

Trade & Sustainable Development in RTAs: Key Considerations, Trends, and Emerging Approaches

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*Slides developed from lecture materials and published works.

May 10, 2022

TRADE & SUSTAINABLE DEVELOPMENT: Considerations for Negotiators (& Stakeholders)

WHICH trade and development priorities should be focus, and HOW can be advanced through trade instruments?

COMMON approaches across RTAs, and how do compare across issues, regions, similarly situated countries?

MORE BINDING or LESS BINDING?

Will influence WHERE PROVISIONS appear in RTA – for example, provisions in preamble or objectives tend to be less binding (although can set the tone for entire agreement); chapters tend to contain more binding commitments

LANGUAGE MATTERS-- for example, “shall” connotes a more binding commitment, whereas “will endeavor to undertake” implies a less binding commitment

“Binding” nature of provisions may have two dimensions – e.g., less binding commitments on costly measures requiring capacity vs. more binding commitments on capacity building

OPTIONS available for negotiators? (Subject of UNESCAP Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic)

ENSURE IMPACT on development and particular stakeholders, particularly with respect to equity and inclusion?

TOP-DOWN approaches (trade agreements, WTO rules) be combined with BOTTOM-UP approaches (domestic law, stakeholder needs)



Trade & Development Approaches NOT Equal (or Neutral)

- **Increasing focus on development issues in trade instruments**, such as labor, environment, and gender (Kuhlmann, Carpentier, Francis, & Le Graet, 2020)
 - Expands and enhances human rights and protects workers, women, and vulnerable communities
- **Trade rules support implementation of the SDGs**, e.g., removal of export subsidies in agriculture, TRIPS flexibilities on access to medicines, etc. (see, e.g., WTO)
- **Benefits of current system uneven** – more advanced economies have captured more of gains, and some countries ruletakers rather than rulemakers
 - Unrealized goal of increased export share for developing countries, lack of movement on duty-free quota-free treatment for least developed countries (LDCs), stalled Doha Development Round
- **Development may be “disguised protectionism”** or used to “level the playing field” for developed economies at expense of broad-based development; development can also conflict with traditional trade focus on non-discrimination
- **Inequality, vulnerability, unequal distribution, and lack of equity** deserve greater attention
- **Staging of commitments** (for example, economic development & environmental adaptation first then environmental mitigation) & more balanced stakeholder participation needed
- **Vulnerabilities at State and stakeholder levels**

Pandemic raised call for new approaches (Kuhlmann 2020)

- **Limitations on policy space & right to regulate**

IP, environment, food standards, finance, and energy

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Trade and Development Approaches & Trends

Tend to start with trade agreements themselves – **Top Down**

Form & Structure of RTA (objectives, provisions, side agreements, or chapters):

- European RTAs (sustainable development chapter)
 - WTO Preamble (“*while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development*”)
 - 3 Pillars – Economic, Social, Environmental
 - Intergenerational Equity
- Issue-focused chapters in US RTAs, CPTPP, etc.
- References in Recent RTAs -- African Continental Free Trade Area (AfCFTA), which includes objectives of sustainable and inclusive development) (Kuhlmann & Agutu, G. J. Int'l L. 2020)
- New, issue-focused RTA models emerging like ACCTS Agreement (Agreement on Climate Change, Trade, and Sustainability) and Digital Economy Partnership Agreement (DEPA)
- Some RTAs, like RCEP do not address labour or environment but has provisions on S&DT, traditional knowledge

RTA Design Elements:

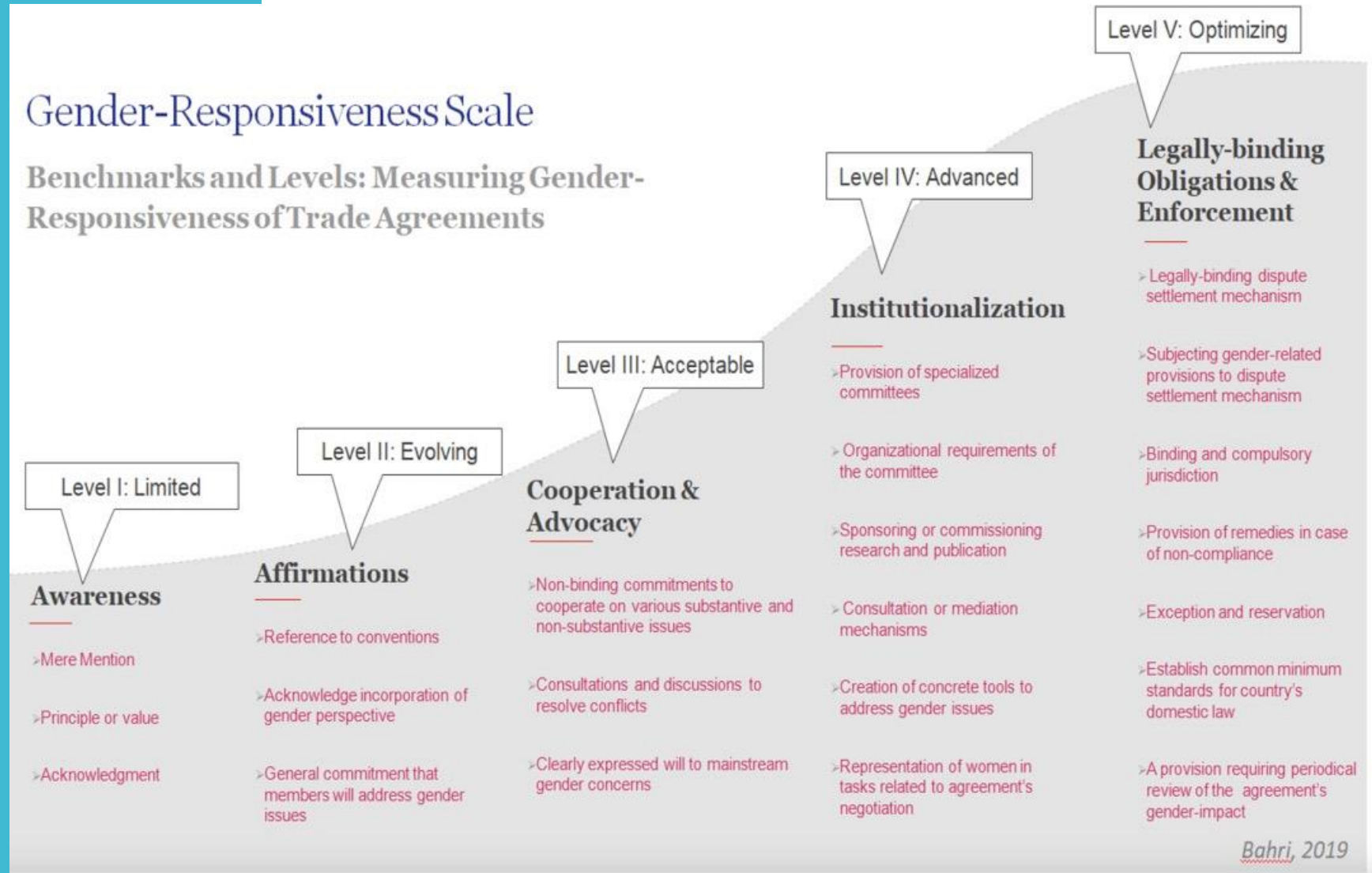
- Commitments to cooperate (most common) – can take form of exchange of information, general cooperation, scientific cooperation, assistance, harmonization, and joint institutions (See Morin et al).
- Commitment to uphold measures and standards in treaties /conventions (Human Rights, MEAs, ILO conventions)
- Non-derogation from domestic laws to attract investment
- Transparency
- Consultation and engagement

Alternative Approaches

- Address development needs rather than incorporating “development”
- Inclusive Law & Regulation Methodology (Kuhlmann) Top Down Meets Bottom Up
- Responsiveness to particular development consideration (e.g., gender responsiveness Bahri, 2019)
- New Template for Sustainable Development? (Khumalo, 2021)
 - Capacity Building (along with compensation for non-use of resources)
 - Declaratory Provisions (instead of binding measures in some cases)
 - Limit to 3 Pillars (Economic, Social, Environmental) without binding inter-generational equity?
 - Sequencing of sustainable development and economic growth
 - Sovereignty
 - Responsibility for investors (best in BITs or investment chapters of FTAs)
- Focus on S&DT, Capacity Building, & Differentiated Needs (Alam, 2018)
 - Special & differential treatment
 - Capacity building needed to address disparities in resource use
 - Better disciplines on NTBs to avoid use with discriminatory intent
 - Address equity considerations in schemes with cost burden (e.g., eco-labeling)

Gender-Responsiveness Scale

Benchmarks and Levels: Measuring Gender-Responsiveness of Trade Agreements



Inclusive Law & Regulation Methodology (Kuhlmann, 2021)

Katrin Kuhlmann *Mapping Inclusive Law and Regulation: A Comparative Agenda for Trade and Development*, AF J. INT'L ECON. L., 2nd Edition (2021)

Katrin Kuhlmann *Resetting the Rules on Trade and Gender? A Comparative Assessment of Gender Approaches in Regional Trade Agreements in the Context of Possible Gender Protocol Under the African Continental Free Trade Area* (forthcoming 2022)

Consider: (a) **Top Down** (international instruments) and (b) **Bottom Up** (domestic law & interests of local stakeholders (e.g., workers, indigenous communities, women, SMEs) along with sectors of importance to local economy.

Differentiation – Special & Differential Treatment (S&DT) for Goods and Services: How can this be tailored (e.g., for gender?), and what are provisions on capacity building (e.g., technical advice and assistance for improving risk assessment techniques, simplifying and expediting customs procedures, advancing technical skills, and enhancing the use of technologies that can lead to improved compliance with laws and regulations.) E.g., AfCFTA: improve export capacity of formal and informal service suppliers, esp. MSMEs, women, & youth

Flexibility – Policy Space Available to Regulate and/or Adapt to Changing Circumstances: How can governments address food security, right to health, and public policy interests? Use of exceptions and/or dispute mechanisms? One example is review and revise mechanism, along with enhanced consultations.

Sustainability – Tailoring Commitments to Particular Needs and Sectors of Development Interest: What is most important for developing economies in sustainability context? How could RTAs focus on sectors that could attract green investment and tech transfer? How can SDGs be implemented in practice? Examples include focus on environmental adaptation.

Equity and Inclusion – Commitments Tailored to Enhance Equity and Inclusion: Rules can be tailored to needs of different vulnerable groups, such as minorities, traditional communities, women, LGBTQ+, persons with disabilities, SMEs, etc.? Examples include minimum legal standards, gender-responsive services commitments, and tailored transparency provisions.

Regulatory Gateways: Do Rules Present Hurdles or Positive Intervention Points for Addressing Needs of Vulnerable Stakeholders?: How do rules affect vulnerable communities in practice? What can international trade law “learn” from domestic law (value of diverse “good practices” rather than one “best practice”)? What implications does this have for design of trade agreements? Examples include trade facilitation, SPS, and business registration.

Implementation and Impact: How can RTAs be Designed to Work Better?:

Ex ante and ex post assessments, links to domestic law (+ administrative law) & transparency, consultation, and engagement
Inclusive avenues for dispute settlement

More Details?

Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic (ESCAP 2021)

New Handbook on Options and Provisions on Trade and Development Coming Soon



Center on Inclusive Trade and Development
Institute of International Economic Law

