

# *The Economic Empowerment of Women in Africa: Regional Approaches to Gender-Sensitive Trade Policies*

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*Empowering women through trade has been an objective of African regional economic communities since their creation. Yet, women across Africa are disproportionately more likely than men to feel the negative effects of trade liberalisation. This article offers a critical intervention into the debate on women and trade and examines the gendered and gendering nature of trade law and policy in historical and contemporary contexts. Women are situated as the central subject of inquiry and a comprehensive mapping of gender clauses in the constitutional legal texts of the RECs is presented to illustrate synergies and divergences in African gender-sensitive trade policies. A significant challenge facing Africa's future development strategies relates to the data gaps of women in their diverse roles, and especially as informal cross-border traders, and how these gaps contribute to the ongoing invisibility of women in trade policy. However, there are examples of progressive gender-sensitive trade strategies in Africa, including the East African Community's Simplified Trade Regime and the Tripartite Free Trade Agreement's Non-Tariff Barrier Reporting, Monitoring and Eliminating Mechanism, that demonstrate how pragmatic responses to gender inequality can be formulated at the regional level. It is argued that an intersectional and multidimensional understanding of how women's experiences may converge and diverge in the context of trade policy is key to our understanding of how gender-sensitive trade can and should be framed. To conclude, this article submits that inclusive trade policies, which should incorporate both legally binding commitments and 'soft law' instruments, at the pan-African level must build on the progressive steps taken by some of the RECS and follow other innovations that are emergent at the multilateral level.*

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## *Introduction*

This article offers a critical intervention into the debate on trade and gender and examines the extent to which African regional economic communities (RECs) promote the economic empowerment of women in the formal and informal economies through gender-sensitive trade policies. Across Africa, the trade-gender linkage has long been recognised as a significant driver of sustainable and inclusive societies. While different approaches to gender and trade are taken through the RECS, some regional development strategies reinforce women's rights set out under international agreements, including the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and explicitly provide for non-discrimination and gender equality. Indeed, some RECs, like the East African Community (EAC), have gone further than any other regional configuration in placing women and gender at the heart of their trade and development policies.

For example, the EAC's Simplified Trade Regime,<sup>1</sup> has eased the cross-border flow of trade which is especially beneficial for women informal traders. The merits of a simplified trade regime for Southern Africa is also under consideration.<sup>2</sup> Another example of innovation is the Non-Tariff Barrier Monitoring and Reporting Mechanism, which has been implemented by three RECs and now forms part of the African Continental Free Trade Agreement (AfCFTA). This mechanism operates to improve transparency by enabling importers, exporters and traders to report and monitor non-tariff barriers to trade through an online platform. This, again, has positive effects for the economic empowerment of women informal cross-border traders. We examine these innovative examples later in this article.

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1 See Taku Fundira, *A Look at the Simplified Trade Regimes in East and Southern Africa*, 7 BRIDGES AFRICA (June 5, 2018), <https://ictsd.iisd.org/bridges-news/bridges-africa/news/a-look-at-the-simplified-trade-regimes-in-east-and-southern-africa>. All links in this article are correct as of August 6, 2020.

2 Joseph Ngwawi, *SADC Moves Toward a Simplified Trade Regime*, TRALAC (May 9, 2017), <https://www.tralac.org/news/article/11594-sadc-moves-towards-a-simplified-trade-regime.html>; MIGRATION, CROSS-BORDER TRADE AND DEVELOPMENT IN AFRICA: EXPLORING THE ROLE OF NON-STATE ACTORS IN THE SADC REGION (Christopher C. Nshimbi & Innocent Moyo eds, 2017).

In the recent past, trade and gender – and the associated issue linkage of women’s participation in the (formal and informal) labour markets – have become a focal point for *sustainable* economic transformations following the launch of the African Union’s 2063 Agenda<sup>3</sup> in 2013 and the United Nations 2030 Agenda for Sustainable Development in 2015.<sup>4</sup> Gender equality is central to Africa’s future development strategies and Aspiration 6 of Agenda 2063 calls for ‘An Africa, whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children.’ At the international level, the 2030 Agenda situates women at the heart of the Sustainable Development Goals (SDGs) and envisages the economic empowerment of women as pivotal for the attainment of just and inclusive societies.<sup>5</sup> The SDGs are integrative and interdependent and while there is no hierarchy between them, they interconnect in diverse ways.<sup>6</sup> Gender is, therefore, an issue that cuts across the SDGs and the Agenda 2063.

Promoting the economic empowerment of women in trade is also a priority for the World Trade Organisation (WTO)<sup>7</sup> and gender-sensitive trade policies are increasingly being embedded into regional trade agreements (RTAs).<sup>8</sup> However, this article will show that the inclusion of gender clauses in RTAs is not a new phenomenon. On the contrary, gender-sensitive trade policy has, rhetorically at least, been a distinct feature of African regionalisms, such as the creation of RECs under the Lagos Plan of Action

3 AGENDA 2063: THE AFRICA WE WANT (African Union, 2015).

4 G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Oct. 21, 2015) [hereinafter 2030 Agenda].

5 *Id.* Goal 5 aims to “achieve gender equality and empower all women and girls” while Goal 8 sets targets for the international community to “achieve full and productive employment and decent work for all women and men” (Goal 8.5) and to “protect the labour rights. . . for all workers, including migrant workers, in particular women migrants” (Goal 8.8). Goal 1.4 reiterates the need to ensure “equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance.”

6 LEGAL PERSPECTIVES ON SUSTAINABILITY (Margherita Pieraccini & Tonia Novitz eds., 2020).

7 Under the 2030 Agenda, the World Trade Organisation has been tasked with promoting “a universal, rules-based, open, non-discriminatory and equitable multilateral trading system” under Goal 17.10. The SDGs are integrative and non-hierarchical, and this goal is intended to dovetail with the other SDGs, including those directly addressing women. 124 Members have also adopted the Joint Declaration on Trade and Women’s Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017 [hereinafter *The Buenos Aires Declaration*]. The WTO has appointed a Trade and Gender Focal Point and implemented a Trade and Gender Action Plan (2018–19).

8 For a comprehensive account of the heterogeneous nature of clauses, see José-Antonio Monteiro, *Gender Related Provisions in Regional Trade Agreements* (WTO Economic Research and Statistics Division, Staff Working Paper ERSD-2018-15, 2018), available at [https://www.wto.org/english/res\\_e/reser\\_e/ersd201815\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd201815_e.pdf).

(1980)<sup>9</sup> and the Abuja Treaty (1991).<sup>10</sup> Nevertheless, gender *inequalities* in the social, economic and cultural realms remain pronounced.

This article provides a comprehensive mapping of gender clauses contained in the constitutional legal texts of the RECs and identifies synergies and divergences in their approaches. We explore whether and how the conflicting approaches to gender-sensitive trade expressed in the RECs can be reconciled through the AfCFTA in its phase II negotiations.

To adopt a gender-sensitive approach to trade policy requires an examination of the complex ways in which trade liberalisation and trade policies affect women's and men's agency and participation in their economic, cultural, social and geographic contexts. With the majority of women in African countries working in the informal or *grey* economy it is important to assess how trade can be utilised to promote equality, non-discrimination and improve standards of living for women. We examine the scope of protection of women's rights afforded under the RECs, identify how these may reinforce or overcome the *feminisation of trade* and its associated issue linkages, and explore whether the AfCFTA presents an opportunity to reconceive gender-sensitive trade policy on a pan-African scale.

As a preliminary note, the expression 'African women' is used with full acknowledgment that African women and their experiences are not homogenous and their historical and present experiences differ from one community to another. An intersectional<sup>11</sup> and multidimensional<sup>12</sup> understanding of how those experiences may

9 Organization of African Unity, Lagos Plan of Action for the Economic Development of Africa 1980–2000, art. 296 (1980) [hereinafter LPA].

10 Organization of African Unity, Treaty Establishing the African Economic Community, art. 75(2) (June 3, 1991) [hereinafter Abuja Treaty]. For an overview of these initiatives, see Ernest Tooichi Aniche, *From Pan-Africanism to African Regionalism: A Chronicle*, 79 AFRICAN STUDIES 70–87 (2020); Karin Bachinger & Johan Hough, *New Regionalism in Africa: Waves of Integration*, 39 AFRICA INSIGHT 43–59 (2009); Richard S. Mukisa & Bankole Thompson, *Prerequisites for Economic Integration in Africa: An Analysis of the Abuja Treaty*, 42 AFR. TODAY 56–80 (1995); Jane L. Parpet, *Women's Rights and the Lagos Plan of Action*, 8 HUM. RTS. Q. 180 (1986).

11 The concept of intersectionality was coined by Kimberlé Crenshaw Williams in *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHICAGO LEGAL F. 139–67 (1989). See also ADRIEN WING, *GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER* (Adrien Wing ed., 2000); Jennifer Nash, *Re-Thinking Intersectionality*, 89 FEMINIST REV. 1–15 (2008); Stéphanie Garneau, *Intersectionality beyond feminism? Some methodological and epistemological considerations for research*, INT'L REV. SOC. 321–35 (2017); CHIMAMANDA NGOZI ADICHIE, *WE SHOULD ALL BE FEMINISTS* (2014); Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893 (1995).

12 James Gathii, *Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn from Each Other*, 67 UCLA L. REV. (2020).

converge and diverge in the context of trade policy is key to our understanding of how we might strengthen existing commitments to gender-sensitive trade.

This article is divided into five sections. In section one, we start by establishing the relationship between women's empowerment and trade, in light of the SDGs. In section two, we invert the dominant understanding that trade liberalisation is gender neutral and we draw on feminist scholarship and Africa-focused historical evidence to unearth the impact of 'neutral' trade policy on women in Africa. In the third section, the diverse ways in which gender and women have featured as part of Africa's continental and regional development policy are presented. The fourth section provides the legal mapping of gender commitments in the RECs and highlights diverging approaches to gender-sensitive trade policy. The fifth section assesses whether, and to what extent, the AfCFTA can serve as a transformative tool for the advancement of gender-sensitive trade policy at the African continental, regional, and domestic levels, with specific emphasis on underlying characteristics of African women, which need to be centre-stage in the design of future trade policy. To conclude, we acknowledge that women's economic, social and cultural agency can be empowered through trade but argue that existing frameworks do not go far enough to promote gender equality and eliminate discrimination against women.

## I. TRADE AND GENDER AS A DEVELOPMENT STRATEGY

The relationship between trade and gender is an international, regional and domestic policy concern. Improving the status of women in society through 'just and equitable growth' while enabling them to contribute effectively to development has been recognised for decades. Since the late 1970s, policy-making at international and domestic institutions has been shaped and informed by the *feminisation of poverty*—a concept widely used in development studies to identify and address gender inequalities in poverty alleviation strategies.<sup>13</sup> *Feminisation* refers to the complex ways in which women experience aspects of social, economic and cultural life differently to men. It refers to gender inequalities that arise in both formal and informal settings and as a result of both formal and informal social, economic, legal and cultural structural norms.

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13 The term 'feminisation' was first used by Diane Pearce in 1978 in her analysis of the labour markets in the USA and Canada. Nilüfer Catagay identified three meanings for the feminisation of poverty: a) women compared to men have a higher incidence of poverty; b) women's poverty is more severe than men's; c) over time, the incidence of poverty among women is increasing compared to men. See Nilüfer Catagay, *Social Development and Poverty Elimination Division WP5: Gender and Poverty*, UN DEVELOPMENT PROGRAMME (May 1998).

The feminisation of poverty concept informed the key policy goals of the Beijing Platform for Action of the Fourth Conference on Women<sup>14</sup> and this international conference served as the impetus behind changing approaches to gender across Africa. However, an analysis of women and trade, and an assessment of the *feminisation of trade*, reinforces the need for a nuanced approach to the issue linkages that intersect with women's participation in the formal and informal economies.

Achieving gender equality and the economic empowerment of women has been a concern for global governance since the mid 1970s.<sup>15</sup> As far back as 1985, the international community was recognising the need to find 'alternative sources of finance and new markets... to maintain and increase women's participation in [trade and commerce].'<sup>16</sup> The Nairobi Report advocated for 'efforts to be made to encourage enterprises to train women in economic sectors that have traditionally been closed to them, to promote diversification of women's employment and to eliminate gender bias from labour markets.'<sup>17</sup> In short, the contemporary issues we see in modern political economy in relation to women empowerment are not new.<sup>18</sup>

The Fourth Conference on Women in Beijing (1995) brought the Women's Decade to a close but set forth political agreements to ensure that women were not left behind in future trade and development policies at the national, regional and international levels. The Beijing Declaration and Platform for Action (1995) was adopted unanimously by 189 countries and is still considered to be the 'key global policy document on gender equality.'<sup>19</sup> It advanced twelve areas for concern for women,<sup>20</sup> including women and the economy, and set strategic objectives for the empowerment

14 United Nations Beijing Declaration and Platform for Women (Sept. 15, 1995).

15 The Decade for Women (1975-1985) launched at the 1975 World Conference of the International Women's Year (Mexico) to raise "the level of consciousness of the world community concerning the inequalities existing between men and women, and the need for women's full participation and integration within all sectors of national life in order to accelerate development."

16 World Conference on Women, *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace*, para. 197, U.N. Doc. A/CONF.116/28/Rev.1 (July 15-26, 1985) [hereinafter *Nairobi Report 1985*].

17 *Nairobi Report 1985*, para. 199.

18 Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimation of Gender Hierarchy in Developing Countries*, (2000) 41 HARV. INT'L. L.J. 381.

19 World Conference on Women, *Beijing Declaration and Platform for Action* (Sept. 4-15, 1995). For a summary of the United Nations World Conferences on Women, see *World Conferences on Women*, UN WOMEN, <https://www.unwomen.org/en/how-we-work/intergovernmental-support/world-conferences-on-women>.

20 The twelve areas of concern include: women and poverty; education and training of women; women and health; violence against women; women and armed conflict; women and the economy; women in power and decision-making; institutional mechanism for the advancement of



of women. The Beijing Declaration and Platform for Action has played a defining role in shaping and informing gender policy across Africa, most notably in the Southern African Development Community (SADC) and the East African Community (EAC).

At the international level, African nations have shown a commitment to gender equality through different human rights frameworks. A formal expression of the commitment to gender equality has been shown by most African countries through the signature and/or ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1979.<sup>21</sup> Ratification of this international human rights instrument does not however guarantee gender equality and non-discrimination<sup>22</sup> of women. Indeed, where national laws have close connections to religious codes of practice<sup>23</sup> or traditional patriarchal cultural systems, the social impact of these national laws will often contradict CEDAW. This contradiction is true for many countries across the world, including African countries.<sup>24</sup>

In recent years, there has been a renewed interest in developing ways to promote the economic empowerment of women through global governance regimes and embed gender-sensitive norms in international regulatory frameworks. International institutions like the United Nations, the WTO and the International Trade Centre (ITC) – a joint agency of the UN and WTO – are working together to empower women through trade policy. The 2030 Agenda for Sustainable Development<sup>25</sup> states that the achievement

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women; human rights of women; women and the media; women and the environment; the girl child.

- 21 Eswatini (formerly Swaziland), Sudan, and Somalia have not signed or ratified CEDAW. The following African countries have signed, but have not yet ratified the Convention: Burundi, Chad, Congo, Liberia, Madagascar, Malawi, Sierra Leone, Zambia.
- 22 Article 1 CEDAW defines “discrimination against women” as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”
- 23 For an interesting account of the intersection between Sharia law and CEDAW, see EKATERINA YAHYAOUI KRIVENKO, *WOMEN, ISLAM AND INTERNATIONAL LAW: WITHIN THE CONTEXT OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN* (2008).
- 24 For an excellent overview of these issues, see CHINYERE UKPOKOLO, *BEING AND BECOMING: GENDER, CULTURE AND SHIFTING IDENTITY IN SUB-SAHARAN AFRICA* (2016); J. Oloka-Onyango & Sylvia Tamale, ‘*The Personal is Political*’ or *Why Women’s Rights are Indeed Human Rights: An African Perspective on International Feminism*, 17 HUM. RTS. Q. 691 (1995); Celestine Nyamu-Musembi, *Ruling Out Gender Equality? The Post-Cold War Rule of Law Agenda in Sub-Saharan Africa*, 27 THIRD WORLD Q. 1193–1207 (2006).
- 25 2030 Agenda makes thirty-two references to the word ‘women’ and seventeen references to the word ‘gender’.



of gender equality and the empowerment of women and girls globally will make a 'critical contribution' to the attainment of sustainable development.<sup>26</sup> The 2030 Agenda specifically recognises international trade as 'an engine for inclusive economic growth and poverty reduction, and a tool for the promotion of sustainable development.' It further expresses a desire for parties to 'promote a universal, rules-based, open, transparent, predictable, inclusive, non-discriminatory and equitable multilateral trading system.'<sup>27</sup>

While the 2030 Agenda does not explicitly address the hurdles which prevent women from utilizing trade as a means for achieving socio-economic empowerment, the Addis Ababa Action Agenda of the Third International Conference on Financing for Development 2015 (Addis Ababa Action Agenda), which is an integral part of the 2030 Agenda,<sup>28</sup> specifically recognises the barriers for women's participation in international trade. While affirming the use of international trade to facilitate the SDGs, the Addis Ababa Action Agenda explicitly recognises that women encounter challenges while being involved in trade and are marginalised in domestic, regional and international trade.<sup>29</sup> Furthermore, Aspiration 6 of the AU's Agenda 2063 is complemented by the AU's Gender Equality and Women's Empowerment (GEWE) strategy,<sup>30</sup> both of which reinforce the principles set out in the AU's Solemn Declaration on Gender Equality in Africa<sup>31</sup> and the rights protected in the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.<sup>32</sup> Collectively, these instruments embed the principles of gender equality and non-discrimination at the domestic, regional and pan-African levels.

There is significant promise in using trade and gender as a development strategy for women globally. Where trade policies contemplate women, there is an opportunity to improve the welfare of not only women but their children and immediate family.

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26 2030 Agenda, para. 20.

27 2030 Agenda, para. 62.

28 2030 Agenda, para. 40 (recognizing the Addis Ababa Action Agenda as an integral part of the 2030 Agenda).

29 G.A. Res. 69/313, Addis Ababa Action Agenda of the Third International Conference on Financing for Development, para. 90 (July 27, 2015) ("Recognizing the critical role of women as producers and traders, we will address their specific challenges in order to facilitate women's equal and active participation in domestic, regional and international trade.").

30 African Union, AU Strategy for Gender Equality and Women's Empowerment 2018–2028, *available at* [https://au.int/sites/default/files/documents/36195-doc-au\\_strategy\\_for\\_gender\\_equality\\_womens\\_empowerment\\_2018-2028\\_report.pdf](https://au.int/sites/default/files/documents/36195-doc-au_strategy_for_gender_equality_womens_empowerment_2018-2028_report.pdf).

31 Assembly/AU/Dec.12 (III) Rev.1, Solemn Declaration on Gender Equality in Africa (2004).

32 Adopted by the 2<sup>nd</sup> Ordinary Session of the African Union on July 11, 2003 and entered into force on November 25, 2005.

Increasing the economic power of women has the potential to induce a ‘snowball effect’ by further increasing the standard of living of those around them.<sup>33</sup> Evidence shows that women are likely to invest approximately 90% of their income in the education and health of their families and communities.<sup>34</sup> While the potential of using international trade as a development and economic empowerment engine for women is clear, until recently<sup>35</sup> there has been little by way of direction on how policies can be designed to help women reap maximum benefits from international trade.<sup>36</sup>

## II. CONFRONTING GENDER-NEUTRAL ASSUMPTIONS IN INTERNATIONAL TRADE

Until recently, issue linkages between gender equality, women’s rights and international trade have been weak. In this section, we argue that the diminutive acknowledgement of the gender issues in trade is congruent with assumptions of gender neutrality in international trade law and architecture. The neoliberal market-based assumptions which scaffold the architecture of the multilateral trading system, underpinned by Ricardo’s theory of comparative advantage and its attendant aim of attaining economic efficiency through specialisation, are influential pillars upon which our modern international trade framework operates.<sup>37</sup> These twin pillars of economic efficiency and market forces tend to prioritise ‘growing the economic pie’ in line with the neoliberal consensus<sup>38</sup> and are less concerned with the distribution of the pie amongst marginalised groups, including women. However, increasing the size of the economic pie has become increasingly difficult to justify as the principal purpose of international trade,<sup>39</sup> thereby feeding growing disquiet about the neoliberal focus on overall economic gains to the detriment of marginalized populations. The notion that trade liberalisation will benefit everyone equally is itself an assumption of gender-neutrality. Feminist scholars and activists have long challenged the assumption that

33 World Trade Organization, Gender Aware Trade Policy: A Springboard for Women’s Economic Empowerment 4 (2017), [https://www.wto.org/english/news\\_e/news17\\_e/dgra\\_21jun17\\_e.pdf](https://www.wto.org/english/news_e/news17_e/dgra_21jun17_e.pdf).

34 *Id.*

35 Specifically, the ITC continues to provide policy direction and support for women traders, particularly through the *She Trades* initiative, which seeks to connect 3 million women to the global market by 2021.

36 Trade Experettes was founded in 2018 to promote the role of women trade experts around the globe. See <https://www.tradeexperettes.org/what-we-do>.

37 DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (1817).

38 Harlan Grant Cohen, *What Is International Trade Law For?*, 113 AM. J. INT’L L. 326–46 (2019).

39 *Id.* at 329.

law is inherently gender neutral. Legal scholarship which deploys gendered lenses has prompted questions on the effects of seemingly neutral law and policies on women.<sup>40</sup> International economic law broadly and international trade law specifically have also benefitted from this feminist critique,<sup>41</sup> albeit in a less comprehensive way than other areas of law.

While international trade has indeed increased the size of the ‘economic pie’ on the average,<sup>42</sup> the equitable distribution of the gains of trade has remained elusive for many. Indeed, many women (particularly but not exclusively those in developing countries) are left with the crust of the pie, as they operate on the peripheries of the formal economy which is regulated by international trade norms.<sup>43</sup> The problem with traditional approaches to international trade is that issues like gender equality are rarely addressed on the centre stage; instead, they are relegated to the realm of domestic concerns.<sup>44</sup> However, many studies have shown that trade policies can and do affect women and men differently.<sup>45</sup>

The gendered implications of trade policies have manifested for African women prior to the creation of the formal international trade architecture in existence today. In colonial West-Africa, trade policies introduced on one of the most prized export commodities – cocoa – created a ripple effect on the fortunes of West-African women. An analysis (below) of the cocoa exporting eco-system in Nigeria and Ghana illustrates

40 Uche U. Ewelukwa, *Women and International Economic Law: An Annotated Bibliography*, 8 L. & BUS. REV. AM. 603–32, 605 (2002).

41 Barnali Choudhury, *The Facade of Neutrality: Uncovering Gender Silences in International Trade*, 15 WM. & MARY J. WOMEN & L. 113–60 (2008); Sundhya Pahuja, *Trading Spaces: Locating Sites for Challenge Within International Trade Law*, 14 AUSTRALIAN FEMINIST L. J. 38–54 (2000); Adrien Wing, *International Law and Feminism*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 468–84 (Robin West & Cynthia Bowman eds., 2019), available at <https://www.elgaronline.com/view/edcoll/9781786439680/9781786439680.xml>; Ewelukwa, *supra* note 28.

42 Glick and Moreno’s study highlights that several factors including the “catch-up effect” as well as government intervention, investment and education, all played a role in the rapid growth experienced by the Asian countries. However, the study identifies openness to trade as a significant contributing factor as well. Glick and Moreno note that “...an outward-looking development strategy, particularly a dynamic export sector is conducive to growth.” Reuven Glick & Ramon Moreno, *The East Asian Miracle: Growth Because of Government Intervention and Protectionism or in Spite of It?* 32 BUS. ECON. 20–25 (1997); JEFFREY FRANKEL, DAVID ROMER & TERESA CYRUS, *Trade and Growth in East Asian Countries: Cause and Effect?* (National Bureau of Economic Research, Working Paper 5732, 1996), <http://www.nber.org/papers/w5732.pdf>.

43 Shelley Wright, *Women and the Global Economic Order: A Feminist Perspective*, 10 AM. U. INT’L L. REV. 861–88, 861 (1995).

44 Pahuja, *supra* note 42.

45 Choudhury, *supra* note 42, at 113; Wright, *supra* note 44.

that trade policy – whether identified as such or not – directly influenced the outcomes of women.

In colonial Nigeria, the government provided price support and agricultural advice – what would today qualify as a subsidy – to cocoa growers, who were predominantly men. On the other hand, traders of exquisite handmade indigo-dyed cloth (*Àdirẹ*)<sup>46</sup> who were mostly women<sup>47</sup> did not benefit from such policies, as *Àdirẹ* clothes were not an export interest.<sup>48</sup> These *Àdirẹ* producers also had to navigate increased competition from outside their country, as imported cotton and imported indigo competed with locally produced traditional cotton and dyes.<sup>49</sup> While not *de jure* identified as gendered trade policy, the introduction of support to cocoa growers in colonial Nigeria had a *de facto* effect of excluding women from the benefit of the subsidy while also labelling the *Àdirẹ* trading ecosystem as inconsequential.<sup>50</sup>

On the other hand, an analysis of early colonial Asante in Ghana shows that in the early 1920s, the increase and establishment of cocoa farming and exporting directly led to an evolution of women's roles in the economy.<sup>51</sup> While initially Asante women worked on their husband's cocoa farms, as cocoa became an established cash crop, some women were later able to exercise property rights and owned cocoa farms, thereby directly benefiting from international trade in cocoa.<sup>52</sup> With their increased income, Asante women also experienced increased marital independence as they had the financial capacity to leave marriages where they were uncared for.<sup>53</sup> Other women

46 CATHERINE COQUERY-VIDROVITCH, *AFRICAN WOMEN: A MODERN HISTORY* 31 (1997).

47 JUDITH A. BYFIELD, *THE BLUEST HANDS: A SOCIAL AND ECONOMIC HISTORY OF WOMEN DYERS IN ABEOKUTA (NIGERIA), 1890-1940* (2002).

48 *Id.*; Elisha P. Renne, *Book Review: The Bluest Hands: A Social and Economic History of Women Dyers in Abeokuta (Nigeria), 1890-1940*, 35 INT'L J. AFR. HIST. STUD. 612–14 (2002); Malika Kraamer, *Judith A. Byfield, The Bluest Hands: A Social and Economic History of Women Dyers in Abeokuta (Nigeria), 1890-1940*, 74 AFR. 478–79 (2004).

49 BYFIELD, *supra* note 48; Renne, *supra* note 49; Kraamer, *supra* note 49.

50 The imposition of taxes on women also affected their ability to benefit fully from international trade. In 1929, Igbo women in the South-Eastern part of Nigeria organized a riot, popularly known as the Aba Women's Riot. The women protested a proposed female tax imposed by the colonial government through indirect rule, using warrant chiefs. However, forces of globalisation and international trade underpinned this struggle, particularly the “steady decline in the price of palm oil and palm kernel in the world market.” Uche U. Ewelukwa, *Centuries of Globalization; Centuries of Exclusion: African Women, Human Rights, and the New International Trade Regime*, 20 BERKELEY J. GENDER L. & JUST. 75–149 (2005).

51 Victoria B. Tashjian & Jean Allman, *Marrying and Marriage on a Shifting Terrain: Reconfigurations of Power and Authority in Early Colonial Asante*, in *WOMEN IN AFRICAN COLONIAL HISTORIES* 237–59, 252 (Jean Marie Allman, Susan Geiger & Nakanyike Musisi eds., 2002).

52 *Id.*

53 *Id.*

were emboldened to challenge matrilineal inheritance in the customary court by “demanding portions of a divorced or deceased husband’s cocoa farm in recognition of labor invested.”<sup>54</sup> International trade in cocoa expanded the options of Asante women who were given the opportunity to participate directly in cocoa trade.

The trade policies introduced in colonial Ghana and Nigeria produced ‘winners’ and ‘losers’ and even if these policies were *de jure* gender neutral, they had *de facto* gendered implications. Whether the gender implications were recognised or not, or whether they were unintended, did not diminish the reality of their effect. Furthermore, growth in cash-crop exports like cocoa often relied on female labour even though the industries were mostly gendered male, leaving many women, except examples like the Asante women, with benefits that were not commensurate to their labour.<sup>55</sup>

In response to the tension between international trade’s traditional objectives of economic efficiency and women’s empowerment through trade, deliberate attempts to make international trade work for women and men are being explored. Gender is now being introduced into trade policy through instruments such as ‘trade liberalisation agreements, reduction of tariffs on sectors with high female employment, tax incentives that encourage exports from women-owned enterprises and multilateral development assistance frameworks.’<sup>56</sup> With stated objectives of the SDGs to promote sustained, inclusive and sustainable economic growth,<sup>57</sup> ensure full and productive employment and decent work for all,<sup>58</sup> as well as ensuring gender equality,<sup>59</sup> the effect of trade on women and their access to decent work and equality cannot be a side issue.<sup>60</sup> Gender-sensitive trade policy must be a priority for all countries, irrespective of their geographic, economic, or social locality.

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54 *Id.*

55 Emmanuel Akyeampong & Hippolyte Fofack, *The Contribution of African Women to Economic Growth and Development in the Pre-Colonial and Colonial Periods: Historical Perspectives and Policy Implications*, 29 *ECON. HIST. DEVELOPING REGIONS* 42–73 (2014).

56 OECD & SAHEL AND WEST AFRICA CLUB, *WOMEN AND TRADE NETWORKS IN WEST AFRICA* 40 (2019), [https://www.oecd-ilibrary.org/development/women-and-trade-networks-in-west-africa\\_7d67b61d-en](https://www.oecd-ilibrary.org/development/women-and-trade-networks-in-west-africa_7d67b61d-en).

57 2030 Agenda, Goal 8.

58 2030 Agenda, Goal 8.

59 2030 Agenda, Goal 5.

60 Choudhury, *supra* note 29, at 113.

### III. GENDER AS AN AFRICAN DEVELOPMENT CONCERN: REGIONAL ECONOMIC COMMUNITIES AS THE VEHICLE?

As evidenced by African regional trade agreements, most African countries and regions have demonstrated an awareness – rhetorically, at least – of the issue linkages between gender and trade. However, there are important aspects of regionalism unique to the African context that require explanation in order to ground the analysis on gender-sensitive trade policy in African regionalisms. To understand regionalism in Africa, we must begin by examining the imprints of colonialism on Africa.

Colonialism disrupted traditionally constructed patterns of governance across African countries. Contemporary Africa is an evolving construct of its pre- and post-colonial past; its cartography carved out to advance European materialism without regard for the cultural, social and linguistic commonalities that had existed among and between African people for many centuries.<sup>61</sup> Regionalism has offered a means to reconnect and rearticulate shared norms, values and identities across the African continent. Promoting economic development through regionalism, or ‘flexible legal regimes,’<sup>62</sup> was a mechanism used to push back against the colonial imaginaries of the African cartography.<sup>63</sup> Even though many of the ‘favourable background conditions’<sup>64</sup> associated with neo-functional integration were absent, regionalism presented an opportunity to reconstruct Africa on its own terms.

The African approach to economic integration is somewhat unique, as it has simultaneously pursued both continentalism and functionalism. Continentalism or ‘pan-Africanism’ is a philosophy of unification; a vision to unite all African states.<sup>65</sup> A

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61 CLAIR GAMMAGE, *NORTH-SOUTH REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES: A CRITICAL ASSESSMENT OF THE EU-SADC ECONOMIC PARTNERSHIP AGREEMENT* 184 (Cheltenham, Edward Elgar, 2017).

62 JAMES THUO GATHII, *AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES* (Cambridge Univ. Press 2011). For an overview of the historical origins of African regionalisms, see CLAIR GAMMAGE, *NORTH-SOUTH REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES: A CRITICAL ASSESSMENT OF THE EU-SADC ECONOMIC PARTNERSHIP AGREEMENT*, Chapter 6 (Cheltenham, Edward Elgar, 2017).

63 F.N. Ikome, *From the Lagos Plan of Action to the New Partnership for Africa's Development – The Political Economy of African Regional Initiatives* 33 (Midrand South Africa: Institute for Global Dialogue, 2007).

64 The original hypothesis of ‘background conditions’ for integration was set out by Ernst Haas and Philippe Schmitter in 1964. See Ernst B. Haas & Philippe C. Schmitter, *Economics and Differential Patterns of Political Integration: Projections about Unity in Latin America*, 18 INT’L ORG. 705–37 (1964); Mario Barrera & Ernst B. Haas, *The Operationalization of Some Variables Related to Regional Integration: A Research Note*, 23 INT’L ORG. 150–60 (1969).

65 Luwam Dirar, *Norms of Solidarity and Regionalism: Theorizing State Behavior Among Southern African States*, 24 MICH. STATE INT’L L. REV. 667–723 (2015).

borderless African continent will be achieved through the abandonment of artificial constructs, like the concept of 'sub-Saharan Africa,' which have come to define epistemological and methodological approaches to the study of social, cultural, political and economic phenomena in Africa. To provide an extensive overview of the origins and evolution of African regionalisms is beyond the scope of this article.

Regionalism has played a central part in Africa's development strategy and it was originally seen as a vehicle to further the pursuit of pan-Africanism in the early days of post-colonialism. (Neo)liberalism has perceived to be one of the most significant threats to African ideologies and the project of pan-Africanism. Speaking in 1961, Kwame Nkrumah urged other African leaders to protect the African way(s) of being:

'We have our own way of life, a socialist way based on sound cultural foundation and an African background. Those who wish to understand our actions must first begin to study and appreciate this background. They should not judge us from ignorance, and they should not expect us to become mere copy-types of their past or present, however good these may be to themselves.'<sup>66</sup>

Nkrumah's vision of a pan-African continent endured and together, the Lagos Plan of Action 1980 and the Treaty Establishing the African Economic Community (the 'Abuja Treaty') 1991 served as the original building blocks for pan-African cooperation through regional groupings. A reading of both treaties situates the constitutional frameworks of the RECs in their normative context. The rationale behind the creation of RECs was to stimulate economic growth within African regional communities, to encourage intra-African trading patterns to relieve path-dependencies on former colonial partners and to serve as a steppingstone *towards* pan-African economic integration. Eight RECs are recognised by the African Union, which continue to exist today albeit their efficiency and coherence varies from one bloc to another: Arab Maghreb Union (AMU); Common Market for Eastern and Southern Africa (COMESA); Community of Sahel-Saharan States (CEN-SAD); East African Community (EAC); Economic Community of Central African States (ECCAS); Economic Community of West African States (ECOWAS); Intergovernmental Authority on Development (IGAD)<sup>67</sup>; and the Southern African Development Community (SADC).

<sup>66</sup> KWAME NKUMAH, THE VOICE OF AFRICA: SPEECH ON THE OPENING OF THE GHANA EXTERNAL BROADCASTING SERVICE (1961).

<sup>67</sup> The IGAD is an organisation focused on regional cooperation in the following priority areas: food security and environmental protection, economic cooperation, regional integration and social development peace and security.



Recent statistics show that trade flows between the African RECs accounts for approximately 80 percent of all intra-African trade in 2015. In terms of trade volumes, just five African countries – Algeria, Côte d’Ivoire, Egypt, Nigeria and South Africa – were responsible for 67 percent of total intra-African traded volumes.<sup>68</sup> The RECs are, therefore, a vital source of trade for the continent and ‘trading it with itself’ is projected to be ‘Africa’s greatest economic opportunity.’<sup>69</sup> With that in mind, the remainder of this article explores the extent to which the RECs can serve as vehicles to promote the economic empowerment of women.

Gender equality and the non-discrimination of women are core features of African development strategies. Gender policy is included in the RECs as part of their ‘development’ policies rather than as independent chapters or clauses. The special place of women in society and the economy was recognised by the LPA which cautioned that the ‘steps to be taken to solve the problems of African women should not be marginal and separate from the question of over-all development.’ Chapter XII of the LPA, dedicated to ‘Women and Development’ consists of thirty provisions relating to women’s participation in the economic, social and environmental dimensions of sustainable development. The LPA called for strategies to address the marginalisation of women in the rural economy and especially those involved in agri-processing,<sup>70</sup> to improve labour laws and union representation,<sup>71</sup> to ensure the entitlement to maternity benefits,<sup>72</sup> and to provide credit facilities for women to support their transition toward self-employment and to support entrepreneurial endeavours.<sup>73</sup> To integrate women into the economy, the LPA encouraged states to improve healthcare systems,<sup>74</sup> to provide educational and skills-training to women,<sup>75</sup> and to adopt measures that will enable women to participate in decision-making institutional settings.<sup>76</sup>

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68 U.N. CONFERENCE ON TRADE AND DEVELOPMENT, FROM REGIONAL ECONOMIC COMMUNITIES TO A CONTINENTAL FREE TRADE AREA, UNCTAD/WEB/DITC/2017/1, page vi (2018).

69 Kingsley Makhubela, *Africa’s Greatest Economic Opportunity: Trading with Itself*, WORLD ECONOMIC FORUM (Jan. 16, 2018), <https://www.weforum.org/agenda/2018/01/why-africas-best-trading-partner-is-itself/>.

70 LPA, arts. 315–17.

71 LPA, art. 318(f).

72 LPA, art. 318(d).

73 LPA, art. 318(b).

74 LPA, art. 321.

75 LPA, arts. 308–14. In addition, Article 140 of the LPA stipulates that “Adult skill and literacy campaigns in science and technology should be mounted, using the national languages, where possible, with the primary object of getting rural women to participate more effectively in agricultural and rural technology programmes and projects...”

76 LPA, art. 300.

Overall, the LPA approached gender and development from a broad perspective and sought to address existing inequalities across all dimensions of social, economic, political and cultural life. However, the LPA was not a perfect legal exemplar for upholding gender equality and non-discrimination. Notwithstanding the call for strategies to promote the social, cultural and economic empowerment of women set out in Article 325 LPA (entitled ‘Legislative and Administrative Matters’), some provisions of the LPA simply reinforced structural systems of patriarchy that embedded the oppression and subjugation of women within legal, cultural and social practices. For example, Article 325(f) LPA, which related to marriage and the controversial cultural practices of polygamy and bride price, stated:

*‘Women and girls should be more aware than men of disadvantages of institutions such as polygamy and payment of bride price and of discrimination of status in marriage caused by those practices and should recognise that they themselves must take steps to eradicate old customs, traditions and prejudices which tend to give women an inferior position in the family...’* (emphasis added)

This provision is at odds with the Nairobi Report (1985) which identified several categories of women who are of ‘special concern’ to the international community, including young women. Indeed, the Nairobi Report expressly stipulated that the onus was on the government to ‘recognise and enforce the rights of young women to be free from sexual violence, sexual harassment and sexual exploitation.’ Another example is found in Article 325(i) LPA which provided that women should be involved in ‘law-making processes in order to ensure that legislation is better adapted to current realities’ yet there was no guidance as to how this objective was to be achieved.

While the Abuja Treaty (1991) complements the LPA, it provided only one clause on women and gender. Article 75 Abuja Treaty stipulated that Member States should ‘agree to formulate, harmonise, coordinate and establish appropriate policies and mechanisms for the full development of the African woman through the improvement of her economic, social and cultural conditions.’ In addition, it stated that Member States ‘shall take all measures necessary to ensure greater integration of women in development activities within the Community.’ Chapter XII LPA, together with the Abuja Treaty, has served as the blue-print for the inclusion of gender clauses in the RECs and the commitment to promoting women as economic and social agents, albeit often framed in the narrative of ‘development.’ The advancement of women in development is, therefore, a common goal of the RECs.

In 2001, the African Union launched the New Partnership for Africa's Development (NEPAD), which formed part of Thabo Mbeki's strategy for an 'African Renaissance.'<sup>77</sup> NEPAD was created in 2001 as the successor to the LPA and focuses on the need to improve infrastructure in Africa to facilitate cross-country investment and foster regional integration.<sup>78</sup> The objectives of NEPAD are development oriented and aim to eradicate poverty and inequality in Africa, to promote empowerment and improve the economic status of women, and to integrate African states into the global economy through sustained economic growth. NEPAD recognises that 'postcolonial Africa inherited weak states and dysfunctional economies, which were further aggravated by poor leadership, corruption and bad governance in many countries'<sup>79</sup> and created a peer review mechanism that enables countries to provide a 'self-assessment' of their progress in key areas for review by other African states. However, this process has been widely criticized for failing to overcome institutionalised neopatrimonialism with one scholar describing the peer review mechanism as a nothing more than 'neocolonial governance mask.'<sup>80</sup> Nevertheless, and notwithstanding its shortcomings, NEPAD represents an effort by the African Union to support sustainable development through good governance and human rights protection, and although it seems to lack clear priorities,<sup>81</sup> it is the development framework within which the RECs now operate.

The intersection between development, trade and gender is outlined in paragraph 11 of NEPAD, which states:

'In Africa's efforts at democracy, good governance and economic reconstruction, women have a central role to play. *We accept it as a binding obligation* to ensure that women have every opportunity to contribute on terms of full equality to political and socio-economic development in all our countries.' [emphasis added]

Under this framework, NEPAD aims 'to end the moral shame exemplified by the

77 Thabo Mbeki, South African Deputy President, *Speech: The African Renaissance, South Africa and the World* (Apr. 9, 1998), available at <http://archive.unu.edu/unupress/mbeki.html>.

78 For an account of the origins and scope of NEPAD, see C. Landsberg, *The African Union and the New Partnership for Africa's Development (NEPAD): Restoring a Relationship Challenged?*, 12 AFR. J. CONFLICT RES. 49–71 (2012).

79 NEPAD, para. 22.

80 Patrick Bond, *Removing Neocolonialism's APRM Mask: A Critique of the African Peer Review Mechanism*, 36 AFR. POL. ECON. 595–603 (2009).

81 James Thuo Gathii, *A Critical Appraisal of the Nepad Agenda in Light of Africa's Place in the World Trade Regime in an Era of Market Centered Development*, 13 TRANSNAT'L L & CONTEMP. PROBS. 179 (2003); RACHEL MURRAY, *HUMAN RIGHTS IN AFRICA: FROM THE OAU TO THE AFRICAN UNION* (Cambridge University Press, 2004). See in particular *Chapter 8: Development, NEPAD and Human Rights*.

plight of women, children, the disabled and ethnic minorities'<sup>82</sup> by recognising and realising human rights and gender equality across all activities of the African Union. On the one hand, the long-standing tradition of situating women within the broader (social) development discourse enables a wide interpretive reading of the many and diverse issue linkages between gender and development, including the feminisation of poverty, trade and labour. On the other hand, an analysis of the constitutional documents and treaty frameworks governing the RECs reveals a diverging approach to gender in the context of development.

#### IV. GENDER-SENSITIVE TRADE POLICIES IN AFRICAN RECS

It is important to note that all RECs have their own rich historical origins that have played a role in the extent to which gender features in their treaties. Ideological divergences about the social, economic, and cultural orientation of regional integration initiatives have created conflict among regional partners and threatened to undermine the feasibility of African regionalisms.<sup>83</sup> The following sections examine how the RECs address and respond to the challenges of gender inequalities.

##### A. North Africa: AMU and CEN-SAD

There are two agreements covering the North African countries: the Arab Maghreb Union (AMU) and the Community of Sahel-Saharan States (CEN-SAD). Originally established in 1998 by six states, the CEN-SAD<sup>84</sup> regional community now consists of twenty-four signatories. The main religion of the CEN-SAD states is Islam but the legal text for this REC is currently inaccessible and we are not able to present *how* and *to what extent* gender-sensitive policies are advanced by this group.

The Arab Maghreb Union (AMU)<sup>85</sup> is an agreement between the Islamic states in northern Africa. Its constitutional treaty makes no reference to women or their economic empowerment. The idea for the creation of this region dates back to 1956 but it was formally created in 1989. Its treaty consists of just nineteen articles and

82 NEPAD, para. 10.

83 Julius Emeke Okolo, *Integrative and Cooperative Regionalism: The Economic Community of West African States*, 39 INT'L ORG. 122 (1985).

84 The member states of CEN-SAD are: Benin, Burkina Faso, Central African Republic, Chad, the Comoros, Côte d'Ivoire, Djibouti, Egypt, Eritrea, the Gambia, Ghana, Guinea-Bissau, Libya, Mali, Mauritania, Morocco, Niger, Nigeria, Senegal, Sierra Leone, Somalia, the Sudan, Togo and Tunisia.

85 The AMU entered into force in 1998 and its members are: Algeria, Libya, Mauritania, Morocco, and Tunisia.

an associated Declaration. The only explicit gendered reference in the AMU Treaty is found in Article 2, which states an aim of the treaty as ‘strengthening the ties of *brotherhood* which link the states and their peoples to one another.’ While women are not directly referred to in the Treaty, the preambular recitals of the Declaration of the Institution of the Arab Maghreb Union give an insight into the broader context in which this regional group operates. For example, the seventh preambular statement ‘proclaim[s] our firm determination to reinforce the foundations of justice and dignity for our Peoples and to confirm the individual and collective rights in our homelands on the basis of our cultural identity and spiritual values’ while the penultimate recital stipulates that the parties envisage ‘a world order where justice, dignity, freedom and human rights would prevail and the relations of which would be marked by sincere cooperation and mutual respect.’ Although gendered aspects of trade are not explicitly addressed, there are references to values and principles implicit to gender equality – justice, dignity, freedom and human rights – albeit these aims should be read through an ‘Arab lens.’

In the Northern African Arab countries,<sup>86</sup> ‘the religious, the cultural and the social realms are intertwined firmly.’<sup>87</sup> The official religion of the state in these countries is Sunni Muslim, Sharia law is applied in the courts, and societies are governed and structured according to traditional cultural norms. As noted by Samar El-Masri:<sup>88</sup>

‘It is this culture that crowned man as the king of his castle, and woman as a follower. This position was determined by the biological role of the woman in society, where it is believed that she is better suited for domestic responsibilities and is generally less capable and more irrational than a man. She is born to bear children and look after her house and family.

Her male guardian is responsible for taking care of her. This downward inferior social status of women led to human rights violations on various fronts.’

Gender inequality is socially, culturally and legally constituted in these localities. The ratification of an international human rights treaty like CEDAW will not immediately undo centuries of cultural practices. Women’s rights in Northern Africa, and indeed across other African states where Islam is the dominant religious framework, can

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86 Algeria, Egypt, Libya, Morocco and Tunisia.

87 Samar El-Masri, *Challenges Facing CEDAW in the Middle East and North Africa*, 16 INT’L J. HUM. RTS. 931, 935 (2012).

88 *Id.*

only be properly understood if situated in their specific cultural context.<sup>89</sup> The RECs were created after CEDAW was implemented and marked an opportunity to commit to gender equality and non-discrimination through the newly-created regional communities. Instead, the AMU represents a restatement of Islamic values in the legal text. Perhaps unsurprisingly, a more inclusive approach to gender is expressed in the RECs involving non-Islamic African states.

## B. West Africa: ECOWAS

Women have a prominent place in the text of the ECOWAS constitutional treaty. The original text was set out in 1975 and the ECOWAS Treaty was subsequently revised in 1993.<sup>90</sup> However, the provisions relating to women and gendered dimensions of development remained unchanged in the new text. The Treaty makes nine references to the term ‘women’ across the Agreement and a stated objective of ECOWAS is ‘the encouragement and strengthening of relations and the promotion of the flow of information particularly among rural populations, *women* and youth organisations and socio professional organisations such as associations of the media, business men and *women*, workers and trade unions.’<sup>91</sup> ECOWAS Members have expressed their commitment to promote ‘women’s organisations and professional associations... as a means of ensuring mass involvement in the activities of the [ECOWAS] Community,’<sup>92</sup> which is seen as an integral part of social affairs and social development in the region.

Of most significance is the stand-alone provision on ‘Women and Development’ set out in Article 63, the original iteration of which predates Article XII LPA. This article provides that Member States of ECOWAS should ‘undertake to formulate, harmonize, coordinate and establish appropriate policies and mechanisms, for enhancement of the economic, social and cultural conditions of women.’<sup>93</sup> In doing so, they ‘shall take all measures necessary’ to ‘identify and assess all constraints that inhibit women from maximising their contribution to regional development efforts’ and ‘provide a framework within which the constraints will be addressed and for the incorporation of women’s concerns and needs into the normal operations of the society.’<sup>94</sup> The

89 Abdullahi Ahmed An-Na, *Religious Norms and Family Law: Is It Legal or Normative Pluralism?*, 25 EMORY INT’L L. REV. 785–809 (2011).

90 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)].

91 ECOWAS Treaty (Original & Revised), art. 3(1).

92 ECOWAS Treaty (Original & Revised), art. 61(c).

93 ECOWAS Treaty (Original & Revised), art. 63(1).

94 ECOWAS Treaty (Original & Revised), art. 63(2).

Treaty envisages that the empowerment of women in the ECOWAS region will be achieved by ‘stimulat[ing] dialogue... on the kinds of projects and programmes aimed at integrating women into the development process’<sup>95</sup> and ‘promoting knowledge exchange on those programmes so that individual Member State experiences can be shared.’<sup>96</sup> Finally, the ECOWAS Treaty proposes the creation of a mechanism for cooperation with bilateral and multilateral organisations to inform and respond to the challenges facing women in the African economies.<sup>97</sup>

While it appears that the language used in the Treaty is framed in a mandatory way with the verb ‘*shall*’ being used throughout, the commitments and obligations set out in the provisions are both vague and ambiguous. In other words, the language confers discretion on the individual States and the Community to determine how these objectives are to be achieved and what constitutes realisation of these objectives. There is no baseline to measure whether the provisions of Article 63 have been realised. Rather, the permissive language enables each Member State of ECOWAS to establish its own baseline. This approach enables the political, social, cultural and traditional normative structures in each respective ECOWAS country, but it seems at odds with the need to create a coherent mechanism to monitor gender equality in the region. This has been recognised by the ECOWAS Commissioner for Social Affairs and Gender, Dr. Fatima Jagne, who in 2019 reiterated the importance of creating a ‘regional gender establishment that will serve as a reference centre while activating a gender scorecard that seeks to bring up all the countries in the region to the same level.’<sup>98</sup>

In the absence of a protocol on gender covering all aspects of activity in the ECOWAS, Article 63 has served as a legal basis for the ECOWAS community to promote women’s access to and control of economic resources through initiatives like the Business Incubator for African Women Entrepreneurs (BIAWE) project and the Programme on Gender Mainstreaming in Energy Access (2013). ECOWAS Commissioners recognise that more needs to be done to prioritise the interests of women in the region. In 2019, the Commissioner for Education, Science and Culture, Professor Leopoldo Amado, stated that ‘the advancement of women has become a *community priority* and women are more than ever at the heart of the decision-making power of

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95 ECOWAS Treaty (Original & Revised), art. 63(3)(a).

96 ECOWAS Treaty (Original & Revised), art. 63(3)(c).

97 ECOWAS Treaty (Original & Revised), art. 63(3)(b).

98 *ECOWAS Commission and UN Women Partner on Gender Mainstreaming*, ECONOMIC COMMUNITY OF WEST AFRICAN STATES (Oct. 24, 2019), <https://www.ecowas.int/ecowas-commission-and-un-women-partner-on-gender-mainstreaming/>.



our community.’<sup>99</sup> This has been reiterated in March 2020 by Dr. Fatima Jagne on International Women’s Day. There are plans afoot to implement the Supplementary Act on gender equality in sustainable development<sup>100</sup> but this has yet to materialise.

### C. Central Africa: ECCAS

ECCAS was established in 1983 as a regrouping of the Central African Economic and Monetary Community (CEMAC) and the Economic Community of the Great Lakes (CEPGL). Today, it comprises ten central African states<sup>101</sup> and of all the sub-saharan RECS. The ECCAS Treaty is the least comprehensive in terms of its treatment of gender issues. Like ECOWAS, the ECCAS Treaty mentions women only in relation to social affairs (Article 60) but it merely states that Members shall ‘develop collective research by appropriate policies aimed at improving the economic, social and cultural status of women in urban and rural areas and increasing their integration in development activities.’<sup>102</sup> There is no indication of how this will be monitored by the Community.

### D. East Africa: EAC

The EAC was established under its Treaty in 1999 and promotes cooperation amongst six East African nations,<sup>103</sup> although the region has enjoyed a much longer history of cooperation. Its mission is to ‘widen and deepen economic, political, social and cultural integration in order to improve the quality of life of the people of East Africa through increased competitiveness, value added production, trade and investments.’<sup>104</sup> Gender equality and the economic empowerment of women has been a focal point for the community and Article 5(3)(e) of the EAC Treaty provides for the ‘mainstreaming of gender in all its endeavours and the enhancement of women in cultural, social, political, economic and technological development’. The EAC Treaty includes references to

99 *ECOWAS Commission to Consolidate Gender Equality and Women Empowerment Drive*, ECONOMIC COMMUNITY OF WEST AFRICAN STATES (Mar. 12, 2019) (emphasis added), <https://www.ecowas.int/ecowas-commission-to-consolidate-gender-equality-and-women-empowerment-drive/>.

100 *A Series of Recommendations to Ensure Gender Equality and Equality in ECOWAS Member States*, ECONOMIC COMMUNITY OF WEST AFRICAN STATES (Feb. 15, 2017), <https://www.ecowasint/a-series-of-recommendations-to-ensure-gender-equity-and-equality-in-ecowas-member-states/>.

101 Angola, Burundi, Cameroon, Central African Republic, Chad, Congo, Democratic Republic of Congo, Gabon, Equatorial Guinea, São Tomé and Príncipe.

102 Treaty for the Establishment of the Economic Community of Central African States, art. 60(2) (b) (1983) [hereinafter ECCAS Treaty].

103 The members of the EAC are Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda.

104 *Overview of EAC: Our Mission*, THE EAST AFRICAN COMMUNITY (EAC), <https://www.eac.int/overview-of-eac>.

‘gender’, which it defines as ‘the role of women and men in society.’<sup>105</sup> For example, Article 9 provides that ‘in the appointment of staff and composition of the organs and institutions of the Community, gender balance *shall be taken into account*.’ Again, the language here implies a mandatory obligation to act yet there is no framework instituted through the EAC Treaty to explain what ‘taking into account’ the ‘gender balance’ requires in practice.

Women are recognised as *socio-economic agents* and they are positioned as a ‘vital economic link between agriculture, industry and trade’ in the EAC. Chapter 22 of the EAC Treaty (1999), entitled ‘Enhancing the Role of Women in Socio-Economic Development,’ contains two provisions relating to the role of ‘women in socio-economic development’ (Article 121) and ‘women in business’ (Article 122). This chapter is framed by the preambular statement of Article 121, which reads:

‘The Partner States recognise that women make a significant contribution towards the process of socio-economic transformation and sustainable growth and that it is impossible to implement effective programmes for the economic and social development of the Partner States without the full participation of women.’

Rhetorically, at least, this statement demonstrates that the agency of women in social, economic and cultural terms is recognised in the Treaty. Article 121 provides that EAC states should adopt ‘appropriate legislative and other measures’ to ‘promote the empowerment and effective integration and participation of women at all levels of socio-economic development especially in decision-making’,<sup>106</sup> abolish legislation and discourage customs that have discriminatory effects against women,<sup>107</sup> promote education,<sup>108</sup> create and adopt technologies to support women in the labour force,<sup>109</sup> and ‘take other such measures that shall eliminate prejudices against women and promote the equality of the female gender with that of the male gender in every respect.’<sup>110</sup>

Furthermore, Article 122 EAC Treaty provides that the partner states will undertake a number of commitments in the context of business to increase the participation of

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105 Treaty for the Establishment of the East African Community, art. 1 (1999) [hereinafter EAC Treaty].

106 EAC Treaty, art. 121(a).

107 EAC Treaty, art. 121(b).

108 EAC Treaty, art. 121(c).

109 EAC Treaty, art. 121(d).

110 EAC Treaty, art. 121(e).

women at both the policy formulation and implementation levels individually<sup>111</sup> and by way of national and regional associations of business.<sup>112</sup> The Treaty provides that its Members shall undertake to ‘promote special programmes for women in small, medium and large scale enterprises’<sup>113</sup> and ‘eliminate all laws, regulations and practices that hinder women’s access to financial assistance including credit.’<sup>114</sup> Education strategies and skills training should be provided to improve women’s access to and participation in the labour market.<sup>115</sup>

Gender is a priority under the current EAC Development Strategy (2016/17–2020/21). The EAC promulgated the Equality and Development Bill in 2016 which has the principle objective to ‘advance gender equality... in the economic, political, social and cultural aspects.’<sup>116</sup> A Technical Working Group on Women, Gender and Development was created to meet twice a year to discuss progress made at the national and community levels in relation to gender and women. In addition, the EAC Vision 2050 recognises that investing in women’s empowerment is ‘fundamental for breaking the inter-generational cycle of poverty.’<sup>117</sup>

To complement the legal provisions set out in the EAC Treaty, the Community has adopted policies to tackle gender inequalities. Article 6(d) EAC Treaty, which upholds the principles of democracy, rule of law, transparency, social justice, gender equality and human rights serves as the legal basis for the EAC’s Gender Policy (2018).<sup>118</sup> The Gender Policy ‘takes cognizance of the fact that women’s poverty is also a result of socially enforced gender roles and relations and that if the causes of gender inequality are not addressed, gender related poverty will persist.’<sup>119</sup> A commitment under the Gender Policy is to coordinate a Regional Gender Policy Implementation Plan by 2023 and develop an effective Monitoring and Evaluation framework.<sup>120</sup> Overall, the EAC is to date demonstrating the most progressive and transformative commitment

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111 EAC Treaty, art. 122(a).

112 EAC Treaty, art. 122(e).

113 EAC Treaty, art. 122(b).

114 EAC Treaty, art. 122(c).

115 EAC Treaty, art. 122(d).

116 The East African Community Gender Equality and Development Bill, *The East African Community Bills Supplement No. 3*, art. 4 (Jan. 8, 2016), available at <http://www.eala.org/documents/view/the-east-african-community-gender-equality-and-development-bill2016>.

117 East African Community, *East African Community Gender Policy* 12 (May 2018) [hereinafter EAC Gender Policy 2018], available at <https://www.eac.int/documents/category/gender>.

118 EAC Gender Policy 2018.

119 EAC Gender Policy 2018, at 27.

120 EAC Gender Policy 2018, at 49.

to gender mainstreaming and gender-sensitive trade policies through these initiatives and its Simplified Trade Regime, discussed below .

### E. Eastern and Southern Africa: COMESA

COMESA was established in 1994, replacing the former preferential trade agreement that had been created in 1981, ‘as an organisation of free independent sovereign states which have agreed to cooperate in developing their natural and human resources for the good of all their people.’<sup>121</sup>

It brings together twenty-one states<sup>122</sup> with an overarching objective to achieve ‘economic prosperity through regional integration.’<sup>123</sup> The region comprises eight Arab countries, the majority of whom are also party to either AMU or CEN-SAD,<sup>124</sup> and it is interesting to note that the approach to gender in the COMESA framework is vastly different to the approach taken under those agreements.

Chapter 24 COMESA Treaty (2009), ‘Women in development and Business’, sets out its commitment to promote the participation of women and their agency in socio-economic development. Much like Chapter 22 of the EAC Treaty, the COMESA text separates out its obligations into two provisions: one addressing the ‘Role of Women in Development’ (Article 154) and the other addressing the ‘Role of Women in Business’ (Article 155). The similarities in approaches to these provisions is likely to stem from the overlapping membership of the two groups.

The preambular statement in Article 154 is almost identical to Article 121 EAC Treaty and reads:

‘The Member States agree that women make significant contribution towards the process of socio-economic transformation and sustainable growth and that it is impossible to implement effective programmes *for rural transformation and improvements in the informal sector* without the full participation of women.’ (Italics indicating textual differences.)

Again, the substantive commitments of Article 154 are almost identical to those set

121 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).

122 Burundi, Comoros, Djibouti, Democratic Republic of the Congo, Egypt, Eritrea, Ethiopia, Eswatini, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Somalia, Tunisia, Uganda, Zambia, Zimbabwe.

123 *COMESA Objectives and Priorities*, COMESA, <https://www.comesa.int/company-overview-2/>.

124 Djibouti, Egypt, Eritrea, Ethiopia, Libya, Sudan, Somalia and Tunisia are Arab members of COMESA. Ethiopia is not a member of AMU or CEN-SAD.

out in Article 121 EAC. However, there are important and notable textual differences between the COMESA Treaty and the EAC Treaty. In the context of ‘women and development,’ Article 154(b) provides that COMESA members will undertake to ‘eliminate regulations and customs that are discriminatory against women *and specifically regulations and customs which prevent women from owning land and other assets*’ while the wording of Article 121 EAC simply provides that its Members should ‘abolish legislation and discourage customs that are discriminatory against women.’ Article 154(b) COMESA goes beyond the scope of Article 121 EAC in its explicit reference to women and ownership of land and assets. Furthermore, Article 154(e) calls for the Members to ‘encourage and strengthen institutions which are engaged in the promotion and development of labour-saving devices aimed at improving the productive capacity of women’ and does not include the reference to ‘eliminating prejudices against women’ set out in Article 122(e) EAC Treaty.

Article 155 on the ‘Role of Women in Business’ of the COMESA Treaty resembles Article 122 of the EAC Treaty. Whereas the EAC Treaty seeks to ‘increase the *participation* of women in business at the policy formulation and implementation levels,’<sup>125</sup> the COMESA Treaty aims to ‘increase the *awareness* of Women in Business issues at the policy level’<sup>126</sup> and ‘*create an enabling environment for the effective participation of women*’<sup>127</sup> in the trade and development opportunities of the Community. The parties of both treaty frameworks commit to ‘promote special programmes for women in small and medium-sized enterprises.’<sup>128</sup> In terms of financial assistance, the wording in the EAC Treaty is broader with the parties undertaking to ‘eliminate all laws, regulations and practices that hinder women’s access to financial assistance *including credit*,’<sup>129</sup> whereas the COMESA Treaty merely stipulates that the parties ‘agree’ to ‘eliminate such laws and regulations that hinder women’s access to credit.’<sup>130</sup>

Both the EAC Treaty and the COMESA Treaty codify the agreement or undertaking by the parties to ‘initiate changes in educational and training strategies to enable women to improve their technical and industrial employment levels through the acquisition of transferable skills offered by various forms of vocational and on-the-

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125 EAC Treaty, art. 122(a).

126 COMESA Treaty, art. 155(1)(a).

127 COMESA Treaty, art. 155(1)(b).

128 EAC Treaty, art. 122(b); COMESA Treaty, art. 155(1)(c).

129 EAC Treaty, art. 122(c).

130 EAC Treaty, art. 155(1)(d).

job training schemes<sup>131</sup> and recognise the importance of federal, regional and national associations to ‘promote the effective participation of women’ in business.<sup>132</sup> However, the COMESA Treaty goes further than the EAC Treaty insofar as it provides that the Federation of National Associations of Women in Business shall be represented at the COMESA Consultative Committee and at Technical Committee meetings.<sup>133</sup> In addition, implementation activities adopted in pursuit of Chapter 9 may be submitted to the Technical Committees ‘depending on the technical items under consideration.’<sup>134</sup> Overall, the spectrum of obligations to promote gender equality and non-discrimination in the EAC and COMESA treaties squeeze and pull at different points.

Under the legal bases of Articles 154 and 155, the Community adopted the COMESA Gender Policy and Addis Ababa Declaration on Gender in 2002. Furthermore, and since 2009, the COMESA Secretariat has been implementing its Gender Mainstreaming Strategic Action Plan, which includes the creation of gender specific manuals for trade, investment, private sector development, environment, peace and conflict prevention, HIV and AIDS, information and communication and COMESA institutions. Mainstreaming gender in agriculture and climate change policies is prioritised under the Regional Strategy and Action Plan (RESTRAP). Gender policy in the region is overseen by the Gender and Social Affairs division in the COMESA Secretariat.

However, the Secretariat has acknowledged that progress has been made towards the advancement of women and social development but ‘the region continues to struggle with gender inequalities across all sectors of the economy.’<sup>135</sup> As a result, in its 2016–2020 Medium Term Strategic Plan, the COMESA community have prioritised gender and social development as one of its strategic objectives.<sup>136</sup> Again, gender and women’s empowerment is situated within the broader framework of social development:

‘People-centred regional development and social justice will be realised through gender equality, empowerment of women and youth, protection and promotion of the rights of vulnerable groups. Promoting gender equality is an important

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131 EAC Treaty, art. 122(d); COMESA Treaty, art. 155(1)(e).

132 EAC Treaty, art. 122(e); COMESA Treaty, art. 155(1)(f).

133 COMESA Treaty, art. 155(2).

134 COMESA Treaty, art. 155(3).

135 COMESA, *Medium Term Strategic Plan 2016-2020: In Pursuit of Economic Transformation and Development* 7–8 (2016), available at <https://www.comesa.int/comesa-medium-term-strategy-2016-2020/>.

136 Strategic Objective 7, entitled ‘Foster Gender Equality and Social Development’, identifies a range of initiatives to realise gender equality. *See id.* at 32–33.

part of the development strategy that seeks to enable people, both women and men, to diminish their poverty and improve the standard of living.’

Overcoming the challenges of feminisation of poverty and trade remains a key concern for COMESA today.

## **F. Southern Africa: SADC**

The original SADC Treaty, referred to as the Windhoek Declaration, was initially signed by ten countries<sup>137</sup> but eventually another four joined the group, including South Africa following its liberation from apartheid.<sup>138</sup> Women are not explicitly referred to in the SADC Treaty (as revised in 2015) but gender is a ‘cross-cutting’ issue for the community. The promotion of gender equality, women’s rights and the economic empowerment of women fall implicitly within the terms of the Treaty’s aims and objectives. A stated principle of the Community is ‘human rights, democracy and the rule of law’<sup>139</sup> while ‘mainstream[ing] gender in the process of community building’<sup>140</sup> is an objective of the bloc. Article 6 sets out the ‘General Undertakings’ of the SADC states, among which is the commitment of non-discrimination of ‘any person on the grounds of gender, religion, political views, race, ethnic origin, culture, ill health, disability, or such other ground as may be determined by the Summit.’

Other objectives of the bloc include ‘promot[ing] sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration’<sup>141</sup> and ‘promot[ing] self-sustaining development on the basis of collective self-reliance.’<sup>142</sup> The creation of ‘democratic, legitimate and effective’ regional institutions is a stated objective which should, of course, by implication mean that gender balance and representation is a concern of the community. It identifies the private sector, civil society, non-governmental organisations and workers and employers organisations as

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137 Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe.

138 South Africa (August 1994); Mauritius (August 1995); DRC (June 1998); Madagascar (August 2005). Although the Seychelles became a member of SADC in February 1998, it subsequently withdrew from the group.

139 Treaty of the Southern African Development Community, art. 4(c) (revised 2015) [hereinafter SADC Treaty].

140 SADC Treaty, art. 5(1)(k).

141 SADC Treaty, art. 4(a).

142 SADC Treaty, art. 4(d).



‘key stakeholders’ with whom the SADC ‘shall seek to involve fully... in the process of regional integration.’<sup>143</sup>

Gender issues are addressed explicitly in two Declarations; one on Gender and Development (1997) and one known as the Addendum to the Declaration on Violence Against Women (1998). The impetus behind these declarations comes from the task force of SADC women in government and non-governmental organisations that was created to attend the Beijing Declaration and Platform for Action (1995).<sup>144</sup> Following the Beijing Conference, this task force became the Regional Advisory Committee for SADC and gender mainstreaming became an objective of the institutional and policy framework for the region.

In 2008, the SADC Community adopted a Protocol on Gender and Development which addresses substantive and procedural gender issues.<sup>145</sup> Gender is defined as ‘the roles, duties and responsibilities which are culturally or socially ascribed to women, men, girls and boys’ with ‘gender equality’ defined by the Protocol as meaning ‘the equal enjoyment of rights and the access to opportunities and outcomes, including resources, by women, men, girls and boys.’ The Protocol defines ‘gender sensitive’ as meaning ‘acknowledging and taking into account the specific gender needs of both men and women at all levels of planning, implementation, monitoring and evaluation.’ The SADC Protocol identifies that women have ‘multiple roles’ in the ‘reproductive, productive and community management sphere’ and sets out objectives to ‘provide for the empowerment of women, to eliminate discrimination and to achieve gender equality and equity through the development and implementation of gender responsive legislation, policies, programmes and projects.’<sup>146</sup> It sets out twenty-three progressive targets including the aim to recognise gender equality and equity as constitutional rights in the SADC States domestic system. For example, Article 4 stipulates that the SADC States were to ‘endeavour’ to ‘enshrine gender equality and gender equity in their Constitutions and ensure that these rights are not compromised by any provisions, laws or practices.’ Furthermore, all existing law that discriminates against women

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143 SADC Treaty, art. 23.

144 Fareda Banda, *Going It Alone? SADC Declarations and the Gender Debate*, 46 J. AFR. L. 259, 260 (2002).

145 Southern African Development Community, *Protocol on Gender and Development* (Oct. 17, 2008) [hereinafter SADC Protocol on Gender].

146 SADC Protocol on Gender, art. 3(a).

should have been repealed by 2015.<sup>147</sup> However, Malawi and South Africa have yet to ratify the Protocol.<sup>148</sup>

This section has revealed the diverging approaches to gender-sensitive trade policies advanced by the RECs. Where progressive approaches toward gender and trade has been seen through the treaties and associated acts of the EAC, ECOWAS, SADC and COMESA, the same cannot be said for ECCAS, AMU and CEN-SAD. However, and even where progressive frameworks are adopted to embed gender within a development framework, it does not necessarily follow that these market-based arrangements genuinely value human capital and gender.<sup>149</sup> As African states continue to negotiate trade commitments under the AfCFTA, what promise might this pan-African agreement hold for women and their economic empowerment?

## V. THE AFCFTA: A PAN-AFRICAN APPROACH TO GENDER AND TRADE?

Research is already being undertaken at the multilateral level to develop better insights into how existing trade rules and ‘unregulated spaces’ in WTO Agreements can be reoriented to empower women.<sup>150</sup> The Buenos Aires Declaration, supported by almost two-thirds of the WTO membership, has marked an important step toward the creation of more inclusive trade policy. It is against this background that the transformative potential of the AfCFTA must be problematised. What, for example, should pan-African gender-sensitive trade policy look like? How can it incorporate the diverse concerns of women across the continent? Can the commitments to gender equality and the non-discrimination of women expressed in some of the RECs be strengthened through pan-African approaches to regional integration to deliver an African approach to the trade and gender? These are just a few of the questions that

147 SADC Protocol on Gender, art. 6.

148 Mauritius is not a signatory to the Protocol as it violates a provision of its civil code on marriage.

149 Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*, 26 MICH. J. INT’L L. 199–243 (2004). For compelling accounts from heterodox and social reproduction theorists, see SOCIAL REPRODUCTION THEORY: REMAPPING CLASS, RECENTRING OPPRESSION (Tithi Bhattacharya ed., 2017); WOMEN AND WORK: FEMINISM, LABOUR AND SOCIAL REPRODUCTION (Susan Ferguson ed., 2019); Sakiko Fukuda-Parr, James Heintz & Stephanie Seguino, *Critical Perspectives on Financial and Economic Crises: Heterodox Macroeconomics Meets Feminist Economics*, 19 FEMINIST ECON. 5 (2013).

150 See Rohini Acharya et al., *Trade and Women – Opportunities for Women in the Framework of the World Trade Organisation*, 22 J. INT’L ECON. L. 323–54 (2019).

need to be answered as the negotiators advance through the forthcoming rounds of negotiations.

It is perhaps unsurprising that gender-sensitive trade policy does not feature in the AfCFTA, given the diversity of approaches to gender illustrated in the preceding section. The current AfCFTA Treaty draft references the term ‘women’ once and ‘gender’ twice. In the seventh preambular recital the state parties ‘recognis[e] the importance of international security, democracy, human rights, *gender equality* and the rule of law, the development of international trade and economic cooperation.’ Furthermore, a ‘general objective’ of the AfCFTA is to ‘promote and attain sustainable and inclusive socio-economic development, gender equality and structural transformation of the State Parties.’<sup>151</sup> The AfCFTA recognises the special position of women in the African economy and State parties have agreed to ‘mobilise resources... and implement measures’ to ‘improv[e] 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>152</sup> In the absence of a provision or chapter on gender in AfCFTA the gender-sensitive trade strategies advanced in the RECs shall be maintained until a comprehensive customs union agreement is negotiated.<sup>153</sup>

The *rendez-vous clause*<sup>154</sup> incorporated into the current draft of the AfCFTA Treaty provides for the ongoing negotiation of State Parties in outstanding areas including tariffs, rules of origin, services, intellectual property, investment and competition policy. Negotiations will continue in phases until agreement is reached in all areas. There is, therefore, scope for the inclusion of gender-sensitive trade policies on an unprecedented scale. However, it is not the immediate intention of the AfCFTA to abolish or supersede the RECs.<sup>155</sup> So, for the time being, the regional gender-sensitive trade policies set out under the RECs will continue to apply.

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151 African Union, *Agreement Establishing the African Continental Free Trade Area*, Part II, art. 3(e) (2019) [hereinafter AfCFTA Treaty], available at <https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area>.

152 AfCFTA Treaty, Part VI, art. 27(2)(d).

153 AfCFTA Treaty, Part V, art. 19 provides: “(1) In the event of any conflict and inconsistency between this Agreement and any regional agreement, this Agreement shall prevail to the extent of the specific inconsistency, except as otherwise provided in this Agreement; (2) Notwithstanding the provisions of Paragraph 1 of this Article, State Parties that are members of other regional economic communities, regional trade arrangements and customs unions, which have attained among themselves higher levels of regional integration than under this Agreement, shall maintain higher levels among themselves.”

154 AfCFTA Treaty, Part II, art. 7.

155 See Gerhard Erasmus, *What Will Happen to the Regional Economic Communities and other African Trade Agreements once the AfCFTA is Operational?*, TRALAC (June 11, 2018), <https://www.tralac.org>.

However, we argue that the existing RECs do not go far enough to promote gender equality and non-discrimination against women. There are flashes of innovation across the RECs in their approaches to gender-sensitive trade policies, but overall there is still a stark disparity between the status of men and women across many African societies. Patriarchal normative structures are prevalent in African cultures and, while they manifest in different ways, the subordinate position of women socially, economically, culturally and politically vis-à-vis their male counterparts is common. Culture has often been used as a reason to treat women on an inferior basis. As a result, women have occupied a different space in the economy to men. However, culture is not the only factor that must be considered in designing gender-sensitive trade policy in Africa. In crafting and implementing gender-sensitive trade policies under the RECs or in future AfCFTA negotiations, other characteristics stand to define the position of women in Africa, in relation to trade; which characteristics must take centre stage in the conceptualisation and design of regional and continent-wide trade policy.

The first of these characteristics is that women make up a large proportion of traders in the informal economy and the informal economy accounts for a large portion of business activities on the continent. The informal economy is a term ‘used broadly to include both modern and traditional non-agricultural work that stands in contrast to the formal economy in that it involves work without recognised contracts, fixed wages or government protection, and is located outside the established sphere of factory and office-based employment.’<sup>156</sup> Since the 1990s, studies have shown that women in Africa participate in and contribute to the informal economy in a significant way<sup>157</sup> and informal cross-border trade (ICBT) in Africa is a significant source of revenue particularly for women in border communities. In the Southern African Development Community (SADC), ICBT is estimated to be 30-40 percent of total intra-SADC trade, with an estimated value of US\$17.6 billion.<sup>158</sup> In West Africa, ICBT is estimated

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org/publications/article/13135-what-will-happen-to-the-regional-economic-communities-and-other-african-trade-arrangements-once-the-afcfta-is-operational.html.

156 Ibipo Johnston-Anumonwo & Donna L Doane, *Globalisation, Economic Crisis and Africa's Informal Economy Women Workers*, 32 SINGAPORE J. TROPICAL GEOGRAPHY 8, 9 (2011).

157 See Shirlena Huang & Brenda S.A. Yeoh, *Gender and Urban Space in the Tropical World*, 17 SINGAPORE J. OF TROPICAL GEO. 105–112 (1996).

158 Suffyan Koroma et al., *Formalization of Informal Trade in Africa: Trends, Experiences and Socio-Economic Impacts*, U.N. FOOD & AGRIC. ORG. vi (2017), available at <https://globalinitiative.net/wp-content/uploads/2018/01/FAO-Formalization-of-informal-trade-in-Africa.pdf>. Christopher Changwe Nshimbi, *The Human Side of Regions: Informal Cross-border Traders in the Zambia–Malawi–Mozambique Growth Triangle and Prospects for Integrating Southern Africa*, 35 J. BORDERLANDS STUD. 75–97 (2020). MIGRATION, CROSS-BORDER TRADE AND DEVELOPMENT

to account for 20 percent of GDP in Nigeria and 75 percent in Benin.<sup>159</sup> Unlike in Asia, where increased trade liberalisation has grown the manufacturing sector<sup>160</sup> and with it, increased Asian women's access to employment opportunities,<sup>161</sup> most African countries do not have a similar trajectory, as they continue to rely heavily on the export of primary commodities as opposed to high-value finished products.<sup>162</sup> Many African women therefore continue to be involved in subsistence farming and agriculture which they trade within their countries or cross border.<sup>163</sup> Ndumbe's study of cross border trade in the vegetable Eru<sup>164</sup> shows that this commodity contributes on average 62 percent of a harvester's annual income.<sup>165</sup> Over half of Eru exporters are women.<sup>166</sup>

This informality is not only evident in trade in goods, but also extends to trade in services, as women cross borders to provide various services, albeit menial, from hair dressing to serving as nannies or domestic workers.<sup>167</sup> Lack of attention to the various hues of informal transactions described above has contributed to a regulatory blindness on how to extract value from these informal industries, while ensuring that the women who dominate these industries are protected and derive commensurate benefit. For instance, there are established, albeit informal routes for transporting people (mostly women) who work as domestic workers in large African cities like Lagos, Nigeria. However, lack of proper understanding and regulation of such informal migration flows have left those involved susceptible to being exploited and open to sexual and

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IN AFRICA: EXPLORING THE ROLE OF NON-STATE ACTORS IN THE SADC REGION, (Christopher Changwe Nshimbi & Inocent Moyo eds., 2017).

159 ASSESSING REGIONAL INTEGRATION IN AFRICA IV: ENHANCING INTRA-AFRICAN TRADE (United Nations, African Union, & African Development Bank eds., 2010).

160 WOMEN AND INDUSTRIALIZATION IN ASIA (Susan Horton ed., 2003).

161 Although there are well-documented negative implications of the manufacturing industry on women including but not limited to abuse of their fundamental human rights. Pahuja, *supra* note 29, at 39.

162 THE CHALLENGE OF AFRICAN ECONOMIC RECOVERY AND DEVELOPMENT 163 (Adebayo Adedeji, Patrick Bugembe & O. Teriba eds., 2014).

163 See Louis Njie Ndumbe, *Unshackling Women Traders: Cross-border Trade of Eru from Cameroon to Nigeria*, WORLD BANK (June 2013), <http://documents.worldbank.org/curated/en/262591468292477021/pdf/797110BRI0PN380Box0377384B00PUBLIC0.pdf>.

164 Eru is a popular vegetable of the *Gnetum* species—*Gnetum africanum* and *Bucholzanum*—which is traded heavily between Cameroon and Nigeria. See *id.* at 3.

165 *Id.* at 2.

166 *Id.*

167 THE WORLD BANK, THE UNEXPLORED POTENTIAL OF TRADE IN SERVICES IN AFRICA: FROM HAIR STYLISTS AND TEACHERS TO ACCOUNTANTS AND DOCTORS (Nora Dihel & Arti Grover Goswami eds., 2016).

gender violence.<sup>168</sup> They also experience harassment at the border, often have to pay bribes to border officials and they may also experience delays which can affect the market value of perishable products.<sup>169</sup> While it is acknowledged that ‘empowering women informal cross border traders will have a multiplier effect on poverty reduction, employment creation, intra-African trade and regional integration,’<sup>170</sup> it is vital that this acknowledgment translates into trade policies that address the needs of women in the informal economy. The recognition of national identity cards as a travel document among Kenya, Rwanda and Uganda since January 2014 is an example of trade policy that has positively affected ICBT traders.<sup>171</sup> This policy has led to a significant uptick in travel between the partner states, with majority of travel being conducted by ICBT actors.<sup>172</sup>

Second, African women involved in trade are often hampered by legal and institutional constraints. These legal and institutional limitations manifest in several ways, including but not limited to obscurity about regulations affecting trade, particularly standards, rules of origin and customs procedures, thereby limiting women’s ability to maximize existing trade routes and regimes. An OECD survey of 1997 entrepreneurs in the rice sector between Benin, Niger and Nigeria shows that men involved in the similar business of rice trading earn five times more than women who are limited by formal and customary laws, public policies, limited access to credit and other financial instruments.<sup>173</sup>

In East Africa, lack of information about the legal aspects of trade has been recognised as one of the most significant non-tariff barriers facing traders, especially those engaging in ICBT, in the EAC region:<sup>174</sup>

‘Traders struggle to find information regarding the goods and services allowed for trade in each Partner State, the standards and authorisation certifications required, the taxes and tariffs expected in each Partner State, the import and

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168 THE WORLD BANK, *WOMEN AND TRADE IN AFRICA: REALIZING THE POTENTIAL 6* (Paul Brenton, Elisa Gamberoni & Catherine Sear eds., 2013).

169 *Id.* at 6.

170 *Unleashing the Potential of Women Informal Cross Border Traders to Transform Intra-African Trade*, UN WOMEN (2011), <https://www.unwomen.org/-/media/headquarters/media/publications/en/factsheetafricanwomentradersen.pdf?la=en&vs=944>.

171 Koroma et al., *supra* note 145.

172 *Id.*

173 OECD AND SAHEL AND WEST AFRICA CLUB, *supra* note 43, at 21.

174 East African Community, *A Simplified Guide for Micro and Small-Scale Women Cross Border Traders and Service Providers within the East African Community*, Foreword, iv-v (Apr. 20, 2017) [hereinafter EAC Simplified Guide].

export laws of each Partner State, the trade processes and controls, the rules of origin and the customs procedures among other details that are important for successful trade in the region...the lack of clear and accessible information is more acute among women entrepreneurs as communication channels and means have not necessarily been developed along their needs.’

Women owned businesses in the EAC are thought to account for between 35–55 percent of the total number of businesses in the region.<sup>175</sup> The majority of women-owned business in the EAC are micro, small and informal<sup>176</sup> and there are gender-specific challenges facing women traders in this region including cultural prejudices, access to affordable finance and credit, educational attainment levels, skills and business acumen. To overcome the disempowerment of women, and in partnership with the International Labour Organisation, the EAC has developed a user-friendly toolkit to make trade rules accessible for women in the region. The ‘Simplified Guide for Micro and Small-Scale Cross Border Traders and Service Providers within the EAC’ is an excellent example of how complex trading norms can be made accessible to women from all backgrounds. It builds on the EAC Strategy for Promoting Women in Business and the Women’s Socio-Economic Empowerment Draft to support women in understanding changes in legislation, like the introduction of the EAC Customs Union (Rules of Origin) Rules in 2015. It is a practical guide that points users not only to the rules but to the main government agencies that can assist them in trading. Initiatives like those taken by the EAC are welcome as they tackle the feminisation of poverty and trade on the continent.

Third, the high rate of unemployment in many African countries, adds a different dimension to African women’s struggles and their interaction with trade, as unemployment has necessitated or encouraged the growth of informality and entrepreneurship. Historically, African women have played a role in entrepreneurship and retail and have demonstrated the ability to operate organised market structures.<sup>177</sup> However, increased unemployment has made it pertinent for many Africans to become entrepreneurs – spawning an entrepreneurship model based on necessity. While female entrepreneurship is encouraged, research shows that businesses owned by female entrepreneurs in Africa are less likely to export.<sup>178</sup> According to the International Trade

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175 EAC Simplified Guide, at 3.

176 EAC Simplified Guide, at 4.

177 Davis A. Bullwinkle, *Women and Their Role in African Society: The Literature of the Seventies*, 15 CURRENT BIBLIOGRAPHY AFR. AFF. 263–91, 264 (1983).

178 UNLOCKING MARKETS FOR WOMEN TO TRADE 7 (International Trade Centre ed., 2015).



Centre (ITC), only 20 percent of exporting firms are led by women, with West-Africa having the least number of women-led exporting firms globally.<sup>179</sup> The ITC explains that women encounter gender-based discrimination when obtaining trade-related paperwork,<sup>180</sup> and not only do they face the typical tariff and non-tariff barriers associated with exporting in Africa, which disproportionately affect smaller businesses, they also balance domestic family responsibilities which are largely unremunerated and unaccounted for.<sup>181</sup>

Fourth, African women not only deal with the difficulties associated with trading in Africa, they also deal with barriers such as structural inequalities in patriarchal societies, limited access to education, health-care, as well as other institutional inequities that limit their capabilities. The problems militating against African women's include 'customary law, family law (polygamy), inheritance law and property law, and stem from religious practices, external and family violence, FGS, their status as refugees, education, employment, health care, trafficking, slavery and lack of representation in the political and economic spheres.'<sup>182</sup> These problems co-exist with other inherently difficult issues associated with trade in and particularly *within* Africa, such as corruption,<sup>183</sup> non-tariff barriers like difficulties with border crossings,<sup>184</sup> lack of connecting infrastructure,<sup>185</sup> delays in shipping and customs,<sup>186</sup> and other practical issues like limited access to electricity for production and in some cases, a volatile political terrain. Trade within Africa is already difficult without the added layer of difficulty that African women

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179 *Id.*

180 Arancha González, *When She Trades, We All Benefit*, in *RESHAPING TRADE THROUGH WOMEN'S ECONOMIC EMPOWERMENT* 13–14, 14 (2018), <https://www.cigionline.org/sites/default/files/documents/Women%20and%20Trade.pdf>.

181 *Id.*

182 Wing, *supra* note 29, at 479–80; Brenton, Gamberoni & Sear, *supra* note 155, at 1.

183 Jacob Wanjala Musila & Simon Pierre Sigué, *Corruption and International Trade: An Empirical Investigation of African Countries*, 33 *WORLD ECON.* 129–46 (2010).

184 Bernard Hoekman, Lemma W Senbet & Witness Simbanegavi, *Integrating African Markets: The Way Forward*, 26 *J. AFR. ECON.* ii3–ii11, ii4 (2017); John Ravenhill, *Regional Integration in Africa: Theory and Practice*, in *REGION-BUILDING IN AFRICA: POLITICAL AND ECONOMIC CHALLENGES* 37–52, 37 (Daniel Levin & Dawn Nagar eds., 2016).

185 Roberto Longo & Khalid Sekkat, *Obstacles to Expanding Intra-African Trade* 10 (OECD Development Centre, Working Paper No. 169, 2001), [https://www.oecd-ilibrary.org/development/obstacles-to-expanding-intra-african-trade\\_042583120128](https://www.oecd-ilibrary.org/development/obstacles-to-expanding-intra-african-trade_042583120128).

186 George R. G. Clarke, *Beyond Tariffs and Quotas: Why Don't African Manufacturers Export More?* 21–22 (The World Bank, Policy Research Working Paper No. WPS3617, 2005), <http://documents.worldbank.org/curated/en/411421468211771497/Beyond-tariffs-and-quotas-why-dont-African-manufacturers-export-more>; Yongzheng Yang & Sanjeev Gupta, *Regional Trade Arrangements in Africa: Past Performance and the Way Forward: Regional Trade Arrangements in Africa*, 19 *AFR. DEV. REV.* 399–431, 418 (2008).

face navigating the socio-economic and cultural impediments associated with their very status as *African women*.

The challenges associated with ICBT, difficulties faced by female exporters, limited manufacturing capacity in Africa, gender norms and cultural stereotypes, unpaid domestic labour, and limited representation in management are all additional problems faced by women in Africa that limit their capacity to conduct or maximize trade in a way that is comparable to their male counterparts. Non-tariff barriers to trade raise costs associated with compliance procedures and regulations, and the recent joint report by the WTO and World Bank recognises that these barriers have a gender differential that disproportionately affect women traders.<sup>187</sup> The implementation of the Continental Online reporting, monitoring and eliminating mechanism<sup>188</sup> set out in Annex 5 of the AfCFTA can play a key role in promoting gender equality across the continent. This mechanism replicated and expands the non-tariff barrier system that has been implemented in the Tripartite FTA, which consists of COMESA, EAC and SADC.<sup>189</sup> At the time of writing, there have been almost 700 registered complaints resolved and a further 70 registered complaints remain active.<sup>190</sup> Creating a robust system of monitoring and evaluation at the pan-continental level is key to the future success of the AfCFTA and important lessons can be learned from existing regional initiatives.<sup>191</sup>

Mainstreaming gender in trade agreements and trade policy in Africa could serve several useful purposes. Even if there are no express commitments to gender dimensions or if such provisions are non-actionable, Choudhury suggests that 'states conduct ex-ante gender and social impact assessments for all forthcoming trade agreements and for preliminary negotiations on new trade-related topics.'<sup>192</sup> By deliberately

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187 WOMEN AND TRADE: THE ROLE OF TRADE IN PROMOTING GENDER EQUALITY (WTO & World Bank Group, 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).

188 Vonesai Hove, *The Proposed Online Non-Tariff Barrier Reporting, Monitoring and Eliminating Mechanism*, TRALAC (May 17, 2019), <https://www.tralac.org/blog/article/14077-the-proposed-afcfta-online-non-tariff-barrier-reporting-monitoring-and-eliminating-mechanism.html>.

189 For more information on this mechanism and how it operates in practice, see <https://www.tradebarriers.org/about>.

190 See Non-Tariff Barriers Reporting, Monitoring and Eliminating Mechanism: Active Complaints [undated], [https://www.tradebarriers.org/active\\_complaints](https://www.tradebarriers.org/active_complaints).

191 Economic Commission for Africa, *Synergies between the AfCFTA and Tripartite FTA will Benefit Africa's Traders and consumers, says ECA Chief* (June 18, 2018), available at <https://www.uneca.org/stories/synergies-between-afcfta-and-tripartite-fta-will-benefit-africa's-traders-and-consumers> says.

192 Choudhury, *supra* note 42, at 156.

including women's voices in the planning stages, states are more likely to have a better understanding of the needs, fears and opportunities that trade agreements and policies present for women. These impact assessments must be conducted with a wide variety of women who represent the various core sub-categories of women to be affected by such policies.

Recent collaboration between the RECs suggests synergies amongst regional policies on gender can be realised. As a collaborative effort between EAC-COMESA-ECOWAS, a digital platform to empower women was launched in November 2019 to connect 50 million women in business across the 38 intra-community countries.<sup>193</sup> The platform is known as the '50 Million African Women Speak' (50MAWS) platform.<sup>194</sup> Resources to support women in starting up and running business is provided and it enables women to connect with one another to share their experiences. Going forward, and in the negotiations for AfCFTA, it is important to harness the role of digital economies and trade facilitation measures for promoting women's economic empowerment. Part of this strategy must include mechanisms to bridge the existing technological divide that currently hinders their participation in trade. However, women and ICBTs in Africa are not sufficiently acknowledged in data and this has considerable implications on the effectiveness of human rights impact assessments carried out in preparation for the AfCFTA.<sup>195</sup> The many data gaps must be filled if meaningful and transformative progress is to be made for gender equality.

## CONCLUDING REMARKS

This article has problematised existing approaches to gender-sensitive trade strategies in African RECs. We have mapped the historical origins of gender in Africa's regional development policies and identified how the failure to properly understand the diverse roles of women as traders, workers, and consumers in African economies has sustained inequalities through the guise of development discourse.

We submit that while progress has been made to advance gender equality through legislative and policy instruments across the RECs, the diverging approaches to gender-

193 *EAC-COMESA-ECOWAS launch digital platform to empower women*, EAC COMMISSION (Nov. 28, 2019), <https://www.eac.int/press-releases/146-gender-community-development-civil-society/1633-eac-comesa-ecowas-launch-digital-platform-to-empower-women>.

194 The 50MAWS platform can be found here: <https://www.womenconnect.org/>.

195 Economic Commission for Africa & Friedrich Ebert Stiftung, *The Continental Free Trade Agreement in Africa: A Human Rights Perspective* (2017), [https://www.ohchr.org/Documents/Issues/Globalization/TheCFTA\\_A\\_HR\\_ImpactAssessment.pdf](https://www.ohchr.org/Documents/Issues/Globalization/TheCFTA_A_HR_ImpactAssessment.pdf).

sensitive trade policy may result in the reproduction of existing structural inequalities for women in African economies. Women remain one of the most vulnerable groups in Africa and they are subject to different trading rules across different regions. Multiple commitments and overlapping obligations which characterise regionalisms across Africa create additional burdens that constrain women's participation in both the formal and informal economies. To date, insufficient attention has been given to the unique place of African women in African economies. Furthermore, their significant role in unpaid work – as mothers and carers – is almost completely absent from official data. Remedying the 'data gap'<sup>196</sup> is key to formulating gender-sensitive responses to trade problems.

As a result of the complex interconnections between the social, political, cultural and economic spheres, it seems inappropriate to advocate for a 'one-size fits all' approach to women and trade at the continental level. Instead, what the preceding analysis has shown is that regional approaches to gender-sensitive trade policy can yield positive results in their specific context. We have identified innovations in gender-sensitive trade policies – like the Simplified Trade Regime and the Non-Tariff Barrier Reporting, Monitoring and Eliminating Mechanism - which are to be celebrated as examples of good practice for other RECs, the AfCFTA and beyond. However, the AfCFTA should not replace regional initiatives; instead, the continental approach should complement and facilitate regional approaches.

Inclusive trade policies, which should incorporate both legally binding commitments and 'soft law' instruments, at the pan-African level must build on the progressive steps taken by some of the RECS and follow innovations at the multilateral level. If the AfCFTA is to offer the promise of change for women, its transformative potential must be harnessed not only in the written legal text but in the implementations of harmonised policy reforms at the sub-regional and domestic levels

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196 INVISIBLE WOMEN: EXPOSING DATA BIAS IN A WORLD DESIGNED FOR MEN (Caroline Ciado Perez ed., 2019).