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## Resetting the Rules on Trade and Gender? A Comparative Assessment of Gender Approaches in Regional Trade Agreements in the Context of a Possible Gender Protocol Under the African Continental Free Trade Area

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Forthcoming in WTO Chairs Compilation on *Trade Policy and Gender Equality* (Amrita Bahri, Jan Yves Remy, and Dorotea Lopez, eds.), Cambridge University Press

## Abstract

At long last, gender and trade are together on the international agenda, with significant implications for women entrepreneurs and traders around the world. Alongside the landmark 2017 Joint Declaration on Trade and Women’s Empowerment, regional trade agreements (RTAs) have taken the lead on more tangible gender commitments. One such RTA is the African Continental Free Trade Area (AfCFTA), in which gender appears as an express priority alongside sustainable and inclusive socio-economic development. Yet, this is only a starting point. A gender-focused protocol has been proposed under the AfCFTA framework, representing a significant opportunity to reassess RTA provisions on gender and consider more tailored approaches that could benefit women on the African continent and around the world.

This chapter will present a comparative assessment of approaches for evaluating and categorizing gender and trade approaches in RTAs. These include focus on gender responsiveness and incorporation of international and domestic legal design innovations and options for “inclusive law and regulation” (with particular examples from African regional and domestic law) in order to use RTAs to address concrete challenges facing women. In particular, the chapter focuses on how RTA rules could more actively support women’s work, reduce procedural hurdles facing women in the market, enhance access to finance and digital inclusion, and promote food security. The chapter shines light on how gender provisions could be shaped, reframed, and better implemented in practice, with implications for the AfCFTA and future RTAs beyond Africa as well.

## I. Introduction

The legal basis exists for a deeper focus on gender through the African Continental Free Trade Area (AfCFTA).<sup>2</sup> The 2017 Joint Declaration on Trade and Women’s Economic Empowerment

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<sup>2</sup> Agreement Establishing the African Continental Free Trade Area art. 3, Mar. 21, 2018, 58 I.L.M. 1028 [hereinafter AfCFTA], <https://afcfta.au.int/en/documents/2018-03-21/agreement-establishing-african-continental-free-trade-area-afcfta>, accessed 20 November 2021.

on the Occasion of the WTO Ministerial Conference in Buenos Aires (Declaration)<sup>3</sup> was heralded as a landmark initiative for putting gender on the trade agenda,<sup>4</sup> and gender is also a strong focus of the African Union (AU) Agenda 2063.<sup>5</sup> Although in legal terms these are soft law instruments without binding obligations, they set the stage for deeper work globally and under regional trade agreements (RTAs) like the AfCFTA. These instruments also align with important human rights instruments, including the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>6</sup> UN Sustainable Development Goals (SDGs), in particular, Goal 5 on Gender Equality,<sup>7</sup> and the African Charter on Human and Peoples' Rights Protocol on the Rights of Women in Africa (Maputo Protocol; also referred to as the AU Protocol on Women's Rights).<sup>8</sup>

RTAs are increasingly incorporating gender priorities,<sup>9</sup> sometimes in the form of more tangible commitments through gender-focused provisions and chapters.<sup>10</sup> Not only is this a global trend, but it has strong roots in the African continent, where “gender-sensitive trade policy has . . . been

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<sup>3</sup> The World Trade Organization, Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017, [https://www.wto.org/english/thewto\\_e/minist\\_e/mc11\\_e/genderdeclarationmc11\\_e.pdf](https://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf), accessed 20 November 2021.

<sup>4</sup> See José-Antonio Monteiro, ‘The Evolution of Gender-Related Provisions in Regional Trade Agreements’, (2018) World Trade Organization Staff Working Paper ERSD-2021-8, [https://www.wto.org/english/res\\_e/reser\\_e/ersd202108\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd202108_e.pdf), accessed 20 November 2021 (hereinafter Monteiro 2021).

<sup>5</sup> African Union (AU) Agenda 2063: The Africa we Want (African Union Commission 2015), [https://au.int/sites/default/files/documents/36204-doc-agenda2063\\_popular\\_version\\_en.pdf](https://au.int/sites/default/files/documents/36204-doc-agenda2063_popular_version_en.pdf), accessed 20 November 2021.

<sup>6</sup> United Nations, Convention on the Elimination of All Forms of Discrimination Against Women, adopted and opened for signature, ratification and accession by United Nations General Assembly (resolution 34/180) (New York, 18 December 1979) [hereinafter CEDAW].

<sup>7</sup> Amrita Bahri, “Measuring the Gender-Responsiveness of Free Trade Agreements: Using a Self-Evaluation Maturity Framework,” (2019), at 2, GLOBAL TRADE & CUSTOMS J. Vol. 14 pp. 517-527, <http://wtochairs.org/mexico/research/measuring-gender-responsiveness-free-trade-agreements-using-self-evaluation-maturity>, accessed 12 October 2021 (hereinafter Bahri 2019), referencing CEDAW and United Nations, “Transforming Our World: The 2030 Agenda For Sustainable Development,” United Nations (A/RES/70/1) (New York, 25 to 27 September 2015) [hereinafter SDGs].

<sup>8</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2005), <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa>, accessed 20 November 2021.

<sup>9</sup> Ideally, gender should be interpreted broadly to include sex, gender identity, and gender expression. Further, as noted in Clair Gammage & Mariam Momodu, ‘The Economic Empowerment of Women in Africa: Regional Approaches to Gender-Sensitive Trade Policies’ (2020) 1 AF. J. INT'L. ECON. L. (hereinafter Gammage & Momodu 2020) at 5, “African women and their experiences are not homogenous and their historical and present experiences differ from one community to another.” An understanding of these experiences should be both “intersectional” and “multidimensional”. As referenced in Gammage & Momodu (footnotes 11 and 12), intersectionality was developed by Kimberlé Crenshaw Williams ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. CHICAGO LEGAL F. (1989); on multidimensionality, see James Gathii, ‘Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn from Each Other’ 67 UCLA L. Rev. (2020).

<sup>10</sup> See, Monteiro 2021, *supra* note 4; Bahri 2019, *supra* note 7; and Sama Al Mutair, Dora Konomi, & Lisa Page, *Trade & Gender: Exploring International Practices That Promote Women's Economic Empowerment*, TRADELAB (May 17, 2018), <https://www.tradelab.org/single-post/2018/05/17/Trade-and-Gender-1>.

a distinct feature of African regionalisms” for years.<sup>11</sup> As of 2020, the World Bank and World Trade Organization (WTO) report that 80 RTAs (including 69 notified to the WTO) contain provisions on gender and women’s issues.<sup>12</sup> Among the recent RTAs that include gender provisions, several incorporate a separate gender chapter, namely, the Chile-Uruguay, Canada-Chile, Argentina-Chile, Chile-Brazil, and Canada-Israel FTAs,<sup>13</sup> the latter of which subjects gender provisions to dispute settlement if amicable avenues for resolving disputes do not succeed.<sup>14</sup> While this is a fairly unique feature among RTAs, it is likely that this feature will be more cosmetic than compulsory.

Despite the proliferation of gender provisions and chapters, current approaches merely scratch the surface of what is possible. Most provisions on gender contain softer obligations and do not establish binding legal standards, which can be important for small enterprises and vulnerable communities. Further, gender provisions often fall short of enhancing equity and inclusiveness by not directly addressing the concrete challenges women face and the sectors in which they work. As gender chapters continue to evolve, they will likely be under increasing scrutiny regarding the depth of provisions, degree to which they are gender responsive, and extent to which they foster equitable and inclusive opportunities for women. This chapter will examine both current approaches and options for the future, with a particular focus on how trade rules could be designed to respond to the challenges that women traders, especially micro, small- and medium-sized enterprises (MSMEs) and small- and medium-sized enterprises (SMEs), face in their day-to-day work.<sup>15</sup>

This assessment is critical in light of the announcement of a gender-related protocol under the AfCFTA,<sup>16</sup> which is the world’s largest RTA in terms of member states and an agreement that has

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<sup>11</sup> Gender and trade approaches in Africa date back to the 1980s. See Gammage & Momodu 2020, *supra* note 9, at 4. See also Lolita Laperle-Forget, ‘Gender Responsiveness in Trade Agreements—How Does the AfCFTA Fare’ (17 March 2021) TRALAC, <https://www.tralac.org/blog/article/15141-gender-responsiveness-in-trade-agreements-how-does-the-afcfta-fare.html>, accessed 15 October 2021 (hereinafter Forget) and Amrita Bahri, “Gender Mainstreaming in Free Trade Agreements: A Regional Analysis and Good Practice Examples”, *Gender, Social Inclusion and Trade Knowledge Product Series* (forthcoming, 2021).

<sup>12</sup> WOMEN AND TRADE: THE ROLE OF TRADE IN PROMOTING GENDER EQUALITY, WORLD BANK & WORLD TRADE ORGANIZATION (2020), [https://www.wto.org/english/res\\_e/booksp\\_e/women\\_trade\\_pub2807\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/women_trade_pub2807_e.pdf), accessed 12 October 2021 (hereinafter World Bank/WTO 2020).

<sup>13</sup> Chile Uruguay Free Trade Agreement (Chile Uruguay FTA) (2016); Chile Canada Free Trade Agreement (CCFTA) (2019); Chile Argentina Free Trade Agreement (Chile Argentina FTA) (2019); Canada Israel Free Trade Agreement (CIFTA) (2018); See also, Katrin Kuhlmann, Tara Francis, Indulekha Thomas, Malou Le Graet, Mushfiqur Rahman, Fabiola Madrigal, Maya Cohen, & Ata Nalbantoglu, “Reconceptualizing Free Trade Agreements Through a Sustainable Development Lens,” July 27, 2020 (hereinafter Kuhlmann et al. 2020), [https://cb4fec8a-9641-471c-9042-2712ac32ce3e.filesusr.com/ugd/095963\\_8b66c44bd19b4683b974eaa267fd4070.pdf](https://cb4fec8a-9641-471c-9042-2712ac32ce3e.filesusr.com/ugd/095963_8b66c44bd19b4683b974eaa267fd4070.pdf), accessed 12 October 2021; and World Bank/WTO 2020, *Id.*

<sup>14</sup> See Kuhlmann et al. 2020, *Id.*

<sup>15</sup> This is a significant gap in trade agreements, both regionally and multilaterally. See, e.g., Gammage & Momodu 2020, *supra* note 9 and Kuhlmann et al. 2020, *supra* note 13.

<sup>16</sup> Xinhua, ‘AfCFTA Secretariat Mulls Protocol to Promote Gender, Youth Interests’ (27 April 2021) THESTANDARD, <https://www.standardmedia.co.ke/business-news/article/2001411063/afcfta-secretariat-mulls-protocol-to-promote-gender-youth-interests>, accessed 15 October 2021; see also, Eleni Giokos, ‘Now for the Hard Part, Says Secretary-General of African Continental Free Trade Area,’ CNN BUSINESS (Jun. 16, 2021), <https://edition.cnn.com/2021/06/16/business/wamkele-mene-afcfta-spc->

the potential to reset the rules well beyond the African continent.<sup>17</sup> Although the AfCFTA's gender-focused protocol is not yet under negotiation, several provisions in the current AfCFTA provide a high-level glimpse into what may follow,<sup>18</sup> and some of these are quite innovative in their design. Treaties establishing other African Regional Economic Communities (RECs) contain gender provisions as well, including the East African Community (EAC),<sup>19</sup> Common Market for Eastern and Southern Africa (COMESA),<sup>20</sup> Southern African Development Community (SADC),<sup>21</sup> Economic Community of West African States (ECOWAS),<sup>22</sup> and Economic Community of Central African States (ECCAS),<sup>23</sup> establishing a foundation on which to build.<sup>24</sup> Given some of the particular challenges facing women traders and entrepreneurs on the African continent,<sup>25</sup> including complex and inconsistent market rules and gaps in digital inclusion and access to finance, the AfCFTA provides a fresh opportunity to go beyond this start and address gender and trade in a meaningful way.

The sections below will examine RTA approaches on gender and trade to date, including the structure of RTA provisions on gender, the gender responsiveness of RTA provisions, and inclusive legal design approaches.<sup>26</sup> Together, these provide a comparative assessment of approaches, provisions, and legal design innovations (drawn from RTAs, WTO rules, hard and soft law, and domestic law) that could be used to address gender considerations in the context of inclusive development under the AfCFTA going forward.<sup>27</sup>

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<sup>17</sup> Katrin Kuhlmann & Akinyi Lisa Agutu, "The African Continental Free Trade Area: Toward A New Model for Trade and Development Law," 51 GEO. J. INT'L L. 4 (2020) (hereinafter, Kuhlmann & Agutu).

<sup>18</sup> Forget, *supra* note 10.

<sup>19</sup> Treaty for the Establishment of the East African Community, art. 1 (1999) [hereinafter EAC Treaty].

<sup>20</sup> Treaty Establishing the Common Market for Eastern and Southern Africa (Nov. 5, 1993) [hereinafter COMESA Treaty], available at [https://www.comesa.int/wp-content/uploads/2019/02/comesa-treaty-revised-20092012\\_with-zaire\\_final.pdf](https://www.comesa.int/wp-content/uploads/2019/02/comesa-treaty-revised-20092012_with-zaire_final.pdf), accessed 20 November 2021.

<sup>21</sup> Treaty of the Southern African Development Community, Art. 4(c) (revised 2015) [hereinafter SADC Treaty].

<sup>22</sup> Treaty of the Economic Community of West African States Treaty (May 28, 1975) [hereinafter ECOWAS Treaty (Original)]; Revised Treaty of the Economic Community of West African States Treaty (July 24, 1993) [hereinafter ECOWAS Treaty (Revised)].

<sup>23</sup> Treaty for the Establishment of the Economic Community of Central African States, art. 60(2)(b) (1983) [hereinafter ECCAS Treaty].

<sup>24</sup> Forget, *supra* note 10, at 2. For a comprehensive assessment of gender provisions in African RECs, see Gammage & Momodu, *supra* note 9.

<sup>25</sup> See, e.g., UN Women, 'Opportunities for Women Entrepreneurs in the African Continental Free Trade Area' (2019) [hereinafter, UN Women 2019], <https://africa.unwomen.org/en/digital-library/publications/2019/07/opportunities-for-women-in-the-acfta>, accessed 15 October 2021.

<sup>26</sup> Katrin Kuhlmann 'Mapping Inclusive Law and Regulation: A Comparative Agenda for Trade and Development' forthcoming in AF. J. INT'L. ECON. L. 2<sup>nd</sup> Ed., [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3912907](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3912907), accessed 12 October 2021 [hereinafter Kuhlmann 2021].

<sup>27</sup> To this end, see additional work on inclusive regulation, including, e.g., Kuhlmann 2021 (*Id.*); Katrin Kuhlmann & Bhramar Dey, *Using Regulatory Flexibility to Address Market Informality in Seed Systems: A Global Study*, AGRONOMY 11 (2) 377 (2021) at 16 [hereinafter Kuhlmann & Dey], <https://www.mdpi.com/2073-4395/11/2/377>, accessed 18 October 2021; and Katrin Kuhlmann, 'Flexibility and Innovation in International Economic Law: Enhancing Rule of Law, Inclusivity, and Resilience in the Time of COVID-19' (2020), AFRONOMICSLAW SYMPOSIUM ON THE VULNERABILITY IN THE TRADE AND INVESTMENT REGIMES IN THE TIME OF COVID-19, <https://www.afronomiclaw.org/2020/08/27/flexibility-and-innovation-in-international-economic-law-enhancing->

## II. A Brief Comparison of Approaches to Assess Trade and Gender Rules

Although the practice and literature are still evolving on gender and trade, several approaches on how to assess gender and trade rules are relevant to the AfCFTA and other future RTAs. These include analysis of the structural nature of RTA provisions on gender, evaluation of the degree to which RTA provisions are gender responsive, and assessment of the equity and inclusivity dimension of gender and trade provisions. These different approaches intersect and are presented briefly below, and they all inform the contextual analysis in the following section focused on women's needs in the market.

### A. Structure of RTA Provisions on Gender

Structurally, the word “gender” appears in RTAs in various forms (Table 1), including in agreements' preambles and objectives (including, e.g., the Preamble to the AfCFTA); annexes; non-specific articles on related issues such as labor, agriculture, and intellectual property;<sup>28</sup> specific articles on gender; side agreements, which are often focused on related issues such as labor (e.g., Canada-Colombia and Canada-Costa Rica FTAs); and even stand-alone gender chapters (e.g., Chile-Uruguay FTA) in RTAs and Protocols, such as the SADC Protocol on Gender.<sup>29</sup> These structural aspects of gender and trade have been comprehensively assessed,<sup>30</sup> and they inform how gender is incorporated into trade agreements and impact the degree and depth of commitments.

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[rule-of-law-inclusivity-and-resilience-in-the-time-of-covid-19/](#), accessed 18 October 2021 [hereinafter Kuhlmann Afronomics].

<sup>28</sup> These include the Chile-Uruguay FTA (Chapter 11.9/6 on Labour) and USMCA (Article 14.17 on corporate social responsibility, Article 23.9 on sex-based discrimination in the workplace, Article 25.2 on investment and SMEs), as referenced in Bahri 2019, *supra* note 7, at 5.

<sup>29</sup> SADC Protocol on Gender and Development, arts. 20, 22, Aug. 17, 2008, [https://www.sadc.int/files/8713/5292/8364/Protocol\\_on\\_Gender\\_and\\_Development\\_2008.pdf](https://www.sadc.int/files/8713/5292/8364/Protocol_on_Gender_and_Development_2008.pdf), accessed 23 November 2021; *See generally*, Monteiro 2021, *supra* note 4, at 15; *see also*, Bahri 2019, *supra* note 7, at 4.

<sup>30</sup> *See, in particular*, Monteiro 2021, *supra* note 4.

Table 1: Main Structures of Gender-Related Provisions (Monteiro 2021)<sup>31</sup>

Structure of gender-related provisions	Number of RTAs
<b>1. Main text of the RTA:</b>	<b>76</b>
- Preamble	12
- Non-specific article(s) on gender	64
- Specific article on gender	10
- Specific chapter on gender	9
- Annex(es)	17
<b>2. Side document(s) to the RTA:</b>	<b>12</b>
- Side letters	1
- Joint statement(s)	1
- Protocol(s)	2
- Labour cooperation agreement	8
<b>3. Post-RTA agreements/decisions on gender:</b>	<b>13</b>
- Declaration(s)/recommendation(s)	4
- Decision(s)/resolution(s)/directive(s)	6
- Agreement(s)/Protocol(s)	3

Source: Author's calculations based on the mapping of gender-related provisions in RTAs.

Note: The GTGA is excluded from the analysis.

Within these structures, gender commitments tend to include common elements: “(i) affirmation of the importance of eliminating discrimination against women; (ii) recognition and adherence to other international agreements on gender; (iii) cooperation on gender issues (iv) institutional provisions including the establishment of committees for cooperation and exchange of information; and (v) soft committee-based dispute resolution mechanisms to amicably resolve differences.”<sup>32</sup>

## B. Gender Responsiveness of RTA Provisions

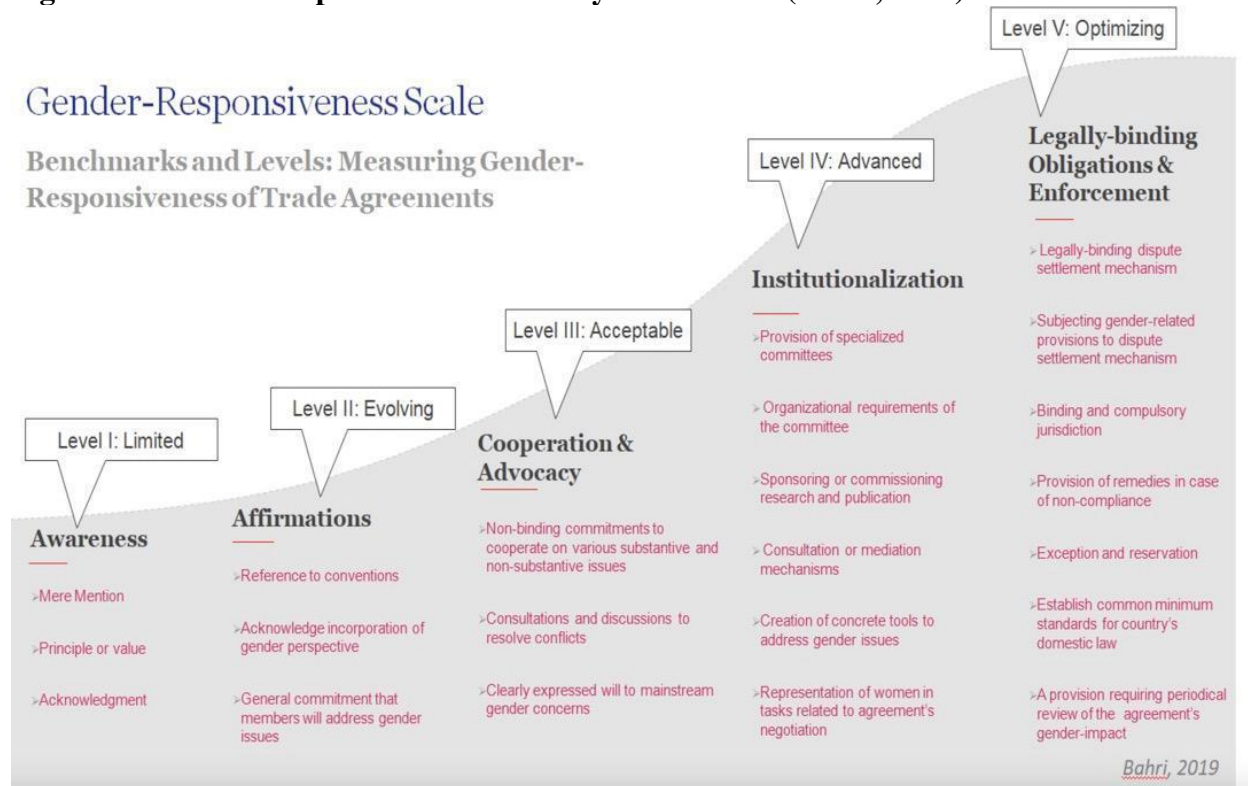
Going beyond structure, gender responsiveness is an important consideration in assessing RTA approaches. Bahri has advanced an instrumental Gender-Responsiveness Scale based on a maturity framework (Figure 1) which categorizes RTA provisions based on their gender responsiveness into five groups: limited, evolving, acceptable, advanced, and optimizing.<sup>33</sup> These benchmarks and levels allow for comparison across RTA provisions that goes beyond their structure and begins to evaluate their impact.

<sup>31</sup> Monteiro 2021, *supra* note 4, at 14.

<sup>32</sup> Kuhlmann et al. 2020, *supra* note 13. *See also*, International Trade Centre, ‘Mainstreaming Gender in Free Trade Agreements’ (2020) [hereinafter ITC 2020], [https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender\\_FTA\\_20200707\\_web.pdf](https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender_FTA_20200707_web.pdf), accessed 11 October 2021.

<sup>33</sup> Bahri’s study focuses on explicit gender-related provisions (those that “use the terms relating to gender, women, female or a similar expression in the provision in an explicit manner.) and implicit gender-related provisions “those which, without making any explicit reference to gender, address the issues of gender in an indirect manner through human rights, vulnerable groups focus, labor discrimination, corporate social responsibility, intellectual property rights and small and medium enterprises.” Bahri 2019, *supra* note 7, at 9, Footnote 31. *See also*, Monteiro 2021, *supra* note 4.

Figure 1: Gender-Responsiveness Maturity Framework (Bahri, 2019)



Applying this framework to the AfCFTA, the AfCFTA contains Level I commitments in the Preamble (“*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*”) and General Objectives (Article 3 (e) under the General Objectives contains the objective to “*promote and attain sustainable and inclusive socio-economic development, gender equality and structural transformation of the State Parties*”).<sup>34</sup> Even though the AfCFTA’s General Objectives contain a non-binding mention of gender equality, the inclusion of the language “*promote and attain*” (emphasis added), however, suggests a higher level of commitment than other general gender references.<sup>35</sup> Further, the language in the AfCFTA Preamble draws an explicit link between gender and “*the development of international trade and economic cooperation,*” implying that the AfCFTA as a whole should be interpreted in this context.<sup>36</sup>

Notably, two of the AfCFTA’s protocols also contain gender-related provisions.<sup>37</sup> The AfCFTA Protocol on Trade in Services includes a reference to women in Article 27 (2) (d) on Technical Assistance, Capacity Building, and Cooperation that could be considered a Level III commitment under Bahri’s scale (“*State Parties agree, where possible, to mobilise resources, in collaboration with development partners, and implement measures, in support of the domestic efforts of State*”).

<sup>34</sup> AfCFTA, *supra* note 2, Preamble and General Objectives (Article 3 (e)).

<sup>35</sup> Forget, *supra* note 10.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*



Parties, with a view to, *inter alia* . . . improving the export capacity of both formal and informal service suppliers, with particular attention to micro, small and medium size; women and youth service suppliers”).<sup>38</sup> The AfCFTA Protocol on the Free Movement of Persons contains a binding commitment with the use of mandatory language “shall” stating that “States Parties *shall* not discriminate against nationals of another Member State entering, residing or established in their territory, on the basis of their [...] sex”.<sup>39</sup> This provision is particularly innovative, as it goes beyond other trade agreements and side agreements, linking non-discrimination with the free movement of persons and explicitly prohibiting discrimination based on sex in this context.<sup>40</sup> The AfCFTA also includes a number of other provisions, including provisions on special and differential treatment (S&DT), that could impact women as well (See Table 2 below) .

Yet, despite these innovations, the AfCFTA’s provisions on gender merely scratch the surface,<sup>41</sup> and movement towards an AfCFTA Protocol on Women in Trade (or Gender and Youth Protocol) could propel the AfCFTA in the direction of more comprehensive gender commitments, perhaps even reaching Level V on Bahri’s scale. As the following section will argue, an AfCFTA protocol could innovate beyond existing Level V commitments and be tailored to address particular challenges facing women traders and entrepreneurs in the market.

### C. Inclusive Legal Design Approach

In addition to the approaches discussed above, another important aspect of assessing the design of RTA options revolves around equity and inclusion in legal design.<sup>42</sup> To date, RTA provisions on gender, whether explicit or implicit, have focused primarily on cooperation and consultation and have not addressed more direct equity considerations.<sup>43</sup>

Cooperation and consultations provisions are common in RTAs and are not limited to gender. They also appear in other RTA chapters, such as those on labor, environment, SMEs/MSMEs, government procurement, agriculture, services, and intellectual property rights (IPRs).<sup>44</sup> These provisions fall within Level III in Bahri’s Gender-Responsiveness Scale and can be a useful tool when combined with other RTA commitments.

Assessing RTA design options through a lens of inclusivity and equity requires a deeper dive into relevant legal design (encompassing a range of instruments, including treaties, soft law, domestic law and regulation, customary law, etc.), diverse legal and regulatory innovations, and the needs

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<sup>38</sup> AfCFTA, Protocol on Trade in Services, Mar. 21, 2018, 58 I.L.M. 1028, 1053, Art. 27 (2) (d) [hereinafter AfCFTA Protocol on Trade in Services].

<sup>39</sup> AfCFTA, Protocol on the Free Movement of Persons, Mar. 21, 2018, 58 I.L.M. 1028, 1053.

<sup>40</sup> Forget, *supra* note 10.

<sup>41</sup> As Forget, *supra* note 10, highlights, of the 36 States that have ratified the AfCFTA, 34 (excluding only Mauritania and the Republic Democratic of Sahwari Arab) have undertaken stronger gender commitments in other RTAs, including in RTAs with the European Union.

<sup>42</sup> Kuhlmann 2021, *supra* note 26.

<sup>43</sup> *Id.*, at 33.

<sup>44</sup> Bahri, *supra* note 7, at 11.

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of vulnerable and marginalized stakeholders.<sup>45</sup> This is presented here based on an approach to “Inclusive Law and Regulation”, applied to trade rules in a gender context (Table 2),<sup>46</sup> following an analytical framework that provides a basis to evaluate economic law and regulation (including RTAs) in the context of inclusive trade and development.<sup>47</sup> Additional options that fall within this analytical framework are presented in section III below.

**Table 2: Inclusive Legal and Regulatory Approach (Kuhlmann 2021)<sup>48</sup>**

<b>Inclusive Legal/Regulatory Dimension</b>	<b>Example RTA Options</b>
(1) Differentiation for Vulnerable Groups [Special & Differential Treatment (S&DT)] <sup>49</sup>	<ul style="list-style-type: none"> <li>● RTA provisions on S&amp;DT related to goods and services (e.g., AfCFTA S&amp;DT provisions) could be applied in a gender context.</li> <li>● Globally, the LDC Services Waiver, could be used to provide preferential market access for services in “sectors employing predominantly women”.<sup>50</sup></li> <li>● AfCFTA Protocol on Trade in Services references “formal and <i>informal</i> service suppliers, with particular attention to . . . women”</li> </ul>
(2) Flexibility in Design and Application of Rules	<ul style="list-style-type: none"> <li>● “Review and revise” provisions in RTAs, such as the AfCFTA “rendez-vous clause”,<sup>51</sup> which allow for agreements to be adapted as circumstances change.</li> <li>● Consultation provisions focused on vulnerable groups and women could inform use of flexibility to reassess and build out commitments subject to circumstances and needs.</li> </ul>
(3) Sustainable Development	<ul style="list-style-type: none"> <li>● Sustainable development provisions could be tailored to gender priorities.</li> <li>● Use Green Box domestic support measures, consistent with the WTO Agreement on Agriculture (AoA) to address women’s needs<sup>52</sup> in the context of</li> </ul>

<sup>45</sup> Kuhlmann 2021, *supra* note 26.

<sup>46</sup> *Id.* Legal instruments also include aspects of WTO law comprehensively assessed through a gender lens in Rohini Acharya, Olga Falgueras Alamo, Salma Mohamed Thabit Al-Battashi, Anoush der Boghossian, Gaghm Ghei, Tania Parcero Herrera, Lee Ann Jackson, Ulla Kask, Claudia Locatelli, Gabrielle Marceau, Ioana-Virginia Motoc, Anna Caroline Müller, Nora Neufeld, Simon Padilla, Josefita Pardo de León, Stella Perantakou, Nadezhda Sporysheva, & Christiane Wolff, ‘Trade and Women – Opportunities for Women in the Framework of the World Trade Organization’ (2019) J. INT’L ECON. L. 22 (hereinafter Acharya et al. 2019).

<sup>47</sup> Kuhlmann 2021, *supra* note 26.

<sup>48</sup> *Id.*

<sup>49</sup> This most often takes the form of special and differential treatment, or special rights, for developing countries at the international law level. Kuhlmann 2021, *supra* note 26.

<sup>50</sup> Acharya et al., *supra* note 33, at 346.

<sup>51</sup> AfCFTA, *supra* note 2, Part. II Art. 7. *See also*, Kuhlmann 2021, *supra* note 26 and Gammage & Momodu, *supra* note 9.

<sup>52</sup> Acharya et al. 2019, *supra* note 46, at 337.

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	<p>climate and food security, which could be part of a more comprehensive approach on food security and gender through RTAs.</p>
(4) Equity <sup>53</sup>	<ul style="list-style-type: none"> <li>● Minimum legal standards on women’s access to land, non-discrimination, equal pay for equal work, inheritance, and other areas of law related to women’s role in the economy<sup>54</sup> would enhance equity through RTAs and domestic law.</li> <li>● Provisions could be incorporated into services schedules to guarantee gender-responsive financial services.</li> <li>● Use of permissible subsidies to provide treatment for “assistance to disadvantaged groups, such as women and ethnic minorities”<sup>55</sup></li> <li>● Provisions could be added on migration and anti-trafficking.</li> <li>● Digital inclusion provisions could be integrated that include gender, and gender could be noted in the context of data privacy (along with human rights, sexual orientation, transgender status, etc.).</li> <li>● AfCFTA and other RTAs could incorporate provisions on gender-responsive standards in line with UNECE Declaration for Gender Responsive Standards and Standards Development.<sup>56</sup></li> </ul>
(5) Engagement and Transparency	<ul style="list-style-type: none"> <li>● Engagement provisions could be used (Bahri Level 3) and linked with “review and revise” RTA provisions to provide an avenue for addressing women’s needs on an ongoing basis, coupling engagement with “responsiveness”.</li> </ul>

<sup>53</sup> Equity encompasses impartiality in law, with an emphasis on ensuring inclusivity for vulnerable groups addressing past injustices through law.

<sup>54</sup> See International Trade Centre, ‘What Role for Women in International Trade?’ (2019), <https://www.intracen.org/layouts/2coltemplate.aspx?pageid=47244640256&id=47244668116>, accessed 11 October 2021 and Kuhlmann et al. 2020, *supra* note 13. At the WTO level, this could take the form of a plurilateral agreement on women in trade, which could “codify the elimination of discrimination against women in trade [by eliminating] domestic laws that perpetuate such discrimination and ensur[ing] compliance with the principles of equal access and opportunity for trade.” Laura Lane & Penny Nass ‘Women in Trade Can Reinvalidate the WTO and Global Economy’ (2020) Center for International Governance Innovation at 6 (hereinafter Lane & Nass), <https://www.cigionline.org/articles/women-trade-can-reinvigorate-wto-and-global-economy/>, accessed 16 October 2021.

<sup>55</sup> Acharya et al. 2019, *supra* note 46, at 342 note that the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) provides for significant policy space that could be used to empower women and disadvantaged groups.

<sup>56</sup> See Lane & Nass, *supra* note 55.

	<ul style="list-style-type: none"> <li>● Transparency provisions could be tailored to women’s needs, drawing upon good practices and lessons learned.</li> </ul>
(6) Reduction of Legal and Regulatory Gateways	<ul style="list-style-type: none"> <li>● Measures to address regulatory hurdles facing women could be more systematically addressed and prioritized, with a focus on regulatory design and implementation to enhance women’s engagement in the market (e.g., focus on processes and procedures in trade facilitation, standards, sanitary and phytosanitary measures, streamlined business registration processes, etc.).</li> <li>● Mapping of specific processes that affect women, with focus on regulatory design and implementation to enhance women’s engagement in the market.</li> <li>● AfCFTA Simplified Trade Regime and Non-Tariff Barrier Reporting, Monitoring, and Eliminating Mechanism could be gender responsive.</li> </ul>
(7) Implementation and Impact	<ul style="list-style-type: none"> <li>● Provisions could be integrated requiring gender assessment and gender impact review, along with focused engagement on implementation that actively involves women affected by trade rules.</li> </ul>

As Table 2 highlights, trade provisions and measures could be designed and applied based on a framework that fosters inclusiveness and equity. Additional examples that track these dimensions of Inclusive Law and Regulation are presented in the following section.

Finally, and critically, there is also a political dimension to gender and trade. Despite the proliferation of gender provisions in trade instruments, gender and trade commitments are sometimes viewed with skepticism from the perspective of preserving policy flexibility (or “policy space”) and avoiding disguised protectionism<sup>57</sup> These are important considerations and are approached here in three interconnected ways, recognizing that these issues are complex and multi-dimensional. First, States and regions need to consider the most appropriate way to use the legal instruments of international trade to meet particular gender and development needs. For this reason, the following section presents options for consideration and not prescriptive solutions. Second, to the extent possible, any options for RTAs should be tracked with innovations in regional and domestic law, which can act as a proxy for supported principles and approaches. In this case, innovations in the design of African law at the international/regional and domestic levels are highlighted, bearing in mind that a more substantial review would be beneficial in the AfCFTA context. Finally, options presented in the following section are linked with actual challenges women face in sub-Saharan Africa, suggesting a balance between policy space and women’s needs

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<sup>57</sup> Similar concerns have been raised regarding human rights, labor, environment, and sustainable development provisions. India, in particular, has voiced concerns with linking gender and trade at the multilateral level. *See* Ananya Singh, ‘Explained: India’s Refusal to Back WTO Declaration on Gender Equality in Trade’ (15 December 2017) QRIUS, <https://qrius.com/explained-india-refusal-gender-equality-trade/>, accessed 11 October 2021; *See also*, Suresh Prabhu, Indian Minister of Industry and Commerce (Indian Press Conference, WTO Ministerial Conference, Buenos Aires, 11 December 2017.

and drawing a connection between RTA provisions and those they are meant to serve, ultimately linking macro-level trade agreements with micro-level challenges and opportunities. This final dimension is also worthy of greater study, as it is an important gap in trade law and trade agreements that should be more systematically addressed.<sup>58</sup>

### III. Options and Innovations for the AfCFTA and Future RTAs

The preceding section presented a brief summary of three interconnected approaches to assess possible RTA provisions on gender and trade: a structural approach, a gender-responsive approach, and a design-focused approach based on inclusive law and regulation. This section draws from these approaches and frames RTA options for the AfCFTA in the context of challenges women face in the market. These challenges include issues related to the sectors in which women work, including challenges related to work in both goods and services (and the high degree of work in the informal sector), non-tariff measures and regulatory hurdles, gaps in access to finance, lack of digital inclusion, and issues related to women's role in the agricultural sector and food security.<sup>59</sup> Although current African RTAs (including the AfCFTA) do contain legal innovations, they do not recognize women's particular needs or the roles that women hold in an economy, highlighting an important gap.<sup>60</sup> The AfCFTA could, however, innovate further through the new protocol.

Important lessons and options can be drawn from the design of both gender-specific and broader provisions in existing RTAs, WTO rules, and African law. The legal dimension of gender and trade should be comprehensively assessed across legal instruments (Table 3), although a full legal assessment is beyond the scope of this chapter. Assessing the legal dimension of RTAs must, however, go beyond RTA text, structure, and enforcement and extend to other international legal instruments and national law as well, encompassing the “various laws and norms that influence gender roles and women's opportunities and constraints within a particular country” [or region] (See Table 3).<sup>61</sup>

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<sup>58</sup> See Kuhlmann 2021, *supra* note 26.

<sup>59</sup> See, e.g., UN Women 2019, *supra* note 25 and United Nations Economic Commission for Africa (ECA), ‘Advancing Gender-equitable Outcomes in African Continental Free Trade Area (AfCFTA) Implementation (2021) [hereinafter UN ECA 2021], [https://www.uneca.org/sites/default/files/keymessageanddocuments/22May\\_Final\\_WhitePaper\\_Advancing\\_gender\\_equitable\\_outcomes.pdf](https://www.uneca.org/sites/default/files/keymessageanddocuments/22May_Final_WhitePaper_Advancing_gender_equitable_outcomes.pdf), accessed 11 October 2021.

<sup>60</sup> These agreements fail to recognize “the diverse roles of women as traders, workers, and consumers in African economies [which] has sustained inequalities through the guise of the development discourse”. Gammage & Momodu, *supra* note 9, at 1.

<sup>61</sup> Eugenia McGill, “Trade and Gender” (2005) in *The World Trade Organization – Legal, Economic, and Political Analysis*, Vol. II (Arthur Appleton, Patrick Macrory, and Michael Plummer, eds.), New York: Springer Science and Business Media, Inc. (hereinafter, McGill 2005) at 36, referencing Rekha Mehra & Sarah Gammage, ‘Trends, Countertrends, and Gaps in Women's Employment’, 27 *WORLD DEV.* 533 (1999), at 23-27 (hereinafter Mehra & Gammage 1999). See also Marceline White, Carols Salas, and Sarah Gammage ‘Trade Impact Review: Mexico Case Study; NAFTA and the FTAA: A Gender Analysis of Employment and Poverty Impacts in Agriculture’ (2003) Women's Edge Coalition.

**Table 3: Legal Instruments Related to Gender and Trade (Adapted from McGill 2005, with Author’s Additions)<sup>62</sup>**

Legal Instrument	Example
International instruments “relevant to gender equality and human rights” <sup>63</sup>	International treaties such as CEDAW, International Labour Organization (ILO) conventions, and the Maputo Protocol/AU Protocol on Women’s Rights; soft law, such as the SDGs (incorporated by reference in RTAs)
National constitutions	Constitution of Kenya (2010), for example <sup>64</sup>
National and subnational laws, regulations, policies, and other instruments “that benefit women and other disadvantaged groups”	<ul style="list-style-type: none"> <li>(a) Non-discrimination/equal treatment laws;</li> <li>(b) Affirmative action and laws to address gender disparity and promote equality;<sup>65</sup></li> <li>(c) Laws related to fair wages, food labeling, and health and safety, as well as non-tariff measures in other areas, for example trade facilitation provisions;</li> <li>(d) Procurement rules related to women; and</li> <li>(e) Laws and regulations facilitating development of sectors in which women work (including agriculture, manufacturing, and services), as well as digital regulation and provisions on digital inclusion.</li> </ul>
“Gaps or biases in the application or enforcement of laws that benefit women”	Labor laws, land titling, banking regulation <sup>66</sup>
“Religious, traditional, or customary laws and practices” (including “living law”)	Land tenure rules, inheritance rules

<sup>62</sup> McGill 2005, *Id.*, at 37-38, also referencing Christine Chinkin, ‘Gender Mainstreaming in Legal and Constitutional Affairs: A Reference Manual for Governments and Other Stakeholders’, Commonwealth Secretariat Gender Management System Series (2001) (hereinafter Chinkin 2001) and Mehra & Gammage 1999, *supra* note 63, at 26.

<sup>63</sup> McGill 2005, *supra* note 63, at 37.

<sup>64</sup> Constitution of Kenya, 2010 (Laws of Kenya), Art. 27 (8); Art. 59 (2); Art. 60 (1) (f); Art. 81 (b); Art. Art. 91 (f); Art. 172 (2) (b); Art. 175 (c); Art 197 (1); and Art. 250 (11). With respect to government procurement, see also Constitution of Kenya, 2010 (Laws of Kenya) Art. 227 (1) and Public Procurement and Asset Disposal Act (Kenya), 2015, Section 53 (6).

<sup>65</sup> According to McGill 2005, *supra* note 63, at footnote 93, such “special measures aimed at accelerating de facto equality between men and women” are expressly authorized under CEDAW.” See CEDAW, *supra* note 2, art. 4.1.

<sup>66</sup> Based on McGill 2005, *supra* note 46, at 38. McGill notes that “Facially neutral laws can . . . be applied in a discriminatory manner . . . [and] can also disadvantage women because of their more limited access to assets and employment opportunities.”

Domestic law is one of the most important sources of information on how RTA parties approach gender. Although States have innovative rules addressing gender, there are still critical gaps. According to the International Trade Centre, over 90 percent of States have laws that limit women's ability to engage in the market. These can take the form, for example, of rules and regulations that restrict women's ownership of land, differentiated processes for business registration, and limitations on women's participation in global trade.<sup>67</sup>

In lieu of a comprehensive legal review, the WTO Trade Policy Review Mechanism (TPRM) provides important insight into how women's empowerment is incorporated into the trade policies of WTO Members.<sup>68</sup> Based on a sampling of TPRM submissions, the majority (seventy percent) of Members' policies contain gender-responsive policies.<sup>69</sup> These include (1) financial and non-financial incentives to the private sector and women-owned/led MSMEs and SMEs (30 percent reported "trade policies that support women-owned/led companies", including economic empowerment in the export sector; (2) "agriculture and fisheries policies that support women's empowerment" (15.5 percent); and (3) "government procurement policies that support women's empowerment" (9 percent).<sup>70</sup>

Possible RTA options should further "be informed by an understanding of the social, economic and political context in which the relevant trade or investment activity is taking place, including the opportunities and constraints facing women and other disadvantaged groups."<sup>71</sup> This aligns with an important aspect of gender mainstreaming, which calls for incorporating the "experience, knowledge, and interests of women . . . on the development agenda",<sup>72</sup> as well as increasing focus on sectors that provide opportunity for women and ways in which to assist women-owned businesses in benefiting from international trade and investment.<sup>73</sup>

The sub-sections that follow discuss four priority areas: (a) women's work in the goods and services sectors (including informal work) and trade measures affecting women (including impact of market rules on women), (b) access to finance, (c) digital inclusion, and (d) women's responsibilities related to agriculture and food security, with relevant RTA options summarized.

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<sup>67</sup> International Trade Centre, 'What Role for Women in International Trade?' (2019), <https://www.intracen.org/layouts/2coltemplate.aspx?pageid=47244640256&id=47244668116>, accessed 11 October 2021, referenced in Acharya et al., 2019, *supra* note 46, at 324.

<sup>68</sup> Acharya et al. 2019, *supra* note 46, at 327-28.

<sup>69</sup> Anoush der Boghossian, 'Trade Policies Supporting Women's Economic Empowerment: Trends in WTO Members' WTO (2019) [hereinafter der Boghossian], [https://www.wto.org/english/res\\_e/reser\\_e/ersd201907\\_e.htm](https://www.wto.org/english/res_e/reser_e/ersd201907_e.htm), accessed 20 November 2021.

<sup>70</sup> Acharya et al. 2019, *supra* note 46, at 327-28. Categorization based on the TPRM submissions of 111 (out of 164) WTO Members. *See also*, der Boghossian, *Id*.

<sup>71</sup> McGill 2005, *supra* note 63, at 36.

<sup>72</sup> According to the United Nations Economic and Social Council (ECOSOC), building upon the Platform for Action adopted at the 1995 United Nations Fourth World Conference on Women, in Beijing, China, gender mainstreaming involves: 'the process of assessing the implications for women and men of any planned action, including legislation, policies, or programmes, in any area and at all levels.' (1997), <https://www.ilo.org/public/english/bureau/gender/newsite2002/about/defin.htm>, accessed 11 October 2021.

<sup>73</sup> Commission on the Status of Women, 'Report on the Forty-Sixth Session' (2002) Ch. I.A., Draft Resolution III.A, para.5, in *Economic and Social Council Official Records 2002, Supp. No. 7*, U.N. Doc. E/2002/27-E/CN.6/2002/13.

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The options below track closely with the “inclusive law and regulation” approach summarized in Table 2 and also integrate aspects of the gender-responsive approach in Figure 1. Although they relate mainly to the AfCFTA, they are applicable to other RTAs as well and also draw upon WTO disciplines as noted.<sup>74</sup>

### A. Women’s Work and Trade Measures Affecting Women

One of the most fundamental aspects of trade and gender centers around the nature of women’s work and engagement in the market. Women’s employment encompasses both the goods and services sectors,<sup>75</sup> and women have faced considerable disruptions in respect of both goods and services work due to COVID-19.<sup>76</sup> A number of these challenges are due to the more precarious nature of women’s work, the lack of social safety nets, and women’s role in unpaid and informal work.<sup>77</sup> Tourism services, which are dominated by women, were also hit particularly hard during the pandemic.<sup>78</sup>

Overall, women are increasingly involved in services, ranging from retail and financial services to tourism and hospitality, to health care,<sup>79</sup> including cross-border delivery of medical care that has been so critical during COVID-19. Women continue to play a strong role in manufacturing sectors as well, particularly export-driven manufacturing such as garments.<sup>80</sup>

Women are disproportionately involved in the informal sector, and the United Nations (UN) estimates that 89 percent of women in Africa work informally (as a percentage of full employment).<sup>81</sup> While informal work can sometimes be more flexible, it can also offer little security and room for advancement.<sup>82</sup> Within the informal sector, migrant women face some of

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<sup>74</sup> For a comprehensive discussion of the relationship between gender and WTO rules, see McGill, *supra* note 63 and Acharya et al. 2019, *supra* note 46.

<sup>75</sup> See, e.g., Katrin Kuhlmann, ‘U.S. Preference Programs: How Well Do They Work?’ Testimony before the U.S. Senate Finance Committee (May 16, 2007), <https://www.finance.senate.gov/hearings/us-preference-programs-how-well-do-they-work/>, accessed 16 October 2021.

<sup>76</sup> A number of gender-differentiated impacts have resulted from the COVID-19 pandemic, including disproportionate effects on women’s work, lack of social safety nets, and gender-based violence. See United Nations Committee on Trade and Development, ‘Impact of the COVID-19 Pandemic on Trade and Development: Transitioning to a New Normal’ (2020), [https://unctad.org/system/files/official-document/osg2020d1\\_en.pdf](https://unctad.org/system/files/official-document/osg2020d1_en.pdf), accessed 16 October 2021 [hereinafter UNCTAD 2020]. Lessons can also be drawn from the gender-differentiated impact resulting from the financial crisis. See, e.g., Maria Floro and Gary Dymski, *Financial Crisis, Gender, and Power: An Analytical Framework*, 28 WORLD DEV. 1269 (2000); Joseph Y. Lim, *The Effects of the East Asian Crisis on the Employment of Women and Men: the Philippine Case*, 28 WORLD DEV. 1285 (2000); Ajit Singh and Ann Zammit, *International Capital Flows: Identifying the Gender Dimension*, 28 WORLD DEV. 1249 (2000).

<sup>77</sup> UNCTAD 2020, *supra* note 77, at 31-32.

<sup>78</sup> *Id.*, at 33.

<sup>79</sup> Acharya et al. 2019, *supra* note 46, at 344.

<sup>80</sup> Export-driven manufacturing is often labor-intensive and subject to poor working conditions, frequent turnover, and unpredictability due to changes in capital and skills requirements (particularly in export processing zones). Eugenia McGill 2005, *supra* note 63, at 12.

<sup>81</sup> UN Women, ‘Women in Informal Economy’ (2021), <https://www.unwomen.org/en/news/in-focus/csw61/women-in-informal-economy>, accessed 11 October 2021.

<sup>82</sup> Informal work includes part-time work, home-based work, and other informal sector activity. McGill 2005, *supra* note 63, at 13.



the most significant challenges, as the pandemic has underscored.<sup>83</sup> The immense challenge of addressing trafficking of women and girls remains as well,<sup>84</sup> which is linked with trade and transport corridors and global value chains.

Women traders struggle with a number of regulatory roadblocks (or “regulatory gateways”),<sup>85</sup> that limit their participation in the markets. These include domestic rules and regulations that relate to non-tariff measures (NTMs) in the form of standards, sanitary and phytosanitary (SPS) measures, and border measures, many of which are not gender-responsive.<sup>86</sup> In terms of border measures, although the WTO Trade Facilitation Agreement,<sup>87</sup> (and African governments), pressed for simplification of measures and encouraged digitalization of border procedures in order to reduce waiting time, women traders still face procedural challenges and safety issues at the border.<sup>88</sup> Women traders also often lack information on cross-border regulations and procedures,<sup>89</sup> putting them at a disadvantage *vis-à-vis* larger businesses and subjecting them to delays at the border crossings.<sup>90</sup> Women also tend to lack access to transport, which impacts opportunities for small-scale women traders, particularly those dealing in perishable goods (this was exacerbated during the pandemic due to border closures).<sup>91</sup>

#### RTA Options: Women’s Work and Trade

- Current RTAs tend to address women’s work through provisions on labor, often including reference to the ILO Convention on Employment Discrimination.<sup>92</sup> While reference to ILO Conventions is important, this is just a start, and the AfCFTA and other future RTAs could incorporate both hard legal obligations and soft law instruments relevant to women’s work, such as SDG targets and indicators and Business and Human Rights principles, enhancing the equity dimension of RTAs. Services commitments could be enhanced in a gender

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<sup>83</sup> UNCTAD 2020, *supra* note 77, at 36. *See also*, Joan Fitzpatrick and Katrina R. Kelly, ‘Gendered Aspects of Migration: Law and the Female Migrant’ (1998) 22 HASTINGS INT’L & COMP. L. REV. 47.

<sup>84</sup> McGill 2005, *supra* note 63, at 34.

<sup>85</sup> “Legal and Regulatory Gateways” are the decision points and hurdles contained within a legal or regulatory process (license, registration, or permit, for example) that “correspond with practical steps that enterprises and other stakeholders encounter in navigating a particular aspect of the legal and regulatory system.” They also “signify intervention points to make the rules more equitable, inclusive, and efficient.” Kuhlmann 2021, *supra* note 26, at 22.

<sup>86</sup> These measures are all linked to WTO disciplines as well; *see* Acharya et al. 2019, *supra* note 46.

<sup>87</sup> Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, Feb. 22, 2017, WTO Doc. WT/L/940.

<sup>88</sup> *See* Philomena Apiko, Sean Woolfrey, and Bruce Byiers, ‘The Promise of the Africa Continental Free Trade Area (AfCFTA)’ (2020), ECDPM, <https://ecdpm.org/publications/promise-african-continental-free-trade-area-afcfta/>, accessed 11 October 2021.

<sup>89</sup> *See* Taku Fundira, ‘Informal Cross-border Trading – Review of the Simplified Trade Regimes in East and Southern Africa’ (2018). tralac Trade Brief No.US18TB03/2018. Stellenbosch, <https://www.tralac.org/publications/article/12825-informal-cross-border-trading-review-of-the-simplified-trade-regimes-in-east-and-southern-africa.html>, accessed 11 October 2021.

<sup>90</sup> East African Sub-Regional Support Initiative for the Advancement of Women (EASSI) ‘Annual Report’ (2020) at 12, 14, <https://eassi.org/annual-reports/>, accessed 17 October 2021 [hereinafter EASSI 2020].

<sup>91</sup> *Id.*

<sup>92</sup> International Labour Organization C111, ‘Discrimination (Employment and Occupation) Convention’, 1958 (in force, 7th May 2001). *See also*, Bahri, *supra* note 7.

context through horizontal commitments (spanning all services sectors) on non-discrimination,<sup>93</sup> strengthening the equity dimension of the AfCFTA. This would put the AfCFTA in a position to lead globally as well (aligning, for example, with Canada's proposal for a horizontal commitment to ensure that services measures 'do not discriminate between men and women').<sup>94</sup>

- The AfCFTA already incorporates differentiated treatment with respect to both goods and services, which is a notable innovation that could be built upon in a gender context.<sup>95</sup> In particular, the language in the AfCFTA Protocol on Trade in Services that mentions "formal and *informal* service suppliers, with particular attention to . . . women" (emphasis added),<sup>96</sup> is unique among RTAs and could inspire more binding commitments under the new protocol.
- The AfCFTA could place special attention on women's migration and trafficking in women and girls, innovating in these areas beyond current approaches. For example, the AfCFTA could incorporate other relevant instruments, such as the *Ten Year Action Plan to Eradicate Child Labour, Forced Labour, Human Trafficking and Modern Slavery (2020-2030)*, adopted in February 2020 by African Heads of States and Government,<sup>97</sup> which aligns with AU Agenda 2063, and SDG Target 8.7. With respect to migration, the AfCFTA could include provisions on free movement of persons and give effect to aspects of the UN Global Compact for Safe, Orderly and Regular Migration, including provisions on mutual recognition of qualifications for migrant workers (Global Compact Objective 18) and other aspects related to human rights, trafficking, and decent work.<sup>98</sup>
- Drawing upon lessons from the pandemic, the AfCFTA could also include provisions on essential services, such as procedural liberalizations, mutual recognition of professional qualifications, and use of green lanes for essential travelers, including service providers.<sup>99</sup>
- The AfCFTA could incorporate gender-specific non-discrimination provisions related to NTMs, such as gender-specific commitments on licensing requirements and licensing procedures for goods and services, along with qualification requirements and procedures in services.<sup>100</sup>

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<sup>93</sup> Lane & Nass, *supra* note 55, at 2. A number of the multilateral recommendations made by Lane and Nass are relevant in an RTA context, as noted and referenced herein.

<sup>94</sup> *Id.* at 345.

<sup>95</sup> Kuhlmann & Agutu, *supra* note 17.

<sup>96</sup> AfCFTA Protocol on Trade in Services, *supra* note 38.

<sup>97</sup> Africa Union, 'Ten Year Action Plan to Eradicate Child Labour, Forced Labour, Human Trafficking and Modern Slavery (2020-2030)' (2019), [https://au.int/sites/default/files/newsevents/workingdocuments/40112-wd-child\\_labour\\_action\\_plan-final-english.pdf](https://au.int/sites/default/files/newsevents/workingdocuments/40112-wd-child_labour_action_plan-final-english.pdf), accessed 23 November 2021. *See also*, 'African Union is Committed to Ending Child Labour and Other Forms of Human Exploitation' (May 29, 2021), <https://au.int/en/articles/african-union-committed-ending-child-labour-and-other-forms-human-exploitation>, accessed 23 November 2021.

<sup>98</sup> United Nations, 'Global Compact for Safe, Orderly and Regular Migration' (July 13, 2018), <https://refugeesmigrants.un.org/migration-compact>, accessed 23 November 2021.

<sup>99</sup> Katrin Kuhlmann, 'Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic' (2021) United Nations Economic and Social Commission for Asia and the Pacific, <https://www.unescap.org/kp/2021/handbook-provisions-and-options-trade-times-crisis-and-pandemic>, accessed 16 October 2021 (hereinafter Kuhlmann UN 2021) at 36-40.

<sup>100</sup> *See* Lane & Nass, *supra* note 55; in the context of the General Agreement on Trade and Services, see World Trade Organization, 'Communication from Argentina, Canada, Colombia, Iceland, and Uruguay: Domestic

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- The AfCFTA and other RTAs could incorporate provisions on gender-responsive standards, building upon the UN Economic Commission for Europe (UNECE) Declaration for Gender Responsive Standards and Standards Development.<sup>101</sup>
- Innovative provisions on addressing NTMs could be strengthened and made more gender-responsive, building upon existing innovations to reduce regulatory gateways include the AfCFTA Simplified Trade Regime and Non-Tariff Barrier Reporting, Monitoring, and Eliminating Mechanism (which also appears in African RECs like the EAC, ECOWAS, and the Tripartite Free Trade Area), as well as the EAC “Simplified Guide for Micro and Small-Scale Cross-Border Traders and Service Providers Within the EAC”.<sup>102</sup> Going forward, these mechanisms could be increasingly approached from a gender perspective,<sup>103</sup> with implementation focused, in particular, on reducing barriers for women traders and linked to ongoing consultations to ensure that they are widely known and used in practice.
- Transparency provisions could be tailored to increase information available to women traders and promote engagement and inclusiveness, building upon those included in Article X of the General Agreement on Tariffs and Trade (GATT),<sup>104</sup> as well as a number of RTAs.<sup>105</sup> Some areas of focus could include using designated contact points or enquiry points and formal and informal dialogue structures,<sup>106</sup> approached in a gender context.
- The AfCFTA could also build upon trade facilitation provisions to address women’s needs,<sup>107</sup> addressing important regulatory gateways. Customs fast track lanes and green lanes, the latter of which appear in some of Africa’s trade corridors and have proven to be helpful during the COVID-19 pandemic,<sup>108</sup> could help facilitate trade for women, including small-scale traders, as could *de minimis* provisions to exempt trade below a certain monetary threshold from duties and other requirements. Further, RTA provisions could address the challenges women face in accessing services, such as transport services.
- The AfCFTA could include gender-specific commitments on procurement in order to increase women’s participation in the market, consistent with the AU proposal for a forty percent government procurement share for women,<sup>109</sup> as well as trends in African domestic

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Regulation – Development of Measures, Gender Equality (2017) JOB/SERV/258, [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S006.aspx?DataSource=Cat&query=@Symbol=%22JOB/SERV/258%22&Context=ScriptedSearches&languageUIChanged=true](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?DataSource=Cat&query=@Symbol=%22JOB/SERV/258%22&Context=ScriptedSearches&languageUIChanged=true), accessed 16 October 2021.

<sup>101</sup> UNECE, ‘Gender Responsive Standards Initiative’ <https://unece.org/gender-responsive-standards-initiative>, accessed 16 October 2021. *See also* Lane & Nass, *supra* note 55.

<sup>102</sup> *See* Gammage & Momodu 2020, *supra* note 9, at 3, 36.

<sup>103</sup> This could be combined with mapping of the regulatory processes and procedures from a gender perspective, using the Regulatory Systems Map approach developed by the New Markets Lab to pinpoint precise areas in which law and regulation could be made more gender responsive. Kuhlmann 2021, *supra* note 26.

<sup>104</sup> Acharya et al. 2019, *supra* note 46, at 329.

<sup>105</sup> Kuhlmann UN, *supra* note 101, at 135.

<sup>106</sup> *Id.* at 145, 147-48.

<sup>107</sup> *See also* Philomena Apiko, Sean Woolfrey, and Bruce Byiers, ‘The Promise of the Africa Continental Free Trade Area (AfCFTA)’ (2020), ECDPM, <https://ecdpm.org/publications/promise-african-continental-free-trade-area-afcfta/>, accessed 11 October 2021.

<sup>108</sup> Kuhlmann UN 2021, *supra* note 101, at 57.

<sup>109</sup> *See* APO Group ‘Piecing the Puzzle of African Integration: The Successes and Exponential Potential’ (2020), <https://www.africanews.com/2021/07/16/piecing-the-puzzle-of-african-integration-the-successes-and-exponential-potential/>, accessed 18 October 2021.

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law. as similar provisions have done in other regions.<sup>110</sup> For example, Section 53 of Kenya's recent Public Procurement and Asset Disposal Act (2015) requires that 30 percent of government procurement be reserved for women.<sup>111</sup> Because implementation of such commitments has already been flagged as a challenge, the AfCFTA could include provisions on implementation, actively engaging women in tracking whether these commitments are applied in practice.

- Across all areas, the AfCFTA could also require collection of sex-disaggregated data and gender impact assessments of trade rules, consistent with articulated continental priorities.<sup>112</sup> The degree to which AfCFTA provisions are binding and subject to dispute settlement will also be an overarching area for further consideration.

### B. Access to Finance

Across the African continent, women face challenges in accessing affordable finance and credit,<sup>113</sup> which often acts as a factor limiting women's work and trade (for example, lack of finance could keep women involved in the production of low value-added, unprocessed agriculture instead of processed products with a higher premium in regional and international markets) and opportunities for specialization, growth, and entrepreneurship.

Further, limitations on women's ownership of land limits women's access to credit and economic opportunity. Collateral requirements tend to favor land-based collateral, and in doing so disadvantage women due to restrictions on women's land ownership.<sup>114</sup> When combined with strict financial sector loan conditions, high interest rates,<sup>115</sup> and lack of tailored financial services products for women, these restrictions can limit women to informal cross-border trade without sufficient opportunities to engage in the market.

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<sup>110</sup> Lane & Nass, *supra* note 55, at 2.

<sup>111</sup> International Centre for Research on Women (ICRW), 'Gender Mainstreaming in Kenya' (2020), [https://www.icrw.org/wp-content/uploads/2020/09/Women-in-Manufacturing-Policy-Brief\\_9.20\\_ICRW.pdf](https://www.icrw.org/wp-content/uploads/2020/09/Women-in-Manufacturing-Policy-Brief_9.20_ICRW.pdf), accessed 11 October 2021.

<sup>112</sup> Nadira Bayat, 'A 'Business Unusual' Approach for Gender Equality under the AfCFTA' (2020), ECDPM GREAT INSIGHTS MAGAZINE, Vol. 9, Issue 1, 2020 [hereinafter Bayat 2020], available at <https://ecdpm.org/great-insights/african-continental-free-trade-area-agreement-impact/business-unusual-gender-afcfta/#:~:text=A%20'business%20unusual'%20approach%20for%20gender%20equality%20within%20the%20AfCFTA&text=In%20this%20way%2C%20AfCFTA%20implementation.a%20key%20role%20to%20play>, accessed 11 October 2021.

<sup>113</sup> See UN ECA 2020, *supra* note 61; see also, Afrieximbank, 'African Trade Report: Informal Cross-Border Trade in Africa in the Context of the AfCFTA' (2020), <https://afr-corp-media-prod.s3-eu-west-1.amazonaws.com/afrexim/African-Trade-Report-2020.pdf>, accessed 11 October 2021.

<sup>114</sup> Louis N. Ndumbe, 'Unshackling Women Traders: Cross-border Trade of Eru from Cameroon to Nigeria' (2013), Africa Trade Policy Notes, at 4.

<sup>115</sup> Bridges Africa, 'Supporting Small-Scale Cross-Border Traders Across Africa' (2018) Vol. 7 Issue 4, at 12, <https://www.tralac.org/images/docs/13116/bridges-africa-june-2018-ictsd.pdf>, accessed 11 October 2021.

RTA Options: Access to Finance

- RTAs could address access to finance in several ways. Importantly, RTA parties could agree to horizontal commitments to reduce gender-based discrimination and improve women's access to services (equity-enhancing provisions), as noted above.
- RTAs, including the AfCFTA, could also enhance equity by introducing binding rules related to gender, as noted above and as proposed in other contexts.<sup>116</sup> These could include access to land, inheritance, and even expanded rules on collateral, including perhaps lease financing, acceptance of moveable property and contracts as collateral, and creation of an electronic collateral securities registry,<sup>117</sup> which could be done in a gender-responsive way. Binding rules could address other areas as well, such as non-discrimination and equal pay for equal work, which would reinforce the other options in this section and go a long way towards ensuring that RTAs are designed to support equity and inclusion.
- RTA parties could also agree to financial services commitments to ensure that financial services products are gender-responsive. These could also include services sector commitments, both horizontal and sector-specific. They could also emphasize important aspects like mobile money, which has significant implications for women traders.<sup>118</sup>
- Some African States, including Burundi, Egypt, Nigeria, and Zambia have put in place policies that promote financial inclusion and gender inclusive finance,<sup>119</sup> highlighting national level support in this area and areas in which the AfCFTA could build out pan-African commitments. Training and awareness building on access to finance could be linked with the AfCFTA as well, including through ongoing initiatives like the African Development Bank's Affirmative Finance Action for Women in Africa (AFAWA) program and 50Million African Women Speak Platform (50MAWS). Over time, the AfCFTA could become a platform for financial education and regulatory alignment.<sup>120</sup>

C. Digital Inclusion

Addressing digital inclusion and inequality in digital trade will be significant across all aspects of women's economic engagement.<sup>121</sup> Although women stand to gain significantly from digital trade,

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<sup>116</sup> See Lane & Nass, *supra* note 55; Kuhlmann et al. 2020, *supra* note 13; and ITC 2020, *supra* note 32.

<sup>117</sup> See Edward Katende & Katrin Kuhlmann, *Building a Regulatory Environment for Agricultural Finance*, (June 2019) Uganda Banker's Association, [https://cb4fec8a-9641-471c-9042-2712ac32ce3e.filesusr.com/ugd/095963\\_a0e1d52d6040405c86334e2bfd8084dc.pdf](https://cb4fec8a-9641-471c-9042-2712ac32ce3e.filesusr.com/ugd/095963_a0e1d52d6040405c86334e2bfd8084dc.pdf), accessed 15 October 2021 (hereinafter Katende & Kuhlmann).

<sup>118</sup> Simonetta Zarelli & Mariana Lopez, 'Leveraging Digital Solutions to Seize the Potential of Informal Cross-Border Trade' (2020) UNCTAD, <https://unctad.org/es/node/2394>, accessed 16 October 2021.

<sup>119</sup> Alliance for Financial Inclusion 'Policy and Regulatory Reforms in the AFI Network 2019' (2019) at 15-26, [https://www.afi-global.org/sites/default/files/publications/2020-07/AFI\\_P%26amp%3BRR\\_G\\_2019\\_AW.pdf](https://www.afi-global.org/sites/default/files/publications/2020-07/AFI_P%26amp%3BRR_G_2019_AW.pdf), accessed 17 October 2021.

<sup>120</sup> See Sone Osakwe, *Extending MSMEs' Access to Trade Finance under the AfCFTA*, CENTRE FOR THE STUDY OF ECONOMIES OF AFRICA 5 (January 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3780767](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3780767), accessed 23 November 2021.

<sup>121</sup> African Union and UNDP, 'The Futures Report, Making the AfCFTA Work for Women and Youth' (2020) at 22, <https://au.int/en/documents/20201202/making-afcta-work-women-and-youth>, accessed 11 October 2021.

they are also particularly affected by the digital divide.<sup>122</sup> Information and Communication Technology (ICT) and financial services, including online payments services, could be better leveraged by women entrepreneurs and traders.<sup>123</sup> However, this also depends upon physical infrastructure and access to the internet.

Digital inclusion and opportunities in digital trade go hand in hand, and digital opportunities could be better harnessed to the benefit of women entrepreneurs and in furtherance of the SDGs,<sup>124</sup> namely SDG 5 and Target 5.b “Enhance the use of enabling technology, in particular ICT, to promote empowerment of women.”<sup>125</sup> Digital trade has already been signaled as an issue for negotiation under the AfCFTA, with a Digital Trade Protocol in the works,<sup>126</sup> which provides an opportunity to address digital inclusion and consider ways in which to tailor provisions to address women’s needs.

#### RTA Options: Digital Inclusion

- Although few RTAs deal with digital inclusion, the Digital Economy Partnership Agreement (DEPA) among Chile, New Zealand, and Singapore (South Korea has just initiated the process of joining)<sup>127</sup> includes specific language that emphasizes digital inclusion for indigenous communities, women, rural populations, and low socio-economic groups.<sup>128</sup> The DEPA explicitly references gender in the context of digital inclusion: “To this end, the Parties shall cooperate on matters relating to digital inclusion, including participation of women, rural populations, low socio-economic groups and Indigenous Peoples”.<sup>129</sup> The DEPA goes on to state that “cooperation may include” a number of things, such as sharing experiences and good practices, “promoting inclusive and sustainable growth”, “addressing barriers in accessing digital economy opportunities”, and others.<sup>130</sup> The cooperation aspect of the DEPA bears similarity to the cooperation provisions in existing gender and trade provisions and chapters, and this language provides a baseline upon which to build more performative obligations in the AfCFTA and future RTAs.

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<sup>122</sup> See Organisation for Economic Co-operation and Development, ‘Bridging the Gender Digital Divide’ (2018), <https://www.oecd.org/digital/bridging-the-digital-gender-divide.pdf>, accessed 18 October 2021.

<sup>123</sup> United Nations Conference for Trade and Development, ‘Harnessing E-commerce for Sustainable Development’ (2017) World Trade Organization publication Chapter 7, [https://www.wto.org/english/res\\_e/booksp\\_e/aid4trade17\\_chap7\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/aid4trade17_chap7_e.pdf), accessed 16 October 2021.

<sup>124</sup> Kuhlmann UN 2021, *supra* note 101, at 102.

<sup>125</sup> SDGs, *supra* note 7.

<sup>126</sup> African Union, ‘Decision of the African Continental Free Trade Area (2020) Assembly/AU/4/(XXXIII) <https://www.tralac.org/documents/resources/cfta/3176-au-assembly-decision-on-the-afcfta-february-2020/file.html>, accessed 16 October 2021.

<sup>127</sup> Digital Economy Partnership Agreement (2020), <https://www.mti.gov.sg/Improving-Trade/Digital-Economy-Agreements/The-Digital-Economy-Partnership-Agreement>, accessed 16 October 2021 (hereinafter DEPA).

<sup>128</sup> DEPA, Art. 11.1. See also Kuhlmann Afronomics, *supra* note 27.

<sup>129</sup> DEPA, *supra* note 128.

<sup>130</sup> *Id.*

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- African national policies and rules on financial digital inclusion, such as those in Mozambique, Madagascar, Tanzania, and Zambia,<sup>131</sup> show national support for digital inclusion that could pave the way for broader strategies under the AfCFTA.
- Gender needs could also be explicitly taken into account in the context of data protection, and the UN Human Rights Council and the UN General Assembly have called upon UN Members to “develop or maintain . . . measures . . . regarding the right to privacy in the digital age that may affect all individuals, including . . . women . . . and persons in vulnerable situations or marginalized groups.”<sup>132</sup> Within the African regional law, the ECOWAS data protection rules reference human rights and “fundamental liberties” of the data holders,<sup>133</sup> which is also notable and could be even further tailored to gender. Some countries’ laws contain innovations in this area as well, including India’s Personal Data Protection Bill (2019), which treats data on health, caste or tribe, sexual orientation, and transgender status with heightened privacy protection.<sup>134</sup>

### D. Agriculture and Food Security

African women play many roles in the agricultural sector – as primary producers of food and primary providers for their households, and also as traders and processors of agricultural products, creating strong links between agricultural trade and human rights, food security, health, livelihoods,<sup>135</sup> and, of course, the SDGs.<sup>136</sup> In sub-Saharan Africa, women tend to be primarily responsible for household food security, in addition to their involvement in the production of both cash and subsistence crops.<sup>137</sup> Non-traditional agricultural exports, such as cut flowers and fruits and vegetables, present both enhanced trade and work opportunities for women, and, in the case of non-traditional food crops, they can provide important benefits in terms of food security as well.<sup>138</sup>

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<sup>131</sup> See Better Than Cash Alliance, Women’s World Banking, and World Bank Group ‘Advancing Women’s Digital Financial Inclusion’ (2020), [https://www.mfw4a.org/sites/default/files/resources/saudig20\\_women\\_compressed.pdf](https://www.mfw4a.org/sites/default/files/resources/saudig20_women_compressed.pdf), accessed 17 October 2021.

<sup>132</sup> Human Rights Council Resolution 34/7 and UN General Assembly ‘Right to Privacy in the Digital Age’ A/RES/71/199, [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/71/199](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/199), accessed 16 October 2021.

<sup>133</sup> Economic Community of West African States, Supplementary Act A/SA.1/01/10 on Personal Data Protection Within ECOWAS, February 16, 2015, available at <http://www.tit.comm.ecowas.int/wp-content/uploads/2015/11/SIGNED-Data-Protection-Act.pdf>

<sup>134</sup> Government of India, Personal Data Protection Act, 2019.

<sup>135</sup> See McGill 2005, *supra* note 63 and Katrin Kuhlmann ‘The Human Face of Trade and Food Security: Lessons on the Enabling Environment from Kenya and India’ (2017) CENTER FOR STRATEGIC & INT’L STUDIES, <https://www.csis.org/analysis/human-face-trade-and-food-security>, accessed 16 October 2021 [hereinafter Kuhlmann CSIS 2017].

<sup>136</sup> Nadira Bayat and David Luke, ‘Gender Mainstreaming in AfCFTA National Strategies: Why it Matters for the SDGs’ (2020) International Institute for Sustainable Development SDG Knowledge Hub, <http://sdg.iisd.org/commentary/guest-articles/gender-mainstreaming-in-afcfta-national-strategies-why-it-matters-for-the-sdgs/>, accessed 15 October 2021.

<sup>137</sup> McGill 2005, *supra* note 63, at 55-56; See also, Lynn R. Brown et al., *Generating Food Security in the Year 2020: Women as Producers, Gatekeepers, and Shock Absorbers*, International Food Policy Research Institute 2020 Vision Brief 17 (1995), available at <http://www.ifpri.org/2020/briefs/number17.htm>.

<sup>138</sup> See Kuhlmann CSIS 2017, *supra* note 136.

Despite their prominent role in the agricultural sector, women continue to struggle with limited land ownership and access rights and challenges with access to credit,<sup>139</sup> as discussed above. Women's limited access to agricultural inputs, including seeds, technology, and extension services, impacts the ability to transition into higher value-added production and ultimately benefit from trade opportunities.<sup>140</sup>

Women also tend to face particularly challenging regulatory hurdles in the agricultural sector, including compliance with standards and SPS measures, which can require significant investment, economies of scale, and technical capacity.<sup>141</sup> The WTO SPS Agreement, with which most RTAs align, including African RECs and the AfCFTA, contains important disciplines and an emphasis on capacity building and S&DT.<sup>142</sup>

#### RTA Options: Agriculture and Food Security

- The AfCFTA could include provisions reaffirming the space for governments to put in place gender-responsive domestic support measures related to agriculture that are consistent with AoA “Green Box” measures, such as training, research, extension, and advisory services.<sup>143</sup> A gender lens could also be applied to agricultural input subsidies for poor farmers in line with Article 6.2 of the AoA.<sup>144</sup>
- The AfCFTA, building upon the precedent created through the RECs, is also scheduled to address agricultural inputs in a more comprehensive way, creating another avenue for gender-responsive domestic support commitments and other provisions, including enhanced gender representation on inputs committees, that would complement the new protocol on gender.

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<sup>139</sup> See, e.g., Acharya et al. 2019, *supra* note 46; Kuhlmann CSIS 2017, *supra* note 113, McGill 2005, *supra* note 63; and Mehra & Gammage, *supra* note 63, at 539.

<sup>140</sup> See Food and Agriculture Organization of the United Nations (FAO), ‘The State of Food and Agriculture’ (2015), <https://www.fao.org/publications/sofa/2015/en/>, accessed 16 October 2021; see also, UNCTAD, ‘Borderline: Women in Informal Cross-Border Trade in Malawi, The United Republic of Tanzania and Zambia’ (2019) at 42, [https://unctad.org/system/files/official-document/ditc2018d3\\_en.pdf](https://unctad.org/system/files/official-document/ditc2018d3_en.pdf), accessed 11 October 2021 and Standards and Trade Development Facility, ‘STDF Briefing Note, Inclusive Trade Solutions: Women in SPS Capacity Building’ (2015), [https://www.standardsfacility.org/sites/default/files/STDF\\_Briefing\\_note\\_13.pdf](https://www.standardsfacility.org/sites/default/files/STDF_Briefing_note_13.pdf), accessed 16 October 2021.

<sup>141</sup> See Acharya et al. 2019, *supra* note 46, at 338 and Spencer Henson, ‘Gender and Sanitary and Phytosanitary Measures in the Context of Trade: A Review of Issues and Policy Recommendations’ (2018), International Centre for Trade and Sustainable Development, [https://standardsfacility.org/sites/default/files/Gender\\_SPS\\_measures\\_in\\_the\\_context\\_of\\_trade\\_Henson ICTSD No v\\_18.pdf](https://standardsfacility.org/sites/default/files/Gender_SPS_measures_in_the_context_of_trade_Henson ICTSD No v_18.pdf), accessed 11 October 2021.

<sup>142</sup> See, in particular, Articles 9 and 10 of the WTO SPS Agreement. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994). The WTO Standards and Trade Development Facility (STDF) has played a central role in mainstreaming gender into SPS capacity building activities Acharya et al. 2019, *supra* note 46, at 339.

<sup>143</sup> These can also include measures related to land reform and rural livelihood security, such as rural employment programmes and issuance of property titles, which could be important to women's livelihood and work. Acharya et al. 2019, *supra* note 46, at 337. See also, McGill 2005, *supra* note 63.

<sup>144</sup> Acharya et al. 2019, *supra* note 46, at 338.



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- While RTAs have not comprehensively addressed food security, this is an area that could be pioneered under the AfCFTA in line with broader sustainable development considerations and the SDGs.<sup>145</sup> Food security could be addressed more comprehensively through detailed provisions on export restrictions, safeguards, tailored domestic support, and links with agricultural inputs and other areas of regulation,<sup>146</sup> all of which could be done consistent with WTO disciplines and approached through a gender and equity lens.
- RTA measures to improve transparency and enhance capacity building could be strengthened, enhancing engagement and inclusiveness, with a particular focus on women's role in the agricultural sector. This could work in tandem with tools for notifying and responding to SPS issues, such as the AfCFTA Simplified Trade Regime and Non-Tariff Barrier Reporting, Monitoring, and Eliminating Mechanism, and other programs noted above, and the ePing Alert System of the UN Department of Economic and Social Affairs and ITC that improves access to SPS and TBT regulations, including through SMS alerts for small traders.<sup>147</sup> These programs could be tailored to women's needs as discussed above.

### E. Overarching RTA Options

Finally, several RTA design options have been proposed that would address challenges across the four areas noted above. These include cooperation and consultation provisions, which are already present in current RTAs (theses align with Bahri's Gender Responsiveness Levels III and IV and Kuhlmann's Engagement Dimension of Inclusive Law and Regulation), and can be important across priority areas to promote enhanced skills, entrepreneurship, access to finance, and bridging the digital divide, among others.<sup>148</sup> Capacity building provisions, while common in RTAs, could also be enhanced to include the creation of gender committees and application of good practices and standards, and the collection and use of sex-disaggregated data.<sup>149</sup> However, while consultation, cooperation, and capacity building provisions are important,<sup>150</sup> these mechanisms alone are insufficient to directly address women's needs. These RTA options should be considered in combination with binding commitments (and softer commitments where appropriate) in the specific areas noted above that would establish more performative obligations that are likely to lead to concrete action and provide a clearer channel for women to exercise rights.

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<sup>145</sup> Annex 2 of the AoA covers government stockpiling programs for food security, and Article XI of the General Agreement on Tariffs and Trade allows for limited and temporary application of export restrictions to “*prevent or relieve critical shortages of foodstuffs*”, and, while these tend to be incorporated into RTAs, there are limitations to these disciplines.

<sup>146</sup> Katrin Kuhlmann, ‘Why the United States and Africa Should Lead a Collaborative, Rules-Based Approach to Food Security’ (2020), Center for Strategic and International Studies, <https://www.csis.org/analysis/why-united-states-and-africa-should-lead-collaborative-rules-based-approach-food-security>, accessed 16 October 2021.

<sup>147</sup> Acharya et al. 2019, *supra* note 46, at 339; see ‘E-Ping, <https://www.epingalert.org/en>, accessed 16 October 2021.

<sup>148</sup> Bahri, *supra* note 7, at 11.

<sup>149</sup> See World Bank/WTO 2020, *supra*, note 12 and Kuhlmann UN, *supra* note 101.

<sup>150</sup> Mia Mikic & Vanika Sharma, ‘Feminising WTO 2.0’, in Simon J. Evenett & Richard Baldwin, ‘Revitalizing Multilateral Trade Cooperation: Why? Why Now? And How?’ (2020), in “Revitalizing Multilateralism: Pragmatic Ideas For The New WTO Director-General”, <https://voxeu.org/content/revitalising-multilateralism-pragmatic-ideas-new-wto-director-general>, accessed 16 October 2021.

RTAs could also address gender on a more systemic level, drawing from pan-African priorities and proposals at the global level, the latter of which includes a possible plurilateral agreement on trade and gender. Both multilateral and regional rules could incorporate expansion of general exceptions clauses modeled on GATT Article XX, which many RTAs, including the AfCFTA, contain.<sup>151</sup> While this could be helpful for incorporating gender and leveraging policy space, exceptions should not take the place of affirmative commitments on gender and trade. Finally, comprehensive gender strategies at the national and regional levels and use of gender-disaggregated data should be widespread practices. On the African continent, the UN has emphasized that gender mainstreaming needs to be integrated into the operationalization of the AfCFTA through countries' national implementation strategies,<sup>152</sup> a proposal that would support many of the options discussed in this chapter.

#### IV. Conclusion

As this chapter illustrates, gender-responsive rules can promote inclusive trade and development and generate significant benefits for women; however, the design and implementation of these rules is critical. The AfCFTA already has a solid foundation on gender upon which a new gender-focused protocol could build, drawing from inclusive legal design options and innovations and broader lessons learned within and outside of the African continent to address real challenges in women's work and trade, access to finance, digital inclusion, and agriculture and food security. The options highlighted in this chapter attempt to balance between policy discretion and establishment of binding commitments that would give greater certainty to women-led MSMEs and SMEs. The AfCFTA holds great promise, both in enhancing existing innovations in legal design and in ensuring that women's voices are heard as new trade rules are developed and existing rules are applied. The options for inclusive law and regulation presented in this chapter could be an entry point for gender-responsive trade provisions, resetting the rules on gender and trade in Africa and beyond.

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<sup>151</sup> Some experts have argued for expanded use of the "public morals" exception in a gender context as well. See James Harrison, 'The Human Rights Impact of the World Trade Organization' (2007) Oxford, 1st ed. (Oxford: Hart Publishing) 207–9; Liane M. Jarvis, 'Women's Rights and the Public Morals Exception of GATT Article 20', 22 Michigan Journal of International Law 219 (2000), at 237.

<sup>152</sup> Bayat 2020, *supra* note 114.