

Gender Approaches in Regional Trade Agreements and a Possible Gender Protocol under the African Continental Free Trade Area

A Comparative Assessment

KATRIN KUHLMANN*

ABSTRACT

With gender and trade now linked on the international agenda, gender approaches in regional trade agreements (RTAs) could have significant implications for women entrepreneurs and traders around the world. Building on the foundation of African Regional Economic Communities (RECs), the African Continental Free Trade Area (AfCFTA) includes gender as an express priority alongside sustainable and inclusive socio-economic development. Yet this is only a starting point. A gender-focused AfCFTA protocol is under negotiation, representing a significant opportunity to reassess RTA provisions on gender and consider more tailored, contextual 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 a focus on gender responsiveness and incorporation of international and domestic legal design options for ‘inclusive law and regulation’ in order to use RTAs to address more holistically the concrete challenges facing women. The chapter also includes a contextual analysis of how trade rules could more actively support women’s work, reduce procedural hurdles in the market, enhance access to finance and digital inclusion, and promote food security under the AfCFTA and future RTAs.

* The author would like to thank Ruth Gitau, who received a Masters of Law degree from Georgetown University Law Center, for her invaluable research support. Special thanks also to the Georgetown Law International Economic Law Colloquium and to Cristen Bauer and Aline Bertolin for comments on earlier versions of this work.

10.1 INTRODUCTION

The legal basis exists for a deeper focus on gender through the African Continental Free Trade Area (AfCFTA).¹ The 2017 Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires (Declaration)² was heralded as a landmark initiative for putting gender on the trade agenda,³ and gender is also a strong focus of the African Union (AU) Agenda 2063.⁴ 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) such as 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),⁵ UN Sustainable Development Goals (UN SDGs), in particular, Goal 5 on Gender Equality,⁶ 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).⁷

RTAs are increasingly incorporating gender priorities,⁸ sometimes in the form of more tangible commitments through gender-focused provisions and

¹ Agreement Establishing the African Continental Free Trade Area, Art. 3, 21 March 2018, 58 ILM 1028 (AfCFTA) <<https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area>> accessed 2 May 2023.

² WTO, 'Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017' (2017) <www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf> accessed 4 May 2023.

³ See José-Antonio Monteiro, 'The Evolution of Gender-Related Provisions in Regional Trade Agreements' (2018) World Trade Organization Staff Working Paper ERSD-2021-8 <www.wto.org/english/res_e/reser_e/ersd201815_e.pdf> accessed 8 May 2022.

⁴ AU Commission, 'African Union (AU) Agenda 2063: The Africa We Want' (2015) <https://au.int/sites/default/files/documents/36204-doc-agenda2063_popular_version_en.pdf> accessed 8 May 2022.

⁵ UN, 'Convention on the Elimination of All Forms of Discrimination Against Women', UNGA Res. 34/180 (18 December 1979) (CEDAW).

⁶ Amrita Bahri, 'Measuring the Gender-Responsiveness of Free Trade Agreements: Using a Self-Evaluation Maturity Framework' (2019) 14(2) *Global Trade & Customs Journal* 517–527. She refers to CEDAW and the UN, 'Transforming Our World: The 2030 Agenda for Sustainable Development', UNGA Res. A/RES/70/1 (25–27 September 2015).

⁷ AU, '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 8 May 2022.

⁸ Ideally, gender should be interpreted broadly to include sex, gender identity, and gender expression. Further, as noted in Clair Gammage and Mariam Momodu, 'The Economic Empowerment of Women in Africa: Regional Approaches to Gender-Sensitive Trade Policies' (2020) 1 *African Journal of International Economic Law* 5: 'African women and their

chapters.⁹ Not only is this a global trend, but it has strong roots in the African continent, where substantive gender commitments are included in obligations through Regional Economic Communities (RECs) and ‘gender-sensitive trade policy has ... been a distinct feature’ for years.¹⁰ As of September 2022, the World Trade Organization (WTO) reported that out of 353 RTAs in force and notified to the WTO, 101 contain provisions on gender and women’s issues.¹¹ Among the recent RTAs that include gender provisions, several incorporate a separate gender chapter, such as the Chile–Uruguay, Canada–Chile, Argentina–Chile, Chile–Brazil, and Canada–Israel Free Trade Agreements (FTAs),¹² as well as the 2020 United Kingdom–Japan

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 and Momodu, ‘The Economic Empowerment of Women in Africa’ (fn 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) University of Chicago Legal Forum; on multidimensionality, see James Gathii, ‘Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn from Each Other’ (2020) 67 *UCLA Law Review* 1610–1650.

- ⁹ See Monteiro, ‘The Evolution of Gender-Related Provisions’ (n 3); Bahri, ‘Measuring the Gender-Responsiveness of Free Trade Agreements’ (n 6); and Sama Al Mutair, Dora Konomi, and Lisa Page, ‘Trade & Gender: Exploring International Practices That Promote Women’s Economic Empowerment’ (TradeLab 17 May 2018) <www.tradelab.org/single-post/2018/05/17/Trade-and-Gender-1> accessed 8 May 2022.
- ¹⁰ Gender and trade approaches in Africa date back to the 1980s. See Gammage and Momodu, ‘The Economic Empowerment of Women in Africa’ (n 8) 4. See also Lolita Laperle-Forget, ‘Gender Responsiveness in Trade Agreements – How Does the AfCFTA Fare’ (Tralac 17 March 2021) <www.tralac.org/blog/article/15141-gender-responsiveness-in-trade-agreements-how-does-the-afcfta-fare.html> accessed 8 May 2022; and Amrita Bahri, ‘Gender Mainstreaming in Free Trade Agreements: A Regional Analysis and Good Practice Examples’ (Gender, Social Inclusion and Trade Knowledge Product Series 2021), <https://wtochairs.org/sites/default/files/7.%20Gender%20mainstreaming%20in%20FTAs_final%20%286%29.pdf> accessed 8 May 2022.
- ¹¹ WTO, ‘Informal Working Group on Trade and Gender: Trade and Gender-related Provisions in Regional Trade Agreements’ INF/TGE/COM/4 (WTO 2022) <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/TGE/COM_4.pdf&Open=True> accessed 2 May 2023.
- ¹² 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, and Ata Nalbantoglu, ‘Reconceptualizing Free Trade Agreements through a Sustainable Development Lens’ (27 July 2020) <https://cb4fec8a-9641-471c-9042-2712ac32ce3e.filesusr.com/ugd/095963_8b66c44bd19b4683b974eaa267fd4070.pdf> accessed 8 May 2022.

Comprehensive Economic Partnership Agreement.¹³ Some African RECs, such as the Common Market for Eastern and Southern Africa (COMESA) and Southern African Development Community (SADD), as well as the Canada–Israel FTA, notably subject gender provisions to dispute settlement, which must often follow an attempt to pursue amicable avenues for resolving disputes.¹⁴ While subjecting gender provisions to dispute settlement is a rather unusual feature among RTAs, it is likely that it is 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 inclusion 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, the degree to which they are gender responsive, and the 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.¹⁵

This assessment is critical in light of the announcement of a gender-related protocol under the AfCFTA,¹⁶ which is the world's largest RTA in terms of

¹³ Treaty Establishing the Common Market for Eastern and Southern Africa (5 November 1993) (COMESA Treaty) <www.comesa.int/wp-content/uploads/2019/02/comesa-treaty-revised-20092012_with-zaire_final.pdf> accessed 8 May 2022; SADC Protocol on Gender and Development, Arts. 20, 22 (17 August 2008) <www.sadc.int/sites/default/files/2021-08/Protocol_on_Gender_and_Development_2008.pdf> accessed 2 May 2023; SADC; and Agreement between the United Kingdom of Great Britain and Northern Ireland and Japan for a Comprehensive Economic Partnership, 23 October 2020.

¹⁴ See Kuhlmann et al., 'Reconceptualizing Free Trade Agreements' (n 12).

¹⁵ This is a significant gap in trade agreements, both regionally and multilaterally. See, for instance, Gammage and Momodu, 'The Economic Empowerment of Women in Africa' (n 8); and Kuhlmann et al., 'Reconceptualizing Free Trade Agreements' (n 12).

¹⁶ Xinhua, 'AfCFTA Secretariat Mulls Protocol to Promote Gender, Youth Interests' (The Standard 27 April 2021) <www.standardmedia.co.ke/business-news/article/2001411063/afcfta-secretariat-mulls-protocol-to-promote-gender-youth-interests> accessed 8 May 2022; see also Eleni Giokos, 'Now for the Hard Part, Says Secretary-General of African Continental Free Trade Area' (CNN Business 16 June 2021) <https://edition.cnn.com/2021/06/16/business/wamkele-mene-afcfta-spc-intl/index.html?utm_source=fbCNNi&utm_campaign=africa&

member states and is an agreement that has the potential to reset the rules well beyond the African continent.¹⁷ Although the Protocol on Women and Youth in Trade under the AfCFTA is still taking shape, several provisions in the current AfCFTA provide a high-level glimpse into what may follow,¹⁸ and some of these are quite innovative in their design. Treaties establishing other African RECs contain gender provisions as well, including the East African Community (EAC),¹⁹ COMESA,²⁰ SADC,²¹ Economic Community of West African States (ECOWAS),²² and Economic Community of Central African States (ECCAS),²³ establishing a foundation on which to build.²⁴ Given some of the particular challenges facing women traders and entrepreneurs on the African continent,²⁵ 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.²⁶ Together, these provide a comparative assessment of approaches, provisions, and legal design innovations (drawn from RTAs, WTO rules, hard and soft

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¹⁷ Katrin Kuhlmann and Akinyi Lisa Agutu, 'The African Continental Free Trade Area: Toward a New Model for Trade and Development Law' (2020) 51(4) *Georgetown Journal of International Law* 853–808.

¹⁸ Laperle-Forget, 'Gender Responsiveness in Trade Agreements' (n 10).

¹⁹ Treaty for the Establishment of the East African Community, Art. 1 (1999) (EAC Treaty).

²⁰ COMESA Treaty (n 13).

²¹ SADC Protocol on Gender and Development (n 13).

²² Treaty of the Economic Community of West African States Treaty (28 May 1975) (ECOWAS Treaty (Original)); Revised Treaty of the Economic Community of West African States Treaty (24 July 1993) (ECOWAS Treaty (Revised)).

²³ Treaty for the Establishment of the Economic Community of Central African States, Art. 60(2) (b) (1983) (ECCAS Treaty).

²⁴ Laperle-Forget, 'Gender Responsiveness in Trade Agreements' (n 10) 2. For a comprehensive assessment of gender provisions in African RECs, see Gammage and Momodu, 'The Economic Empowerment of Women in Africa' (n 8).

²⁵ See, for instance, UN Women, 'Opportunities for Women Entrepreneurs in the African Continental Free Trade Area' (2019) <<https://africa.unwomen.org/en/digital-library/publications/2019/07/opportunities-for-women-in-the-acfta>> accessed 8 May 2022.

²⁶ Katrin Kuhlmann, 'Mapping Inclusive Law and Regulation: A Comparative Agenda for Trade and Development' (2021) 2 *African Journal of International Economic Law* 48–87.

law, and domestic law) that could be used to address gender considerations in the context of inclusive development under the AfCFTA going forward.²⁷

The chapter unfolds as follows. Section 10.2 compares the approaches to assess trade and gender rules. Section 10.3 provides a contextual analysis of the options and innovations with respect to trade measures affecting women, access to finance, digital inclusion, and food security, under the AfCFTA and for future RTAs.

10.2 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 Section 10.3 focused on women's needs in the market.

10.2.1 *Structure of RTA Provisions on Gender*

Structurally, the word 'gender' appears in RTAs in various forms (Table 10.1), including in agreements' preambles and objectives (including, e.g., the Preamble to the AfCFTA); annexes; non-specific articles on related issues such as labour, agriculture, and intellectual property;²⁸ specific articles on gender; side agreements, which are often focused on related issues such as labour (e.g., Canada–Colombia and Canada–Costa Rica FTAs); and even stand-alone gender chapters (e.g., Chile–Uruguay FTA) in RTAs and

²⁷ To this end, see additional work on inclusive regulation, including, for example, Kuhlmann (ibid); Katrin Kuhlmann and Bhramar Dey, 'Using Regulatory Flexibility to Address Market Informality in Seed Systems: A Global Study' (2021) 11(2) 377 *Agronomy* 1–27, 16; Katrin Kuhlmann, 'Flexibility and Innovation in International Economic Law: Enhancing Rule of Law, Inclusivity, and Resilience in the Time of COVID-19' (Afronomicslaw 27 February 2020) <www.afonomicslaw.org/2020/08/27/flexibility-and-innovation-in-international-economic-law-enhancing-rule-of-law-inclusivity-and-resilience-in-the-time-of-covid-19/> accessed 8 May 2022.

²⁸ 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, 'Measuring the Gender-Responsiveness of Free Trade Agreements' (n 6) 5.

TABLE 10.1 Main structures of gender-related provisions

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

Source: José-Antonio Monteiro, 'The Evolution of Gender-Related Provisions in Regional Trade Agreements', (2021) World Trade Organization Staff Working Paper ERS-D-2021-8, 14.

protocols, such as the SADC Protocol on Gender and Development.²⁹ These structural aspects of gender and trade have been comprehensively assessed;³⁰ they inform how gender is incorporated into trade agreements, and they impact the degree and depth of commitments.

Within these structures, gender commitments tend to include common elements: '(i) affirmations 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'.³¹

²⁹ SADC Protocol on Gender and Development (n 13) Arts. 20, 22; *see generally*, Monteiro, 'The Evolution of Gender-Related Provisions' (n 3) 15; *see also* Bahri, 'Measuring the Gender-Responsiveness of Free Trade Agreements' (n 6) 4.

³⁰ *See* Monteiro, 'The Evolution of Gender-Related Provisions' (n 3).

³¹ Kuhlmann et al., 'Reconceptualizing Free Trade Agreements' (n 12). *See also* ITC, 'Mainstreaming Gender in Free Trade Agreements' (2020) <<https://intracen.org/resources/publications/mainstreaming-gender-in-free-trade-agreements>> accessed 2 May 2023.

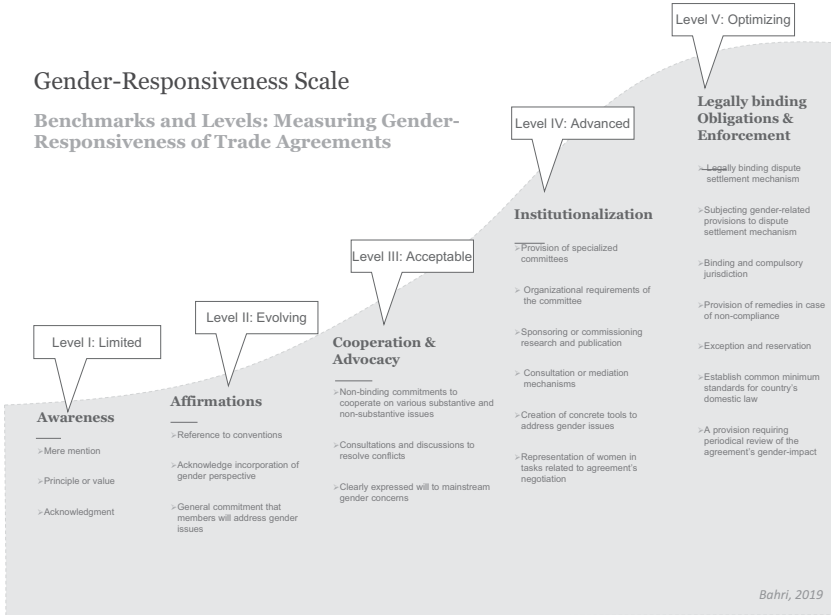


FIGURE 10.1 Gender-responsiveness maturity framework.

Source: Amrita Bahri, 'Measuring the Gender-Responsiveness of Free Trade Agreements: Using a Self-Evaluation Maturity Framework' (2019) 14(2) *Global Trade & Customs Journal* 517–527.

10.2.2 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 10.1) which categorizes RTA provisions based on their gender responsiveness into five groups: limited, evolving, acceptable, advanced, and optimizing.³² These benchmarks and levels allow for comparison across RTA provisions that go beyond their structure and begin to evaluate their impact.

³² 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, labour discrimination, corporate social responsibility, intellectual property rights and small and medium enterprises'). Bahri, 'Measuring the Gender-Responsiveness of Free Trade Agreements' (n 6) 9, fn 31. See also Monteiro, 'The Evolution of Gender-Related Provisions' (n 3).

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').³³ Even though the AfCFTA's General Objectives contain a non-binding mention of gender equality, the inclusion of the language 'promote and attain' suggests a higher level of commitment than other general gender references.³⁴ 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.³⁵

Notably, two of the AfCFTA's protocols also contain gender-related provisions.³⁶ 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 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').³⁷ 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'.³⁸ This provision is particularly innovative, as it links non-discrimination with the free movement of persons and explicitly prohibits discrimination based on sex in this context.³⁹ The AfCFTA also includes a number of other provisions, including on special and differential treatment (S&DT), that could impact women as well (*see* Table 10.2).

³³ AfCFTA (n 1) Preamble and General Objectives (Article 3 (e)).

³⁴ Laperle-Forget, 'Gender Responsiveness in Trade Agreements' (n 10).

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ AfCFTA, Protocol on Trade in Services, Art. 27(2)(d), 21 March 2018, 58 ILM 1028, 1053 (AfCFTA Protocol on Trade in Services).

³⁸ AfCFTA, Protocol on the Free Movement of Persons, 21 March 2018, 58 ILM 1028, 1053.

³⁹ Laperle-Forget, 'Gender Responsiveness in Trade Agreements' (n 10).

TABLE 10.2 *Inclusive legal and regulatory approach*

Inclusive legal/regulatory dimension	Example RTA options
(1) Differentiation for vulnerable parties [special & differential treatment (S&DT)] ^a	<ul style="list-style-type: none"> • RTA provisions on S&DT related to goods and services (e.g., AfCFTA S&DT provisions) could incorporate a gender context. • Globally, the LDC Services Waiver could be used to provide preferential market access for services in ‘sectors employing predominantly women’.^b • AfCFTA Protocol on Trade in Services references ‘formal and <i>informal</i> service suppliers, with particular attention to . . . women’.
(2) Flexibility in design and application of rules	<ul style="list-style-type: none"> • ‘Review and revise’ provisions in RTAs, such as the AfCFTA ‘rendezvous clause’,^c which allow for agreements to be adapted as circumstances change. • Consultation provisions focused on vulnerable groups and women could inform use of flexibility to reassess and build out commitments subject to circumstances and needs.
(3) Sustainable development	<ul style="list-style-type: none"> • Sustainable development provisions could be tailored to gender priorities. • Green Box domestic support measures could be assessed, consistent with the WTO Agreement on Agriculture (AoA), based on how to address women’s needs,^d particularly in the context of climate and food security, which could be part of a more comprehensive approach on food security and gender through RTAs.
(4) Equity ^e	<ul style="list-style-type: none"> • 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^f could enhance equity through RTAs and domestic law. • In addition to non-discrimination, building on the WTO Joint Initiative on Services Domestic Regulation, provisions could be incorporated into services schedules to guarantee gender-responsive financial services. • Permissible subsidies could be considered to provide treatment for ‘assistance to disadvantaged groups, such as women and ethnic minorities’.^g • Provisions could be added on migration and anti-trafficking. • Digital inclusion provisions could be integrated that include gender, and gender could be noted in the

Inclusive legal/regulatory dimension	Example RTA options
(5) Engagement and transparency	<p>context of data privacy (along with human rights, sexual orientation, transgender status, etc.).</p> <ul style="list-style-type: none"> • AfCFTA and other RTAs could incorporate provisions on gender-responsive standards in line with the United Nations Economic Commission for Europe Declaration for Gender Responsive Standards and Standards Development.^h • Engagement provisions could be incorporated (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’. • Transparency provisions could be tailored to women’s needs, drawing upon good practices and lessons learned. • Engagement should be broadly designed to include civil society and the private sector, including enterprises of all sizes and women entrepreneurs across sectors.
(6) Reduction of legal and regulatory gateways	<ul style="list-style-type: none"> • Measures to address regulatory hurdles facing women could be more systematically assessed 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.). • Mapping of specific processes that affect women could be done, with a focus on regulatory design and implementation to enhance women’s engagement in the market. • AfCFTA Simplified Trade Regime and Non-Tariff Barrier Reporting, Monitoring, and Eliminating Mechanism could be gender responsive.
(7) Implementation and impact	<ul style="list-style-type: none"> • 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.

Source: Katrin Kuhlmann, ‘Mapping Inclusive Law and Regulation: A Comparative Agenda for Trade and Development’ (2021) 2 *African Journal of International Economic Law* 48–87.

^a This most often takes the form of special and differential treatment, or special rights, for developing countries at the international law level. Kuhlmann, ‘Mapping Inclusive Law and Regulation’.

^b Acharya et al., 'Trade and Women', 346.

^c AfCFTA, Part. II Art. 7. See also Kuhlmann, 'Mapping Inclusive Law and Regulation', and Gamage and Momodu, 'The Economic Empowerment of Women in Africa'.

^d Acharya et al., 'Trade and Women', 337.

^e Equity encompasses impartiality in law, with an emphasis on ensuring inclusivity for vulnerable groups addressing past injustices through law.

^f See ITC, 'What Role for Women in International Trade?' (2019) <<https://intracen.org/news-and-events/news/what-role-for-women-in-international-trade>> accessed 2 May 2023; Kuhlmann et al., 'Reconceptualizing Free Trade Agreements'. 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 and Penny Nass, 'Women in Trade Can Reinvalidate the WTO and Global Economy' (CIGI 27 April 2020) 6 <www.cigionline.org/articles/women-trade-can-reinvalidate-wto-and-global-economy/> accessed 8 May 2022.

^g Acharya et al., 'Trade and Women', 342. They 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.

^h See Lane and Nass, 'Women in Trade Can Reinvalidate the WTO and Global Economy'.

Yet, despite these innovations, the AfCFTA's provisions on gender merely scratch the surface,⁴⁰ and movement towards an AfCFTA Protocol on Women and Youth in Trade 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.

10.2.3 *Inclusive Legal Design Approach*

In addition to the approaches discussed above, another important aspect of assessing RTA approaches revolves around equity and inclusion in legal design.⁴¹ To date, RTA provisions on gender, whether explicit or implicit, have focused primarily on cooperation and consultation and have not fully addressed more direct equity considerations.⁴²

⁴⁰ As Laperle-Forget (ibid) highlights, of the thirty-six states that have ratified the AfCFTA, thirty-four (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.

⁴¹ Kuhlmann, 'Mapping Inclusive Law and Regulation' (n 26).

⁴² Ibid 82.

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 labour, the environment, SMEs/MSMEs, government procurement, agriculture, services, and intellectual property rights (IPRs).⁴³ 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 inclusion 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 of vulnerable and marginalized stakeholders.⁴⁴ This is presented here based on an approach to 'Inclusive Law and Regulation' (Kuhlmann), applied to trade rules in a gender context (Table 10.2),⁴⁵ following an analytical framework that provides a basis to evaluate economic law and regulation (including RTAs) in the context of inclusive trade and development.⁴⁶ Additional options that fall within this analytical framework are presented in Section 10.3.

As Table 10.2 highlights, trade provisions and measures could be designed and applied based on a framework that fosters inclusion and equity. Additional examples that track these dimensions of inclusive law and regulation are presented in section 10.3.

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 scepticism from the perspective of preserving policy flexibility (or 'policy space') and avoiding disguised protectionism.⁴⁷ These are important considerations and are

⁴³ Bahri, 'Measuring the Gender-Responsiveness of Free Trade Agreements' (n 6) 11.

⁴⁴ Kuhlmann, 'Mapping Inclusive Law and Regulation' (n 26).

⁴⁵ Ibid. 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, Naghm 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, and Christiane Wolff, 'Trade and Women – Opportunities for Women in the Framework of the World Trade Organization' (2019) 22(3) *Journal of International Economic Law* 323–354.

⁴⁶ Kuhlmann, 'Mapping Inclusive Law and Regulation' (n 26).

⁴⁷ Similar concerns have been raised regarding human rights, labour, 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' (QRIOUS 15 December 2017) <<https://qrius.com/explained-india-refusal-gender-equality-trade/>> accessed 8 May 2022; see also Suresh Prabhu, 'Indian Minister of Industry and Commerce' (Indian Press Conference, WTO Ministerial Conference, Buenos Aires, 11 December 2017).

approached here in three interconnected ways, recognizing that these issues are complex and multidimensional. 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, as far as 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 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.⁴⁸

10.3 CONTEXTUAL ANALYSIS OF 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 are engaged, 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.⁴⁹ Although current African RTAs (including the AfCFTA) do contain legal innovations, they do not fully recognize women's particular

⁴⁸ See Kuhlmann, 'Mapping Inclusive Law and Regulation' (n 26).

⁴⁹ See, for instance: UN Women, 'Opportunities for Women Entrepreneurs' (n 25); and UNECA, 'Advancing Gender-Equitable Outcomes in African Continental Free Trade Area (AfCFTA) Implementation' (2021) <www.uneca.org/sites/default/files/keymessageanddocuments/22May_Final_WhitePaper_Advancing_gender_equitable_outcomes.pdf> accessed 8 May 2022.

needs or the roles that women hold in an economy, highlighting an important gap.⁵⁰ The AfCFTA could, however, innovate further through the new protocol and through a comprehensive, whole-agreement approach to address women's needs.⁵¹

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 10.3), 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 10.3).⁵²

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 per cent 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.⁵³

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.⁵⁴

⁵⁰ 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'. *See* Gammage and Momodu, 'The Economic Empowerment of Women in Africa' (n 8) 1.

⁵¹ *See* Nadiya Bayat, 'A Whole Agreement Approach to Gender Mainstreaming in the AfCFTA' (Friedrich Ebert Stiftung March 2022).

⁵² Eugenia McGill, 'Trade and Gender' in Arthur Appleton, Patrick Macrory, and Michael Plummer (eds), *The World Trade Organization – Legal, Economic, and Political Analysis* (Springer Science and Business Media 2005) 36, referencing Rekha Mehra and Sarah Gammage, 'Trends, Countertrends, and Gaps in Women's Employment' (1999) 27(3) *World Development* 533–550. *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' (Women's Edge Coalition 2003) <www.iatp.org/sites/default/files/NAFTA_and_the_FTAA_A_Gender_Analysis_of_Employ.pdf> accessed 8 May 2022.

⁵³ ITC, 'What Role for Women in International Trade?' (2019) <<https://intracen.org/news-and-events/news/what-role-for-women-in-international-trade>> accessed 2 May 2023, referenced in Acharya et al., 'Trade and Women' (n 45) 324.

⁵⁴ Acharya et al., 'Trade and Women' (n 45) 327–328.

TABLE 10.3 *Legal instruments related to gender and trade*

Legal Instrument	Example
International instruments 'relevant to gender equality and human rights' ^a	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 UN SDGs (incorporated by reference in RTAs)
National constitutions	Constitution of Kenya (2010), for example ^b
National and subnational laws, regulations, policies, and other instruments 'that benefit women and other disadvantaged groups'	(a) Non-discrimination/equal treatment laws; (b) Affirmative action and laws to address gender disparity and promote equality; ^c (c) Laws related to fair wages, food labelling, and health and safety, as well as non-tariff measures in other areas, for example trade facilitation provisions; (d) Procurement rules related to women; and (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.
'Gaps or biases in the application or enforcement of laws that benefit women'	Labour laws, land titling, banking regulation ^d
'Religious, traditional, or customary laws and practices' (including 'living law')	Land tenure rules, inheritance rules

Source: Adapted from McGill, 'Trade and Gender', 37–38, with author's additions, also referencing Christine Chinkin and Florance Butegwa, *Gender Mainstreaming in Legal and Constitutional Affairs: A Reference Manual for Governments and Other Stakeholders* (Commonwealth Secretariat 2001) and Mehra and Gammage, 'Trends, Countertrends and Gaps', R 26.

^a McGill, 'Trade and Gender', 37.

^b Constitution of Kenya, 2010 (Laws of Kenya), Arts. 27(8), 59(2), 60(1)(f), 81(b), 91(f), 172(2)(b), 175(c), 197(1), and 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).

^c According to McGill, 'Trade and Gender', fn 93, such 'special measures aimed at accelerating de facto equality between men and women' are expressly authorized under CEDAW.' See CEDAW, Art. 4.1.

^d Based on McGill, 'Trade and Gender', 38. McGill notes that '[f]acially 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'.

Based on a sampling of TPR submissions, the majority (70 per cent) of members' policies contain gender-responsive provisions.⁵⁵ These include (1) financial and non-financial incentives to the private sector and women-owned/led MSMEs and SMEs (30 per cent 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 per cent); and (3) 'government procurement policies that support women's empowerment' (9 per cent).⁵⁶

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'.⁵⁷ This aligns with an important aspect of gender mainstreaming, which calls for incorporating the 'experience, knowledge, and interests of women . . . on the development agenda',⁵⁸ as well as increasing focus on sectors that provide opportunities for women and ways in which to assist women-owned businesses to benefit from international trade and investment.⁵⁹

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. The options below track closely with the 'inclusive law and regulation' approach summarized in Table 10.2 and also integrate aspects of the gender-responsive approach in Figure 10.1. Although they relate mainly to the AfCFTA, they are

⁵⁵ Anoush der Boghossian, 'Trade Policies Supporting Women's Economic Empowerment: Trends in WTO Members' (2019) WTO Staff Working Paper ERSD-2019-07 <www.wto.org/english/res_e/reser_e/ersd201907_e.htm> accessed 8 May 2022.

⁵⁶ Acharya et al., 'Trade and Women' (n 45) 327–328. Categorization based on the TPR submissions of 111 (out of 164) WTO members.

⁵⁷ McGill, 'Trade and Gender' (n 52) 36.

⁵⁸ According to the UNECOSOC, 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). See ILO, 'Definition of Gender Mainstreaming' <www.ilo.org/public/english/bureau/gender/newsite2002/about/defin.htm> accessed 8 May 2022.

⁵⁹ Commission on the Status of Women, 'Report on the Forty-Sixth Session' 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 (2002).

applicable to other RTAs as well and also draw upon WTO disciplines as noted.⁶⁰

10.3.1 *Women's Work and Trade Measures Affecting Women*

One of the most fundamental aspects of trade and gender centres around the nature of women's work and engagement in the market. Women's employment encompasses the goods and services sectors,⁶¹ and women have faced considerable disruptions in respect of both goods and services work due to the COVID-19 pandemic.⁶² 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.⁶³ Tourism services, which are dominated by women, were also hit particularly hard during the pandemic.⁶⁴

Overall, women are increasingly involved in services, ranging from retail and financial services to tourism and hospitality, to health care,⁶⁵ including cross-border delivery of medical care that has been so critical during the COVID-19 pandemic. Women continue to play a strong role in manufacturing sectors as well, particularly export-driven manufacturing such as garments.⁶⁶

Women are disproportionately involved in the informal sector, and the United Nations (UN) estimates that 89 per cent of women in Africa work

⁶⁰ For a comprehensive discussion of the relationship between gender and WTO rules, see McGill, 'Trade and Gender' (n 52) and Acharya et al., 'Trade and Women' (n 45).

⁶¹ See, for instance, Katrin Kuhlmann, 'U.S. Preference Programs: How Well Do They Work?' (*US Senate Finance Committee* 16 May 2007) <www.finance.senate.gov/hearings/us-preference-programs-how-well-do-they-workd> accessed 8 May 2022.

⁶² 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 UNCTAD, '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> accessed 8 May 2022. Lessons can also be drawn from the gender-differentiated impact resulting from the financial crisis. See, for instance, Maria Floro and Gary Dymski, 'Financial Crisis, Gender, and Power: An Analytical Framework' (2000) 28 *World Development* 1269–1283; Joseph Y. Lim, 'The Effects of the East Asian Crisis on the Employment of Women and Men: the Philippine Case' (2000) 28 *World Development* 1285–1306; Ajit Singh and Ann Zammit, 'International Capital Flows: Identifying the Gender Dimension' (2000) 28 *World Development* 1249–1268.

⁶³ UNCTAD, 'Impact of the COVID-19 Pandemic on Trade and Development' (n 62) 31–32.

⁶⁴ *Ibid.* 33.

⁶⁵ Acharya et al., 'Trade and Women' (n 45) 344.

⁶⁶ Export-driven manufacturing is often labour-intensive and subject to poor working conditions, frequent turnover, and unpredictability due to changes in capital and skills requirements (particularly in export processing zones). McGill, 'Trade and Gender' (n 52) 12.

informally (as a percentage of full employment).⁶⁷ While informal work can sometimes be more flexible, it can also offer little security and room for advancement.⁶⁸ Within the informal sector, migrant women face some of the most significant challenges, as the pandemic has underscored.⁶⁹ The immense challenge of addressing trafficking of women and girls remains as well,⁷⁰ which is linked with trade and transport corridors and global value chains.

Women traders struggle with a number of regulatory roadblocks, or ‘regulatory gateways’,⁷¹ 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.⁷² In terms of border measures, although the WTO Trade Facilitation Agreement⁷³ (and African governments) have pressed for simplification of measures and encouraged digitalization of border procedures in order to reduce waiting times, women traders still face procedural challenges and safety issues at the border.⁷⁴ Women traders also often lack information on cross-border regulations and procedures,⁷⁵ putting them at a disadvantage vis-à-vis larger businesses and

⁶⁷ UN Women, ‘Women in Informal Economy’ (2021) <www.unwomen.org/en/news/in-focus/csw61/women-in-informal-economy> accessed 8 May 2022.

⁶⁸ Informal work includes part-time work, home-based work, and other informal sector activity. McGill, ‘Trade and Gender’ (n 52) 13.

⁶⁹ UNCTAD, ‘Impact of the COVID-19 Pandemic on Trade and Development’ (n 62) 36. See also Joan Fitzpatrick and Katrina R. Kelly, ‘Gendered Aspects of Migration: Law and the Female Migrant’ (1998) 22(1) *Hastings International and Comparative Law Review* 47–112.

⁷⁰ McGill, ‘Trade and Gender’ (n 52) 34.

⁷¹ ‘Legal and Regulatory Gateways’ are the decision points and hurdles contained within a legal or regulatory process (licence, 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, ‘Mapping Inclusive Law and Regulation’ (n 26) 70.

⁷² These measures are all linked to WTO disciplines as well. See Acharya et al., ‘Trade and Women’ (n 45).

⁷³ WTO, ‘Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization’, WT/L/940 (22 February 2017).

⁷⁴ See Philomena Apiko, Sean Woolfrey, and Bruce Byiers, ‘The Promise of the Africa Continental Free Trade Area (AfCFTA)’ (ECDPM 2020) <<https://ecdpm.org/publications/promise-african-continental-free-trade-area-afcfta/>> accessed 8 May 2022.

⁷⁵ See Taku Fundira, ‘Informal Cross-Border Trading – Review of the Simplified Trade Regimes in East and Southern Africa’ (TRALAC 2018) <www.tralac.org/publications/article/12825-informal-cross-border-trading-review-of-the-simplified-trade-regimes-in-east-and-southern-africa.html> accessed 8 May 2022.

subjecting them to delays at border crossings.⁷⁶ In addition, women 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).⁷⁷

A number of RTA options could be considered to address women's work and trade, as elaborated upon below.

- For example, current RTAs tend to address women's work more indirectly through provisions on labour, often including reference to the ILO Convention on Employment Discrimination.⁷⁸ While integrating 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 UN SDG targets and indicators and business and human rights principles, enhancing the equity dimension of RTAs. Services commitments could be shaped in a gender context through horizontal commitments (spanning all services sectors) on non-discrimination,⁷⁹ strengthening the equity dimension of the AfCFTA. This would put the AfCFTA in a position to lead globally as well (aligning, for example, with the 2021 WTO Joint Initiative on Domestic Services Regulation that includes a provision to ensure that services measures 'do not discriminate between men and women').⁸⁰
- 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.⁸¹ In particular, the language in the AfCFTA Protocol on Trade in Services that mentions 'formal and

⁷⁶ EASSI, 'Annual Report' (2020) 12, 14 <<https://eassi.org/annual-reports/>> accessed 8 May 2022.

⁷⁷ Ibid.

⁷⁸ ILO C111, 'Discrimination (Employment and Occupation) Convention' (1958) (in force, 7 May 2001). See also Bahri, 'Measuring the Gender-Responsiveness of Free Trade Agreements' (n 6).

⁷⁹ Laura Lane and Penny Nass, 'Women in Trade Can Reinvigorate the WTO and Global Economy' (CIGI 27 April 2020) 6 <www.cigionline.org/articles/women-trade-can-reinvigorate-wto-and-global-economy/> accessed 8 May 2022, 2. A number of the multilateral recommendations made by Lane and Nass are relevant in an RTA context, as noted and referenced herein.

⁸⁰ WTO Joint Initiative on Services Domestic Regulation, 'Declaration on the Conclusion of Negotiations on Services Domestic Regulation' WT/L/1129, Section III 19 (d) (WTO 2021) <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:AWT/L/1129.pdf&Open=True>> accessed 4 May 2023; See also Lane and Nass, 'Women in Trade Can Reinvigorate the WTO and Global Economy' (n 79) 345.

⁸¹ Kuhlmann and Agutu, 'The African Continental Free Trade Area' (n 17).

informal service suppliers, with particular attention to . . . women',⁸² is unique among RTAs and could inspire more binding commitments under the new protocol.

- The AfCFTA could place special emphasis on women's migration and trafficking in women and girls, innovating in these areas beyond current approaches. For example, the AfCFTA could include commitments in these important areas and 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,⁸³ which aligns with AU Agenda 2063, and UN 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.⁸⁴
- 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 travellers, including service providers.⁸⁵
- 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.⁸⁶

⁸² AfCFTA Protocol on Trade in Services (n 37) (emphasis added).

⁸³ AU, '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> accessed 8 May 2022. See also AU, 'African Union Is Committed to Ending Child Labour and Other Forms of Human Exploitation' (29 May 2021) <<https://au.int/en/articles/african-union-committed-ending-child-labour-and-other-forms-human-exploitation>> accessed 8 May 2022.

⁸⁴ UN, 'Global Compact for Safe, Orderly and Regular Migration' (13 July 2018) <<https://refugeesmigrants.un.org/migration-compact>> accessed 8 May 2022.

⁸⁵ Katrin Kuhlmann, 'Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic' (UNESCAP 2021) 36–40 <www.unescap.org/kp/2021/handbook-provisions-and-options-trade-times-crisis-and-pandemic> accessed 8 May 2022.

⁸⁶ See Lane and Nass, 'Women in Trade Can Reinvigorate the WTO and Global Economy' (n 79); in the context of the General Agreement on Trade and Services, see WTO, 'Communication from Argentina, Canada, Colombia, Iceland, and Uruguay: Domestic Regulation – Development of Measures, Gender Equality', JOB/SERV/258 (2017).

- The AfCFTA and other RTAs could incorporate provisions on gender-responsive standards, building upon the UNECE Declaration for Gender Responsive Standards and Standards Development.⁸⁷
- Provisions on addressing NTMs could be strengthened and made more gender responsive, building upon existing innovations to reduce regulatory gateways including the AfCFTA Simplified Trade Regime and Non-Tariff Barrier Reporting, Monitoring, and Eliminating Mechanism, with parallels to the NTM mechanisms in African RECs such as the EAC, ECOWAS, and the Tripartite Free Trade Area, as well as the Simplified Trade Regimes (STRs) in COMESA and the EAC, and the EAC 'Simplified Guide for Micro and Small-Scale Cross-Border Traders and Service Providers within the EAC'.⁸⁸ Going forward, these mechanisms could increasingly be approached from a gender perspective,⁸⁹ 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, expanding upon those included in Article X of the General Agreement on Tariffs and Trade (GATT),⁹⁰ as well as a number of RTAs.⁹¹ Some areas of focus could include using designated contact points or enquiry points and formal and informal dialogue structures,⁹² approached in a gender context.
- The AfCFTA could also build upon trade facilitation provisions and the STRs to address women's needs,⁹³ focusing on 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

⁸⁷ UNECE, 'Gender Responsive Standards Initiative' <<https://unece.org/gender-responsive-standards-initiative>> accessed 8 May 2022. See also Lane and Nass, 'Women in Trade Can Reinvigorate the WTO and Global Economy' (n 79). For more details on gender-responsive standards, see Gabrielle White and Michelle Parkouda, 'The Importance of Gender-Responsive Standards for Trade Policy' (Chapter 8 in this book).

⁸⁸ See Gammage and Momodu, 'The Economic Empowerment of Women in Africa' (n 8) 36.

⁸⁹ 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, 'Mapping Inclusive Law and Regulation' (n 26).

⁹⁰ Acharya et al., 'Trade and Women' (n 45) 329.

⁹¹ Kuhlmann, 'Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic' (n 85) 135.

⁹² Ibid 145, 147–148.

⁹³ See also Apiko et al., 'The Promise of the Africa Continental Free Trade Area' (n 74).

during the COVID-19 pandemic,⁹⁴ 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.

- The AfCFTA could include gender-specific references in the context of procurement in order to increase women's participation in the market, consistent with the WTO Agreement on Government Procurement and AU proposal for a 40 per cent government procurement share for women,⁹⁵ as well as trends in African domestic law.⁹⁶ For example, Section 53 of Kenya's recent Public Procurement and Asset Disposal Act (2015) requires that 30 per cent of government procurement be reserved for women.⁹⁷ 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 and the WTO Declaration.⁹⁸ The degree to which AfCFTA provisions are binding and subject to dispute settlement will also be an overarching area for further consideration.

10.3.2 Access to Finance

Across the African continent, women face challenges in accessing affordable finance and credit,⁹⁹ 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

⁹⁴ Kuhlmann, 'Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic' (n 85) 57.

⁹⁵ See APO Group, 'Piecing the Puzzle of African Integration: The Successes and Exponential Potential' (2020) <www.africanews.com/2021/07/16/piecing-the-puzzle-of-african-integration-the-successes-and-exponential-potential/> accessed 8 May 2022.

⁹⁶ Lane and Nass, 'Women in Trade Can Reinvigorate the WTO and Global Economy' (n 79) 2.

⁹⁷ ICRW, 'Gender Mainstreaming in Kenya' (2020) <www.icrw.org/wp-content/uploads/2020/09/Women-in-Manufacturing-Policy-Brief_9.20_ICRW.pdf> accessed 8 May 2022.

⁹⁸ Nadira Bayat, 'A "Business Unusual" Approach for Gender Equality under the AfCFTA' (2020) 9(1) ECDPM Great Insights Magazine.

⁹⁹ See UNECA, 'Advancing Gender-Equitable Outcomes' (n 49); 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 8 May 2022.

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 opportunities. Collateral requirements tend to favour land-based collateral, and in doing so disadvantage women due to restrictions on women's landownership.¹⁰⁰ When combined with strict financial sector loan conditions, high interest rates,¹⁰¹ 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.

A number of RTA options could be considered to address access to finance for women.

- For example, RTA parties could agree to horizontal commitments to reduce gender-based discrimination and improve women's access to services (equity-enhancing provisions), as noted in Table 10.2 and Section 10.3.1.
- RTAs, including the AfCFTA, could enhance equity by introducing binding rules related to gender, as noted in Table 10.2, which are consistent with REC provisions in a number of contexts.¹⁰² 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,¹⁰³ 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 help ensure that RTAs are designed to support equity and inclusion. While these rules would address significant aspects of access to finance, they would be important all across women's work and livelihood.

¹⁰⁰ Louis N. Ndumbe, 'Unshackling Women Traders: Cross-Border Trade of Eru from Cameroon to Nigeria' (2013) Africa Trade Policy Note 38 <<https://documents1.worldbank.org/curated/en/262591468292477021/pdf/797110BRI0PN380Box0377384BooPUBLICo.pdf>> accessed 8 May 2022.

¹⁰¹ Emma Marie Bugingo, 'Empowering Women by Supporting Small-Scale Cross-Border Trade' (2018) 7(4) *Tralac: Bridges Africa – Supporting Small-Scale Cross-Border Traders across Africa* 11–13.

¹⁰² See Lane and Nass, 'Women in Trade Can Reinvigorate the WTO and Global Economy' (n 79); Kuhlmann et al., 'Reconceptualizing Free Trade Agreements' (n 12); and ITC, 'Mainstreaming Gender in Free Trade Agreements' (n 31).

¹⁰³ See Edward Katende and Katrin Kuhlmann, 'Building a Regulatory Environment for Agricultural Finance' (*Uganda Banker's Association* June 2019) <https://cb4fec8a-9641-471c-9042-2712ac32ce3e.filesusr.com/ugd/095963_a0e1d52d6040405c86334e2bfd8084dc.pdf> accessed 8 May 2022.

- RTA parties could agree to financial services commitments to encourage gender-responsive financial services products. These could include services sector commitments, both horizontal and sector specific. They could also emphasize important aspects such as mobile money, which has significant implications for women traders.¹⁰⁴
- Some African states, including Burundi, Egypt, Nigeria, and Zambia, have put in place policies that promote financial inclusion and gender-inclusive finance,¹⁰⁵ highlighting national-level support in this area and areas in which the AfCFTA could build out pan-African commitments. Training and building awareness on access to finance could be linked with the AfCFTA, including through ongoing initiatives, such as the African Development Bank's Affirmative Finance Action for Women in Africa (AFAWA) programme and 50 Million African Women Speak Platform (50MAWS). Over time, the AfCFTA could become a platform for financial education and regulatory alignment.¹⁰⁶

10.3.3 Digital Inclusion

Addressing digital inclusion and inequality in digital trade will be significant across all aspects of women's economic engagement.¹⁰⁷ Although women stand to gain significantly from digital trade, they are also particularly affected by the digital divide.¹⁰⁸ Information and Communication Technology (ICT) and financial services, including online payments services, could be better leveraged by women entrepreneurs and traders.¹⁰⁹ However, this also depends upon physical infrastructure and access to the internet.

¹⁰⁴ Simonetta Zarelli and Mariana Lopez, 'Leveraging Digital Solutions to Seize the Potential of Informal Cross-Border Trade' (UNCTAD 29 April 2020) <unctad.org/es/node/2394> accessed 8 May 2022.

¹⁰⁵ Alliance for Financial Inclusion, 'Policy and Regulatory Reforms in the AFI Network 2019' (2019) 15–26 <www.afi-global.org/sites/default/files/publications/2020-07/AFI_P%26amp%3BRR_G_2019_AW.pdf> accessed 8 May 2022.

¹⁰⁶ See Sone Osakwe, 'Extending MSMEs' Access to Trade Finance under the AfCFTA' (2021) Centre for the Study of Economies of Africa 5 <https://papers.ssm.com/sol3/papers.cfm?abstract_id=3780767> accessed 8 May 2022.

¹⁰⁷ AU and UNDP, 'The Futures Report, Making the AfCFTA Work for Women and Youth' (2020) 22 <<https://www.oecd.org/digital/au.int/en/documents/20201202/making-afcta-work-women-and-youth>> accessed 8 May 2022.

¹⁰⁸ See OECD, 'Bridging the Gender Digital Divide' (2018) <[bridging-the-digital-gender-divide.pdf](https://www.oecd.org/bridging-the-digital-gender-divide.pdf)> accessed 8 May 2022.

¹⁰⁹ UNCTAD, 'Harnessing E-commerce for Sustainable Development' (WTO 2017) <www.wto.org/english/res_e/booksp_e/aid4trade17_chap7_e.pdf> accessed 8 May 2022.

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 UN SDGs,¹¹⁰ namely UN SDG 5 and Target 5.b: ‘Enhance the use of enabling technology, in particular ICT, to promote empowerment of women.’¹¹¹ Digital trade has already been highlighted as a priority issue for the next phase of the AfCFTA, with a digital trade protocol under negotiation,¹¹² which, in tandem with the gender and youth protocol, provides an opportunity to address digital inclusion and consider ways in which to tailor provisions to address women’s needs.

RTAs could address digital inclusion in a number of ways.

- Although few RTAs deal with digital inclusion, the Digital Economy Partnership Agreement (DEPA) among Chile, New Zealand, and Singapore (China and South Korea have also initiated the process of joining)¹¹³ includes specific language that emphasizes digital inclusion for indigenous communities, women, rural populations, and low socio-economic groups.¹¹⁴ 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.’¹¹⁵ 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.¹¹⁶ 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. The draft negotiated text for the Partnership Agreement between the European Union and the members

¹¹⁰ Kuhlmann, ‘Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic’ (n 85) 102.

¹¹¹ UN Women, ‘SDG 5: Achieve gender equality and empower all women and girls’ <www.unwomen.org/en/news/in-focus/women-and-the-sdgs/sdg-5-gender-equality> accessed 8 May 2022.

¹¹² AU, ‘Decision of the African Continental Free Trade Area (2020), Assembly/AU/4/(XXXIII).

¹¹³ Government of Singapore, ‘Digital Economy Partnership Agreement’ (2020) <www.mti.gov.sg/Trade/Digital-Economy-Agreements/The-Digital-Economy-Partnership-Agreement> accessed 8 May 2022.

¹¹⁴ *Ibid* Art. 11.1. See also Kuhlmann, ‘Flexibility and Innovation in International Economic Law’ (n 27).

¹¹⁵ Government of Singapore, ‘Digital Economy Partnership Agreement’ (n 113).

¹¹⁶ *Ibid*.

- of the Organisation of African, Caribbean and Pacific States (OACPS) also contains important provisions on reducing the digital divide and supporting digital entrepreneurship, particularly by women and youth.¹¹⁷
- African national policies and rules on financial digital inclusion, such as those in Mozambique, Madagascar, Tanzania, and Zambia,¹¹⁸ 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’.¹¹⁹ Within African regional law, the ECOWAS data protection rules reference human rights and ‘fundamental liberties’ of the data holders,¹²⁰ which is also notable and could be even further tailored to gender. Some countries’ laws contain innovations in this area, including India’s Personal Data Protection Bill (2019), which, if passed into law, would treat data on health, caste or tribe, sexual orientation, and transgender status with heightened privacy protection.¹²¹

10.3.4 *Agriculture and Food Security*

African women play many roles in the agricultural sector – as primary producers of food and 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,¹²² and, of course,

¹¹⁷ Draft Negotiated Text of the Partnership Agreement between the European Union/Member States of the European Union and Organisation of African, Caribbean and Pacific States, Article 48(1) and (3); negotiated agreement text initialled by EU and OACPS negotiators 11 April 2021.

¹¹⁸ See Better than Cash Alliance, Women’s World Banking and World Bank, ‘Advancing Women’s Digital Financial Inclusion’ (2020) <www.mfw4a.org/sites/default/files/resources/saudig20_women_compressed.pdf> accessed 8 May 2022.

¹¹⁹ UNHRC, ‘Right to Privacy in the Digital Age’, A/HRC/RES/34/7 (7 April 2017); UNGA, ‘Right to Privacy in the Digital Age’, A/RES/71/199 (25 January 2017).

¹²⁰ ECOWAS, ‘Supplementary Act A/SA.1/01/10 on Personal Data Protection within ECOWAS’ (16 February 2015) <www.tit.comm.ecowas.int/wp-content/uploads/2015/11/SIGNED-Data-Protection-Act.pdf> accessed 8 May 2022.

¹²¹ Government of India, Personal Data Protection Bill, 2019.

¹²² See McGill, ‘Trade and Gender’ (n 52); and Katrin Kuhlmann, ‘The Human Face of Trade and Food Security: Lessons on the Enabling Environment from Kenya and India’ (CSIS 2017) <www.csis.org/analysis/human-face-trade-and-food-security> accessed 8 May 2022.

the SDGs.¹²³ 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.¹²⁴ Non-traditional agricultural exports, such as cut flowers and fruit and vegetables, present 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.¹²⁵ However, trade's differential impact on women needs to be carefully considered, particularly in the agricultural sector where export-oriented agriculture can displace women-dominated subsistence farming.¹²⁶

Despite their prominent role in the agricultural sector, women continue to struggle with limited landownership and access rights and challenges with access to credit.¹²⁷ 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.¹²⁸

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.¹²⁹ The WTO SPS Agreement, with which most RTAs largely align,

¹²³ Nadira Bayat and David Luke, 'Gender Mainstreaming in AfCFTA National Strategies: Why It Matters for the SDGs' (IISD 20 February 2020) <<http://sdg.iisd.org/commentary/guest-articles/gender-mainstreaming-in-afcfta-national-strategies-why-it-matters-for-the-sdgs/>> accessed 8 May 2022.

¹²⁴ McGill, 'Trade and Gender' (n 52) 55–56; *see also* Lynn R. Brown, Hilary Feldstein, Lawrence Haddad, Christine Pena, and Agnes Quisumbing, 'Generating Food Security in the Year 2020: Women as Producers, Gatekeepers, and Shock Absorbers' (1995) International Food Policy Research Institute 2020 Vision Brief 17 <www.semanticscholar.org/paper/GENERATING-FOOD-SECURITY-IN-THE-YEAR-2020%3A-WOMEN-AS-Brown-Feldstein/01f19be2a78245ec09e5ccde6c7c36d96187a929> accessed 8 May 2022.

¹²⁵ *See* Kuhlmann, 'The Human Face of Trade and Food Security' (n 122).

¹²⁶ *See* Bayat, 'A Whole Agreement Approach to Gender Mainstreaming in the AfCFTA' (n 51) 4.

¹²⁷ *See*, for instance, Acharya et al., 'Trade and Women' (n 45); Kuhlmann, 'The Human Face of Trade and Food Security' (n 122); McGill, 'Trade and Gender' (n 52); Mehra and Gammage, 'Trends, Countertrends, and Gaps in Women's Employment' (n 52) 539.

¹²⁸ *See* FAO, 'The State of Food and Agriculture' (2015) <www.fao.org/publications/sofa/2015/en/> accessed 8 May 2022; *see also* UNCTAD, 'Borderline: Women in Informal Cross-Border Trade in Malawi, The United Republic of Tanzania and Zambia' (2019) 42 <https://unctad.org/system/files/official-document/ditc2018d3_en.pdf> accessed 8 May 2022; STDF, 'STDF Briefing Note, Inclusive Trade Solutions: Women in SPS Capacity Building' (2015) <www.standardsfacility.org/sites/default/files/STDF_Briefing_note_13.pdf> accessed 8 May 2022.

¹²⁹ *See* Acharya et al., 'Trade and Women' (n 45) 338; Spencer Henson, 'Gender and Sanitary and Phytosanitary Measures in the Context of Trade: A Review of Issues and Policy Recommendations' (ICSTD 2018) <https://standardsfacility.org/sites/default/files/Gender_

including African RECs and the AfCFTA, contains important disciplines and an emphasis on capacity building and S&DT.¹³⁰

There are a number of RTA options for integrating agriculture and food security.

- For example, 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.¹³¹ A gender lens could also be applied to agricultural input subsidies for resource-poor farmers in line with Article 6.2 of the AoA.¹³²
- The AfCFTA, building upon the precedent created through the RECs, is 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.
- 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.¹³³ Food security could be addressed more comprehensively through detailed provisions on export restrictions, safeguards, tailored domestic support, climate adaptation, and links with agricultural inputs and other areas of regulation,¹³⁴ all

[SPS_measures_in_the_context_of_trade_Henson ICTSD_Nov_18.pdf](#)> accessed 8 May 2022.

¹³⁰ See, in particular, Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299, 33 ILM 1197 Arts. 9–10. The WTO Standards and Trade Development Facility (STDF) has played a central role in mainstreaming gender into SPS capacity-building activities Acharya et al., ‘Trade and Women’ (n 45) 339.

¹³¹ 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., ‘Trade and Women’ (n 45) 337. See also McGill, ‘Trade and Gender’ (n 52).

¹³² Acharya et al., ‘Trade and Women’ (n 45) 338.

¹³³ Annex 2 of the Agreement on Agriculture covers government stockpiling programmes 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’; while they tend to be incorporated into RTAs, there are limitations to these disciplines. Agreement on Agriculture, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 410.

¹³⁴ Katrin Kuhlmann, ‘Why the United States and Africa Should Lead a Collaborative, Rules-Based Approach to Food Security’ (CSIS 2020) <www.csis.org/analysis/why-united-states-and-africa-should-lead-collaborative-rules-based-approach-food-security> accessed 8 May 2022.

of which could be aligned with WTO disciplines and other areas of international law and approached through a gender and equity lens.

- RTA measures to improve transparency and enhance capacity building could be strengthened, enhancing engagement and inclusion, 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 programmes noted, in addition to 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.¹³⁵ These programmes could all be tailored to women's needs.

10.3.5 Overarching RTA Options

Finally, several RTA design options could address challenges across the four areas that are the focus of sections 10.3.1, 10.3.2, 10.3.3, and 10.3.4. These include cooperation and consultation provisions, which are already present in current RTAs (these 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.¹³⁶ Capacity-building provisions, while common in RTAs, could be enhanced to include the creation of gender committees and application of good practices and standards, as well as the collection and use of sex-disaggregated data.¹³⁷ However, while consultation, cooperation, and capacity-building provisions are important,¹³⁸ these mechanisms alone are insufficient to directly address women's needs. These RTA options should

¹³⁵ Acharya et al., 'Trade and Women' (n 45) 339; see 'E-Ping' <www.epingalert.org/en> accessed 8 May 2022.

¹³⁶ Bahri, 'Measuring the Gender-Responsiveness of Free Trade Agreements' (n 6) 11.

¹³⁷ See World Bank and WTO, 'Women and Trade: The Role of Trade in Promoting Gender Equality' (WTO 2020) <www.wto.org/english/res_e/booksp_e/women_trade_pub2807_e.pdf> accessed 8 May 2022; and Kuhlmann, 'Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic' (n 85).

¹³⁸ Mia Mikic and Vanika Sharma, 'Feminising WTO 2.0' in Simon J. Evenett and Richard Baldwin (eds), *Revitalizing Multilateral Trade Cooperation: Pragmatic Ideas for the New WTO Director-General* (VoxEU 2020) 171–185.

be considered in combination with binding commitments (and softer commitments where appropriate) discussed in particular in Section 10.3.2 that would establish more performative obligations likely to lead to concrete action and provide a clearer channel for women to exercise rights.

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 modelled on GATT Article XX, which many RTAs, including the AfCFTA, contain.¹³⁹ 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,¹⁴⁰ a proposal that would support many of the options discussed in this chapter.

10.4 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 will be critical. The AfCFTA already has a solid foundation on 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

¹³⁹ 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* (Hart Publishing 1st ed. 2007) 207–209; Liane M. Jarvis, 'Women's Rights and the Public Morals Exception of GATT Article 20' (2000) 22 *Michigan Journal of International Law* 219–238, 237.

¹⁴⁰ Bayat, 'A "Business Unusual" Approach' (n 98).

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, which could be incorporated into new RTA chapters and protocols or combined into an inclusive whole-of-agreement approach, provide an entry point for gender-responsive trade provisions and an opportunity for resetting the rules on gender and trade.