Gender Mainstreaming in African Regional Trade Agreements

By:

Rachel Gesare
Patrick Anam

11 November 2024

Introduction

Gender equality is the cornerstone of sustainable development. It is an important aspect of all social and economic undertakings at a personal, national, and international level. Sustainable development can only be achieved if the unique needs of men and women are addressed systematically. Trade is essential in the development of families, communities, and countries. However, we cannot view development only as an increase in gross domestic product (GDP); it is also measured as an increase in human well-being. This means that trade at all levels affects, and is affected by, human well-being.

One of the debates around gender mainstreaming and trade has been whether international trade law can accommodate gender empowerment. Amrita Bahri in her work Women at the Frontline of COVID-19: Can Gender Mainstreaming in Free Trade Agreements Help? notes that FTAs can play an important role in

reducing gender inequality; through them, countries can encourage their trade partners to create laws and procedures that can eliminate or reduce the barriers that impede women's participation in trade.

Men and women experience trade differently, mostly due to gender roles determining how both genders access resources, use their time and earn income. Trade liberalization, despite its best intentions, has often perpetuated gender inequalities, with women being on the losing end.

Gender factors causing inequality in trade are unpaid care work which leads to time poverty among women, illiteracy which reduces women's trade bargaining power and denies them access to better-paying work, the gender pay gap, inaccessible family contraceptives, and social and cultural norms which impede their access to factors of production such as land.

Pre-COVID-19 projections indicated that integrating women in trade can increase worldwide GDP by 26%, but this can only be done if the needs and positions of men and women are considered in FTAs. Gender mainstreaming in Free Trade Agreements (FTAs) and Regional Trade Agreements (RTAs) has increasingly become vital in ensuring gender equality in trade. The mainstreaming is done by including gender chapters and gender annexes and protocols in FTAs and RTAs to make gender a larger discussion for negotiating countries.

How then have different RTAs and other economic formations approached gender mainstreaming, and are these approaches workable? This research has three sections. The first section examines the different approaches that RTAs have adopted. The second section looks at selected African RTAs in Africa, how the gender clauses have been framed, and whether these provisions are [legally] binding on the Contracting Parties. The last section is a comparative assessment of RTAs in other parts of the world to make a case for best practices.

Gender Mainstreaming: An Overview

The Modernized Canada-Chile Free Trade Agreement (CCFTA) as well as the modernized Canada-Israel Free Trade Agreement (CIFTA) both have standalone chapters on gender. The Stabilisation and Association Agreement between the

European Communities and Montenegrohttps://eur-lex.europa.eu/EN/legal-content/summary/stabilisation-and-association-agreement-with-montenegro.html does have a single provision that creates a strong legal obligation related to gender equality. In Africa, gender mainstreaming provisions are contained in some of the FTAs, at the continental and the regional levels. For instance, the Preamble African Continental Free Trade Agreement (AfCFTA), recognizes the importance of gender equality for international trade and development.

Gender clauses in FTAs and RTAs are heterogenous. Their heterogeneity is characterized by factors such as their structure and location in an agreement as well as their scope and language. Gender-related provisions can be found in the preamble, in non-specific articles on gender, or specific articles and chapters on gender. Some gender-related provisions are also found in annexes as well as side documents. The choice of the structure of gender-related provisions varies significantly among FTAs and RTAs, even among agreements negotiated by the same party.

Gender Chapters / Clauses In The AFCFTA And The RECS In Africa

The Agreement Establishing the African Continental Free Trade Area (AfCFTA) formally recognizes eight Regional Economic Communities (RECs) in Africa as its building blocks. These are the Arab Maghreb Union (UMA); the East African Community; the Common Market for Eastern and Southern Africa (COMESA); the Community of Sahel-Saharan States (CEN-SAD); the East African Community (EAC); the Economic Community of Central African States (ECCAS); the Economic Community of West African States (ECOWAS); the Intergovernmental Authority on Development (IGAD) and the Southern African Development Community (SADC).

Gender Mainstreaming provisions in the AfCFTA

The Preamble of the AfCFTA Agreement has recognized the importance of gender equality in integration and development. It provides in part that:

> RECOGNISING the importance of international security, democracy, human rights, **gender equality**, and the rule of law, for the

development of international trade and economic cooperation

It is important to note that apart from this part of the Protocol, the AfCFTA does not have a standalone Article or Clause on Gender mainstreaming. However, Article 8(3) of the Agreement permits the conclusion of additional instruments within the scope of this Agreement that can further the objectives of the AfCFTA.

Under this Article and the AfCFTA preamble provision on gender, the AfCFTA State Parties negotiated the AfCFTA Protocol on Women and Youth in Trade. The Protocol aims at supporting and enhancing the effective participation of women and youth in trade in intra-African trade as well as supporting the inclusion of women and youth into regional and continental value chains. Further, the e-Protocol has provisions on how State Parties should ensure that their domestic policies and regulations aim at ensuring women and youth participate more in trade.

Gender Mainstreaming provisions in Africa's RECS

East African Community (EAC)

The EAC is established by the Treaty Establishing the East African Community. The Treaty defines "gender" as the role of women and men in society. The Treaty incorporates gender mainstreaming as one of the objectives of the EA. For instance, Article 5(3)(e) of the Treaty provides that the Community 'shall ensure the mainstreaming of gender in all its endeavours and the enhancement of the role of women in cultural, social, political, economic and technological development'. Gender mainstreaming policies in EAC are further captured in some of the key instruments and reports. These include the EAC Framework for Gender and Social Development Outcome Indicators for EAC Development Strategy (2011-2016), the EAC Framework for Gender and Social Development Outcome Indicators for EAC Development Strategy (2011-2016), and the Gender Mainstreaming Strategy for EAC Organs and Institutions, 2013.

Economic Community of West African States (ECOWAS)

The ECOWAS Treaty does not have an explicit gender mainstreaming provision as part of the objectives of ECOWAS. Article 3(2)(l) of the Treaty is to the effect

that the Community shall, by stages, ensure “the encouragement and strengthening of relations and the promotion of the flow of information particularly among rural populations, women and youth organizations and socio-professional organizations such as associations of the media, business, men and women, workers, and trade unions.”

Common Market for Eastern and Southern Africa (COMESA)

Under Article 155, the COMESA treaty contains a gender mainstreaming clause where member states recognize the role of women in Agriculture, Trade, and Industry as a vital economic link. The Member States then commit to several measures to encourage and increase the participation of women in trade and development. Some of the measures involve including women in decision-making, increase awareness of issues facing women in development at the policy level, promoting special programs for women-led small and medium enterprises, and eliminate laws and regulations hindering women from access to credit.

Intergovernmental Authority on Development (IGAD)

The Agreement establishing the Inter-Governmental Authority on Development **(IGAD) lists the aims of IGAD to include** promoting joint development strategies, harmonizing policies with regard, to trade as well as promoting and realizing the objectives of the Common Market for Eastern and Southern Africa (COMESA) and the African Economic Community concerning gender mainstreaming.

While the treaty does not contain gender mainstreaming provisions, there are two key initiatives that IGAD has developed over the years that address gender mainstreaming namely the IGAD Regional Trade Policy 2022-2026 and the IGAD’s 2023-2030 Gender Strategy.

Regional Trade Policy 2022-2026

Chapter 5 of the IGAD Trade policy addresses IGAD’s policy measures and among the cross-cutting issues identified are gender and trade. Under it, Member States recognize the need for trade to benefit everyone inclusively. Member States also recognize that women, youth, and disadvantaged groups

face challenges as they trade in the region. IGAD identifies measures to be taken to solve these challenges which include: focusing on trade or investment promotion in areas where the poor are concentrated so they can be more than producers and workers; education, capacity building, and training of women and the disadvantaged groups to simplify international trade rules so that these groups can trade internationally; focus on the collection of granular gender and age disaggregated data to inform design of socially inclusive policies.

IGAD's 2023-2030 Gender Strategy

The purpose of IGAD's gender strategy is to guide member states and IGAD in their work towards gender equality and social inclusion. One of the priority areas in the gender strategy is to 'advance gender equality in regional trade and economic integration.' This is with the understanding that men and women experience trade differently when different circumstances caused by trade liberalization are considered. Women are unequally affected by increases in the prices of imported goods; and tax policy changes to compensate for tariff revenue losses among other circumstances. IGAD Member States are also cognizant of unequal distribution of resources, limited access to information and markets, and inequality in training and education puts women at a disadvantage, making them unable to climb regional and global value chains and hence have less access to higher valued segments of production.

The IGAD Gender Strategy seeks to cure these challenges through commitments such as supporting Gender-Responsive trade regimes, advancing easy mobility and safety of women, especially in cross-border trade, reducing non-tariff barriers in cross-border trade such as extensive and complex paperwork which may prove too difficult for low-literacy women, increasing access to trade-related information and knowledge of market opportunities and strengthening of women's business associations.

The Southern African Development Community (SADC)

The SADC Treaty does not contain gender mainstreaming provisions. However, it has a Revised Consolidated Protocol on Gender and Development 2016 which contains several clauses that promote equality in trade. For instance, in Article 18 of the Protocol, member states commit to review all policies and laws that determine access to, control of, and benefit from productive resources by

women to ensure that women have equal access and rights to credit, capital, mortgages, and security and training as men. This article also requires states to ensure men and women have access to modern, appropriate, and affordable technology and support services. As we discussed earlier in this research the lack of access to factors of production is causing inequality in the experience of trade between men and women. It is worth noting that Article 18 acknowledges this challenge and commits member states to solving it through policy and regulation.

Article 19 of the Protocol requires members to put up measures that ensure equal pay for equal work, eradication of occupational and employment segregation, and the recognition and protection of persons engaged in domestic work.

As a subset of Gender Based Violence, Sexual harassment is an impediment to trade. In this regard , Article 22 of the Protocol recognizes this and requires state parties to implement and adopt strategies to define and prohibit sexual harassment.

Economic Community of Central Africa States (ECCAS)

ECCAS was established in 1983 and was formed by states from central Africa. The ECCAS Treaty has a gender mainstreaming clause, but it is coached in general terms that lack specificity of actions and objectives. Article 60 of the treaty requires member states to develop collective research by appropriate policies aimed at improving the economic, social, and cultural status of women in urban and rural areas and increasing their integration in development activities. It is important to note that this treaty predates the Beijing Declaration and Platform for Action 1995 which set the stage for transformative change in gender equality. Therefore, it is a commendable inclusion in this treaty and progressive for the period in which it was conceived.

From the above examinations, African countries have shown political goodwill in solving the challenges that cause differences in trade between men and women from as far back as 1983 (as shown in the ECCAS). Renata Amaral and Amrita Bahri have explored the challenges that developing countries face on the negotiating table, especially in FTAs between themselves and developed countries. Developing countries may hesitate to join gender-responsive FTAs as

they feel developed countries with gender equality measures may use this as a protectionist cloak to prevent imports from developing countries. Negotiators from developing countries may lack the technical capacity to understand the interlinking of trade and gender. This makes them reluctant to enter binding agreements with parties from developed countries that have nuance and experience in negotiating gender equality clauses in agreements.

The current trend is to put gender equality in clauses as a focal point in the text of treaties. In the absence of gender mainstreaming in the main text of the treaties, there is considerable effort in putting it in protocols and strategies borne from non-discrimination commitments in the treaties.

Strengthening Gender Mainstreaming Clauses; Some Notable Best Practices

How can gender mainstreaming clauses be strengthened RTAs to ensure that contracting states enable gender equality in trade? What has become clear in this discourse is that several RTAs especially in Africa have made attempts at mainstreaming gender in their provisions. However, it is to be noted that in this category the respective gender provisions/clauses are best endeavours and indeed merely aspirational. The essence of this is that the Countries in these RTAs are not obligated to take any legislative or policy measures, which can ensure gender inclusion in trade within their territories. If this is the case, then what are the best approaches to gender mainstreaming RTAs? There is certainly no perfect example of an RTA world over that can serve as a model in this respect. However different RTAs have pursued the critical issue through various means. This section highlights some of these approaches and briefly assesses whether they are progressive in ensuring that trade becomes as inclusive as possible.

The Modernized Canada-Israel Free Trade Agreement (CIFTA)

Chapter 13 of the Canada-Israel Agreement contains gender equality provisions in line with SDG 5. Parties to this FTA also reaffirm their obligations on trade and labour as related to gender. The Canada-Israel FTA also stands out as it seeks to empower women in the non-traditional areas of science, technology, and innovation, a break from the usual areas of business where women are often supported.

Under Chapter 13, the Canada-Chile Agreement establishes a trade and gender committee with a mandate to support policies and make recommendations to parties on the integration of gender-related commitments and activities into their work. This is a big step in ensuring ender mainstreaming is happening outside of mere commitments. It is a follow-up measure to ensure that gender is an integral part of trade activities arising out of the FTA. The Chapter also has a dispute resolution clause where, if parties do not agree on the implementation of provisions on Trade and gender, they can submit the matter to dispute settlement under Chapter 19 (Dispute Settlement).

US-Mexico-Canada Agreement(USMCA)

The USMCA which substituted the North America Free Trade Agreement (NAFTA) entered into force on July 1, 2020 Chapter 23 of the Agreement addresses labour rights as a shared commitment between the parties. These include gender rights such as elimination of discrimination in employment and occupation, protection of workers against sexual harassment, and protection of workers from employment discrimination based on sexual orientation, gender identity and caregiving responsibilities. Parties are also required to give protected leave for the birth or adoption of a child and care of family members as well as protection against wage discrimination.

Still, under Chapter 23, the parties commit to strengthening their local tribunals to resolve issues arising out of the chapter. Article 23.9 goes as far as requiring parties to give procedural guarantees to ensure each person with interest in matters arising from the Labor chapter of the FTA. To this end, the FTA requires state parties to ensure that local labour tribunals are fair, equitable, and transparent, comply with due process of the law, do not require unreasonable fees or unwarranted time limits and delays, and that they are open to the public. This is a bid to ensure that labour disputes arising from chapter 23 which also include gender labour rights are heard fairly and expeditiously through parties' internal mechanisms.

Chapter 23 also introduces the methods of cooperation and labour consultation to resolve labour disputes. All avenues under this chapter must be exhausted before resorting to dispute settlement avenues provided by Chapter 31 of the FTA. What this means is that the door of labour disputes has been kept open to

dispute resolution mechanisms under Chapter 31 of the FTA even if it is as a last resort after the exhaustion of prescribed methods under Chapter 23.

Canada-Chile Free Trade Agreement

Canada-Chile Free Trade Agreement Chapter on Gender and Trade generally reaffirms the SDGs related to gender equity as well as the CEDAW framework. Like the CIFTA, the agreement also establishes the Gender Committee and a mandatory consultation framework which is to the effect that member states must make all efforts, through dialogue, consultations, and cooperation, to resolve any matter that may arise regarding its Gender and Trade Chapter. This ringfences the trade and gender-related dispute resolutions from the often lengthy and bureaucratic dispute resolution processes that most FTA have. Accordingly, this approach can also be seen as a good practice that can further make trade more gender inclusive. However, a critical view of it would also point to the fact that excluding gender and trade issues from the main dispute resolution mechanisms may have the effect of making such issues appear smaller as compared to the issues that may arise from the implementation of the FTA.

A suggestion to include gender equality as a public morality exception clause interpretation

Aside from the direct inclusion of gender clauses in RTAs and FTAs Amrita Bahri and Daria Boklan take the radical view that gender should be an interpretation within public morality clauses found in many FTAs. Public morality clauses in FTAs are founded on Article XX(a) of the 1994 GATT. Bahri and Boklan argue that public morality exceptions are a catch-all phrase and gender equality can and should be included in its interpretation. They state that '*if countries can accept trade-restrictive practices and laws to protect public morals, or animal health or life, or even plant health or life, is it fair to oppose an exception that can reduce gender inequality and include half of humankind's population in the journey towards economic growth? Is the removal of the barriers that women face any less important than the conservation of exhaustible natural resources (such as sea turtles)?*

The authors do agree that implementing gender equality under the public morality exception clause comes with its challenges. A party to an FTA that

includes gender equality under the public morality exception clause may violate WTO principles of the Most Famous Nation as well as the National Treatment principle. Bahri and Boklan conclude that WTO dispute resolution bodies need recomposition to include more women adjudicators if gender equality is going to be a consideration in resolving trade disputes arising out of interpreting gender as a public morality exception that restricts trade. They also recommend training of adjudicators on gender and trade. The authors also recommend drafting of a gender exception clause into FTAs during negotiations, though they admit this may be harder than finding a needle in a haystack.

Conclusion

What the RTAs and FTAs discussed above show is that it is possible for gender clauses to be enforceable under the dispute resolution mechanisms in the respective RTAs and FTAs. The Canada-Israel FTA is an excellent illustration of how gender commitments can be followed up in trade activities arising from FTAs through follow-up and advisory mechanisms. This makes gender mainstreaming an active and ongoing process that is continuously implemented.

The Authors

Rachel Gesare

Practicing Advocate & Gender Equality and social Inclusion Expert

LinkedIn: Gesare Rachel

X Handle : @MissGesare

Patrick Anam

Trade Law & Policy Practitioner

LinkedIn: Patrick Anam

X Handle: @PAnam_tradelaw

View online: Gender Mainstreaming in African Regional Trade Agreements

Provided by Afronomicslaw