			pdf	
Albania	UK	EECA	OECD	09-02-93	03-07-95								pdf	
Algeria	Belgium	MENA	OECD	29-03-94	01-08-99								pdf	
Algeria	Jordan	MENA	MENA	29-05-97									pdf	
Algeria	Switzerland	MENA	OECD										pdf	
Algeria	Spain	MENA	OECD		18-06-04									
Argentina	Bolivia	LAC	LAC		26-09-90								pdf	ALADI/AAP/A14TM/3
Argentina	Brazil	LAC	LAC		26-09-90								pdf	ALADI/AAP/A14TM/3
Argentina	Chile	LAC	LAC		26-09-90								pdf	ALADI/AAP/A14TM/3
Argentina	Paraguay	LAC	LAC		26-09-90								pdf	ALADI/AAP/A14TM/3
Argentina	Peru	LAC	LAC		26-09-90								pdf	ALADI/AAP/A14TM/3
Argentina	Uruguay	LAC	LAC		26-09-90								pdf	ALADI/AAP/A14TM/3
Armenia	Greece	EECA	OECD	18-06-96	09-06-97								pdf	
Armenia	Romania	EECA	EECA	25-03-96	03-02-98								pdf	
Austria	Belarus	OECD	EECA	15-10-96	15-10-96					http://www.ris.bka.gv.at/Dokumente			pdf	
Austria	Belgium	OECD				0.5								
Austria	Bosnia-Herzegovina	OECD	EECA		01-05-03					http://www.ris.bka.gv.at/Dokumente			pdf	
Austria	Bulgaria	OECD				0								
Austria	Croatia	OECD	EECA							http://www.ris.bka.gv.at/Dokumente			pdf	
Austria	Czech Republic	OECD	EECA	26-05-98	01-03-01					http://www.ris.bka.gv.at/Dokumente			pdf	
Austria	Denmark	OECD	OECD											
Austria	Estonia	OECD	EECA							http://www.ris.bka.gv.at/Dokumente			pdf	
Austria	France	OECD				0.8								
Austria	Germany	OECD				12.2								
Austria	Greece	OECD				0.1								



Contact:

Virginia Tanase

Email address:
v.tanase@outlook.com

Thank you for your continued support to achieving regional transport connectivity!

