

Negotiating towards a tailor-made gender protocol under the AfCFTA:

Could integrating Africa's fragmented gender chapters be the key?

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Abstract

Recently, the understanding that enhanced intra-regional trade among African countries could be a powerful tool in accelerating economic growth, development and poverty reduction on the continent has led African leaders to place considerable importance on regional integration (Brenton *et al.*, 2013). However, tapping into the benefits of intra-African trade requires careful attention to inclusivity issues in ensuring both men and women benefit and participate equally in regional economic integration (Bussolo and De Hoyos, 2009). The decision by African heads of state to negotiate a separate Protocol on Women and Youth in Trade under the newly implemented African Continental Free Trade Area (AfCFTA) Agreement reaffirms the belief that improving women's access to opportunities and removing barriers to their participation in international economies contributes to economic development.

Evidence shows that Africa's regional economic communities continue to lead trade liberalization on the continent (UNECA *et al.*, 2019). As a result, in negotiating a gender protocol, the regional economic communities will play a crucial role in accelerating gender responsiveness (UNECA, 2021). Moreover, with most of these economic communities already including gender provisions in their treaties of establishment, it is helpful to assess how such pre-existing gender provisions could serve as a guide for a gender protocol that is suited to the interests and challenges of women on the continent under the AfCFTA.

Introduction

International trade affects men and women differently (Jansen *et al.*, 2012), but until recently, the differential impact of international trade policy on specific population groups has been underplayed (Gammage and Momodu, 2020). Studies on trade and poverty have, however, evidenced the importance of making a gendered analysis of international trade rules and policy a priority (Tran-Nguyen and Beviglia Zampetti, 2004). This underscores the need for well-targeted trade rules, policies and measures explicitly aimed at addressing the differential impact of trade on gender (Tran-Nguyen and Beviglia Zampetti, 2004). Moreover, addressing the gendered impact of trade is conducive to economic growth, since the attainment of gender equality in economic opportunities is estimated to augment world GDP by US\$ 28 trillion in ten years (Woetze *et al.*, 2015), thereby giving a significant role to trade policy to advance women's economic development through increased participation in international trade (Korinek *et al.*, 2021). Tackling the differential gender impact of trade law and policy

requires mainstreaming¹ gender concerns and perspectives into trade agreements, but the ability of such considerations to address the issues of gender constraints in trade is what makes the mainstreamed provisions gender-responsive² (Murray, 2019).

International trade on the African continent saw a momentous milestone with the implementation of the African Continental Free Trade Area (AfCFTA) in 2018 (UNECA, 2019; UNECA *et al.*, 2019; World Bank, 2020). The AfCFTA is a flagship project of Africa's developmental strategies (Gammage and Momodu, 2020), with aspiration six calling for "an Africa whose development is people-driven, relying on the potential of African people, especially women and youth and caring for children". In this regard, AU members, now parties to the AfCFTA Agreement, seek to promote and attain sustainable and inclusive socioeconomic development, gender equality and structural transformation.

At the 35th ordinary session of the AU Assembly in February 2022, African heads of states, recalling their commitment to broadening the inclusivity of the AfCFTA³ through interventions that support women and in pursuance of the Agreement's objectives enshrined in Article 3(e), decided on the need to negotiate a separate Protocol on Women and Youth in Trade (Bayat, 2022). Currently, aside the mention of gender equality in Article 3 as part of the Agreement's objectives, the only definite reference to women is in Article 27 of the Protocol on Trade in Services. As such, the proposed protocol will be integral in recognizing the specifics needed to support women in their different trade-related roles. More broadly, with the vast disparity among the regional economic communities (RECs) in terms of addressing the nexus between trade and gender, the protocol will likely serve as a platform for harmonizing frameworks aimed at progressing gender equality⁴ and women's economic empowerment (UNECA, 2021). Notably, a gender protocol for the continent will greatly benefit RECs that have made little to no progress in addressing the linkages between trade and gender (UNECA, 2021).

While the decision to negotiate a separate protocol on women deserves much commendation, African countries have diverse economic configurations and thus will be affected differently by the AfCFTA (Luke and MacLeod, 2019). More importantly, evidence on trade and gender inequalities on the continent shows that, aside the gendered impact of trade, the barriers women traders and entrepreneurs face though cross-cutting differ to some extent from one region of the continent to the other (Brodsky *et al.*, 2021). It is also important to note that the rich historical origins of the various RECs play a vital role in the extent to which gender features in their treaties (Gammage and Momodu, 2020).

Considering these differences in the various sub-regions, in negotiating a gender protocol under the AfCFTA Agreement, a "one size fits all" attempt at mainstreaming gender in the proposed protocol could be disastrous (ATPC, 2021; Gammage and Momodu, 2020). Thankfully, most of the sub-RECs include about 20 gender-related provisions directly in their treaties of establishment aimed at addressing diverse gender concerns (Laperle-Forget, 2021). These provisions thus offer a menu of gender-provisions and considerations for trade negotiators.

As stake-holder engagements and consultations for the AfCFTA Gender Protocol gather momentum, it is useful to take stock and assess the pre-existing gender chapters in the treaties establishing the various economic communities and their capacity to serve as a foundational tool and a guide for the AfCFTA Gender Protocol. Suffice it to say, however, that this is where this chapter makes its entry point: How should provisions in the protocol

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be shaped and/or framed to meet the peculiar needs, interests and challenges of women on the continent? Should gender chapters and provisions in the existing treaties establishing the RECs serve as a foundation to build the AfCFTA Gender Protocol? Although international free trade agreements (FTAs) like Canada–Chile, Canada–Israel and Chile–Uruguay include gender chapters for gender mainstreaming instead of separate protocols on gender, are there still valuable lessons to be learnt from these FTAs regarding gender mainstreaming? This chapter aims to answer this barrage of questions in detail.

Gender considerations in the legal frameworks of Africa’s regional economic communities

Trade promotes socioeconomic development in Africa (UNECA, 2021), but study after study in recent times has also shown the world that there is no developmental tool more effective than the empowerment of women (Porter, 2013). Therefore, women’s economic empowerment⁵ has become a buzzword (Rowlands, 1995) that requires multiple interventions, including trade policy (Bahri, 2021). In light of this, African leaders have sought to achieve the best of both worlds by mainstreaming gender in their regional economic integration endeavours.

RECs have played a vital role in the continent’s developmental agenda since the post-colonial era with the notion of stimulating economic growth within African regional communities, encouraging intra-African trading patterns that relieve path-dependencies on former colonial partners and serve as stepping stones towards pan-African economic integration (Gammage and Momodu, 2020). In pursuit of economic growth, gender equality and non-discrimination of women have featured in various developmental strategies (Lagos Plan of Action, 1983⁶; Abuja Treaty 1991⁷, Agenda 2063⁸) and the legal frameworks establishing most of the RECs. Commitments in these instruments are soft law provisions and, therefore, not legally binding, but they have contributed to setting the tone for gender mainstreaming in the RECs (Kuhlmann, 2021).

The Arab Maghreb Union (AMU), the Common Market for Eastern and Southern Africa (COMESA), the Community of Sahel-Saharan States (CEN-SAD), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority on Development (IGAD) and the Southern African Development Community (SADC) are the eight RECs recognized by the African Union (Eerdewijk *et al.*, 2018). These eight RECs form the African Economic Community’s pillars and work on regional integration (Yusuf and Ouguergouz, 2012). The RECs also play a key role in coordinating interests in development and governance, peace and security and gender.

As part of their mandate, most of the RECs have incorporated gender-sensitive provisions in their treaties of establishment as a way of addressing issues of gender inequalities (UNECA, 2021). For instance, within the legal frameworks establishing RECs like COMESA, the EAC, ECOWAS and the SADC, gender provisions seek to promote gender equality and women's economic empowerment (COMESA Treaty, Article 154; EAC Treaty, Article 121). In addition, while provisions in the gender chapters of these RECs fall within the ambit of dispute settlement, there are no remedial mechanisms in case of a breach. On the other hand, the treaty establishing the AMU, an agreement in the North African region, has not paid explicit attention to gender equality or women's economic empowerment, leaving members to deal with the topic mainly at the domestic level in line with their international and national commitments (UNECA, 2021). The CEN-SAD Treaty also does not have in place structures for mainstreaming gender in both its activities and policies (Laperle-Forget, 2021). Similarly, the treaty establishing the IGAD does not have specific provisions on women's and girls' rights or gender issues. The subsequent analysis of gender chapters in the legal frameworks of the RECs in this section will therefore not include an analysis of these three RECs.

The Common Market for Eastern and Southern Africa (COMESA) (1994)⁹

COMESA has among its objectives the attainment of sustainable growth and development of its members through the promotion of "balanced and harmonious development of its production and marketing structures" (COMESA Treaty, Article 3). To mainstream gender, members to the Treaty have committed to various provisions on gender equality and women's economic development (Bahri, 2021). In this regard, gender mainstreaming makes an entry point in chapter 24 of the Treaty headlined "Women in Development and Business" with two key provisions.

First is the affirmation that "women make a significant contribution towards the process of socioeconomic 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" (COMESA Treaty, Article 154). In this regard, parties pledge through "legislation and other measures to increase women's participation in decision-making, eliminate regulation and customs that discriminate against women entrepreneurs and inhibit their access to resources, promote their education and awareness and adopt technology that supports the professional progress of women workers" (COMESA Treaty, Article 154(a)-(e)).

This recognition is particularly crucial for women's economic empowerment and overall development, since research shows women dominate in the informal sectors of trade (Brenton *et al.*, 2013). Furthermore, the pledge by members through legislation and other measures to

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eliminate regulations and customs that discriminate against women guarantees equal rights for both men and women in the exercise of control over assets such as land and in their ability to access services such as education and credit (Ndumbe, 2013). The absence of discriminatory laws and customs gives women control over economic decisions that affect their lives, leading to their progress, empowerment and economic development (World Bank, 2015)¹⁰.

The second key provision in the COMESA Treaty that mainstreams gender in the Treaty addresses women's role in business (COMESA Treaty, Article 155). Under this provision, parties again recognize women's importance as a vital economic link within the chain of agriculture, industry, and trade (COMESA Treaty, Article 155). With this realization, parties "commit themselves to create enabling environment for the effective participation of women in common market trade and development activities, eliminate laws and regulations that hinder women's access to credit while recognizing and supporting the Federation of National Association of Women in Business established to promote the effective participation of women in the common market trade and development activities". This gives women traders and entrepreneurs a seat at the decision-making table. In addition, it is worth noting that the COMESA gender chapter represents a best practice example for gender mainstreaming in trade agreements by including the gender chapter in the ambit of the Treaty's dispute settlement mechanism (Bahri, 2021).

The commitment of parties to create an enabling environment for the effective participation of women in trade and development activities was affirmed through the development and adoption of the Gender Policy for the region in 2002, which was replaced by the Revised Gender Policy and the Gender Mainstreaming Strategic Plan in 2016 (Eerdewijk *et al.*, 2018). The objective of the Gender Policy is to create an enabling environment to mainstream gender perspectives into all policies, structures, systems, programmes and activities of all members towards gender equality, women's empowerment and social development. This allows for a meaningful approach to gender mainstreaming in the region.

The East African Community (EAC) (created 1977, re-established 1999)¹¹

The EAC Treaty recognizes gender mainstreaming (EAC Treaty, Article 5(3)(e)) and gender equality (EAC Treaty, Article 6(d)) as fundamental principles of the community that explicitly acknowledges the role of women in the socioeconomic and business development of the region.

Chapter 22 of the Treaty is dedicated to "enhancing the role of women in socio-economic development". It calls for members to adopt measures to maximize the contribution of women to promote socioeconomic transformation and sustainable growth. More specifically, the Treaty commits members to promote women's empowerment and effective integration and participation of women at all levels of socioeconomic development, especially in decision-making, abolish legislation and discourage customs that discriminate against women (EAC Treaty, Article 121(a)-(e)). Constraints in decision-making hinder women's ability to engage in productive economic activities. As such, the commitment by members to integrate women in decision-making will play a critical role in improving the chances of women in the EAC region to benefit from trade liberalization and regional integration policies (UNCTAD, 2015).

Members' commitment to discourage customs that discriminate against women (EAC Treaty, Article 121(b)) is a step in the right direction, since research has proven gender-based customs and traditions inhibit women's access to economic resources that are crucial for their empowerment and economic development at large (UNCTAD, 2017a). For instance, through customs and traditions that limit women's ability to own land, it has been shown that only a lower share of women tend to be landowners in the EAC region (UNCTAD, 2018), a phenomenon that has dire consequences on women's economic empowerment and development.

In line with promoting equality for men and women, it is noteworthy that there have been commendable efforts at the institutional level to reduce gender inequality in the region through the membership of all parties to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) even though for the time being, these efforts have proved insufficient in dealing with gender inequalities in the region (UNCTAD, 2017a).

Again, on the role of women in business, the Treaty, having recognized the importance of women as a vital economic link between agriculture, industry and trade, entreats parties to undertake to increase the participation of women in business at the policy formulation and implementation levels while promoting special programmes for women in small, medium and large-scale enterprises (EAC Treaty, Article 122(a)-(b)). Agriculture is still the dominant employment sector in the EAC region, particularly for women. For example, recent figures available from a World Bank study in an UNCTAD report shows that 96 per cent of women in Burundi, 76 per cent in Kenya, 84 per cent in Rwanda, 71 per cent in Tanzania and 77 per cent in Uganda are still employed in agriculture (UNCTAD, 2017a). Judging from these statistics, increased participation through the pursuit of policies favourable to women in this sector will undeniably promote women's effective engagement and involvement in the agricultural sector.

The Economic Community of Central Africa States (ECCAS) (revised 2019)¹²

Members' first attempt at gender mainstreaming in the region is in Chapter 2 of the Revised Treaty. It provides that "the appointment of staff of the commission is to take into account, in addition to the requirements of moral integrity and competence, an equitable distribution of posts among nationals of all member states and a balance between men and women" (ECCAS Revised Treaty, Article 21(8)).¹³ Although this provision seeks to achieve gender equality in the appointment of Commission staff, it limits the fundamental issue of gender equality and women's involvement in decision-making to the Commission's work. As a result, it does not seek broader engagement of women as stakeholders in the community's activities. This lapse, however, seems to be covered by the Treaty's provision on social affairs and gender, where the Treaty mandates members to promote equality between men and women in all public and private sectors while ensuring the implementation of the ECCAS gender policy in regional integration policies, strategies and programmes (ECCAS Revised Treaty, Article 79(1-3)).

Another attempt at gender mainstreaming is again seen in Chapter 18, where members "undertake to formulate, coordinate, and establish appropriate policies and mechanisms for the enhancement of economic, social, and cultural conditions of women". In so doing, members are to take all measures necessary to identify and assess constraints that inhibit women from maximizing their contribution to regional developments and efforts (ECCAS Revised Treaty, Article 78(1-2)(a)). The Treaty further entreats members to provide a framework within which

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these constraints will be addressed and for the incorporation of women’s concerns and needs into the normal operations of society (ECCAS Revised Treaty, Article 78(2)(b)). Women’s effective participation in trade liberalization and regional integration has been closely linked to removing barriers they encounter, such as constraints in access to resources and market opportunities, land ownership and educational attainment, among many others (UNCTAD, 2014). Therefore, efforts at identifying constraints that may be more peculiar to women within the community can help policymakers target trade policies specific to the identified constraints, thereby helping to increase women’s benefits from regional economic integration.

At the community level, ECCAS members are “to stimulate dialogue among themselves on the kinds of projects and programmes aimed at integrating women into the development process, establish mechanisms for cooperation with bilateral, multilateral, and non-governmental organizations, promote and develop mechanisms that encourage the exchange of experiences and information between member states” (ECCAS Revised Treaty, Article 78(3)(a)-(c)). Members cooperation with bilateral, multilateral and non-governmental organizations set the stage for more profound work on gender to be done at the sub-regional and continental level under trade agreements (Kuhlmann, 2021).

The Economic Community of West African States (ECOWAS) (1993)¹⁴

The Treaty Establishing ECOWAS was revised in 1993 with the overarching objective of “promoting cooperation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standard of its people and to maintain and enhance economic stability, foster relations among member states and contribute to the progress and development of the African continent” (ECOWAS Revised Treaty, Article 3(1)). In furtherance of this objective, ECOWAS is to ensure, among other things, the harmonization and coordination of national policies and the integration of programmes, projects and activities, particularly in energy, trade and economic reform policies, an enabling legal environment and harmonized standards and measures (ECOWAS Revised Treaty, Article 3(2)(a)-(o)).

ECOWAS mainstreams gender as part of its objectives through “the encouragement and strengthening of relations and the promotion of the flow of information particularly among rural populations, women and youth organizations and socioprofessional organizations such as the associations of the media, businessmen and women, workers, and trade unions” (ECOWAS Revised Treaty, Article 3(2)(i)). Access to trade-related information is critical for business success, particularly for women entrepreneurs and women in rural communities, yet many women lack access to key information opportunities (UNECA/FES, 2017). More importantly, information is essential if trade is to be used as a tool for economic empowerment and for increasing women’s participation in the global market (WTO, 2017). With information and access to information being so crucial in trade, ECOWAS’s attempt to encourage the flow of trade information among women and youth organizations and women businesses and workers sets a precondition for empowering women-owned businesses. This also helps to

maintain healthy and profitable cross-border operations through informed decision-making, as access to information is critical for poorer women engaged in cross-border trade (Acharya *et al.*, 2019). Research has further shown that lack of clarity on trade information has resulted in women engaged particularly in informal cross-border being extorted and harassed at the borders by border officials and other unscrupulous persons pretending to be border officials (WTO, 2015). In support of this, ECOWAS members have also expressed their commitment to promote women's organizations and professional associations to ensure mass involvement in the activities of ECOWAS seen as an integral part of social affairs and social development in the region (ECOWAS Revised Treaty, Article 61(c)).

The stand-alone provision on women and development committing members to formulate, harmonize, coordinate and establish appropriate policies and mechanisms for the enhancement of the economic, social and cultural conditions of women (ECOWAS Revised Treaty, Article 63) is of great significance. It is trite that although trade policies are themselves not *de jure* discriminatory, their impact on women and men differ significantly (Korinek *et al.*, 2021). In light of this, closing gender gaps and advancing women's economic empowerment requires policy action in many areas, including increasing women's participation in international trade (Korinek *et al.*, 2021). Therefore, ECOWAS members committing to establish appropriate policies and mechanisms for the enhancement of women is a key step in closing gender gaps and advancing women's participation in trade.

In support of the above, members are to "take all measures necessary for identifying and assessing all constraints that inhibit women from maximizing their contribution to regional development efforts and to 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" (ECOWAS Revised Treaty, Article 63(2)). Gender inequalities and constraints severely limit women's activities and ability to take advantage of increased trade openness relative to men. Again, sociocultural gender norms and constraints, including limited mobility and reduced access to training, hinders women's ability to benefit from employment and other economic opportunities (UNCTAD, 2017b). This commitment, therefore, clearly demonstrates the willingness of members to incorporate gender perspectives into ECOWAS's development and societal operations (Bahri, 2021). Quite unfortunately, the Treaty's mandate is constrained, absent explicit provisions for monitoring mechanisms ensuring members take the necessary steps to implement their commitments on gender mainstreaming.

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The Southern African Development Community (SADC) (1992)¹⁵

The SADC Treaty provides a basis for women's and girls' rights as part of the SADC's economic development by listing gender mainstreaming in the process of community building as one of its major objectives (SADC Treaty, Article 5(1)(k)). Including gender as part of the SADC's objective is a critical step which places gender issues firmly on the region's agenda and ensures that commitments to equality and women's economic empowerment are effectively implemented at the national and regional levels.

Furthermore, the Treaty outrightly prohibits discrimination based on sex or gender (SADC Treaty, Article 6(2)). More specifically, the Treaty provides that "SADC and member states shall not discriminate against any person on the grounds of gender, religion, political views, race, ethnic origin, culture, ill health, disability, or such other grounds as may be determined by the summit". The explicit and outright prohibition of discrimination on the grounds of gender in this provision serves as a guide to members on what constitutes appropriate state practice on gender-related issues. This provision is also a best practice example that mandates states to ensure that women's rights are respected, eliminating inequalities and practices that negatively affect women's rights and economic development (UNECA/FES, 2017). It is worth reiterating that the existence of gender-based discrimination fuels unequal access to economic resources, credits and other economic opportunities necessitating the urgent need to end all forms of discrimination against women if economic development and regional integration are to be achieved, since gender equality has been shown to lead to faster economic growth (UNECA/FES, 2017).

The SADC Treaty also calls for the establishment of sectoral and cluster ministerial committees with the responsibility of overseeing activity in the core areas of integration which includes gender and social affairs (SADC Treaty, Article 12(2)(a)(iv)).

In furtherance of the SADC's objectives, members put in place a legally binding instrument on gender mainstreaming by adopting the SADC Protocol on Gender and Development in 2008. In the Protocol's section on economic policies and decision-making, SADC members undertake to "ensure equal participation of women and men in policy formulation and implementation of economic policies" (SADC Protocol on Gender and Development, Article 15). Ensuring both men and women equally participate in policy formulation ensures women's concerns and perspectives are accounted for in policies.

On economic empowerment, SADC members agree to "review their national trade and entrepreneurship policies to make them gender responsive by introducing measures to ensure that women benefit equally from economic opportunities, including those created through public procurement processes in line with affirmative action provisions in article 5 of the protocol" (SADC Protocol on Gender and Development, Article 17(2)-(3)). Complementary procurement measures serve as an entry point by encouraging participation of women-led and women-owned businesses in trade, their access to public contracts, and their ability to access public tenders (UN Women, 2021).

The Protocol further contains provisions on access to property and resources by mandating members to "review all policies and laws that determine access to, control of, and benefit from, productive resources by women, to end all discrimination against women and girls concerning

water and property rights such as land, ensure that women have equal access and rights to credit, capital, mortgages, security and training as men and ensure that women and men have access to modern, appropriate and affordable technology and support services” (SADC Protocol on Gender and Development, Article 18(1)(a)-(c)). Research shows that women-owned and women-led businesses are often concentrated in sectors with low entry barriers and limited growth potential due to gender-asset gaps, unequal access to credit facilities and collateral (UN Women, 2021). In this regard, the Protocol’s provisions ensuring men and women have equal access to modern technology, assets, credits and capital will go a long way in addressing some of the most critical constraints facing women’s capacity to participate in economic development and trade effectively.

Realizing promise of the AfCFTA for women through a tailor-made gender protocol

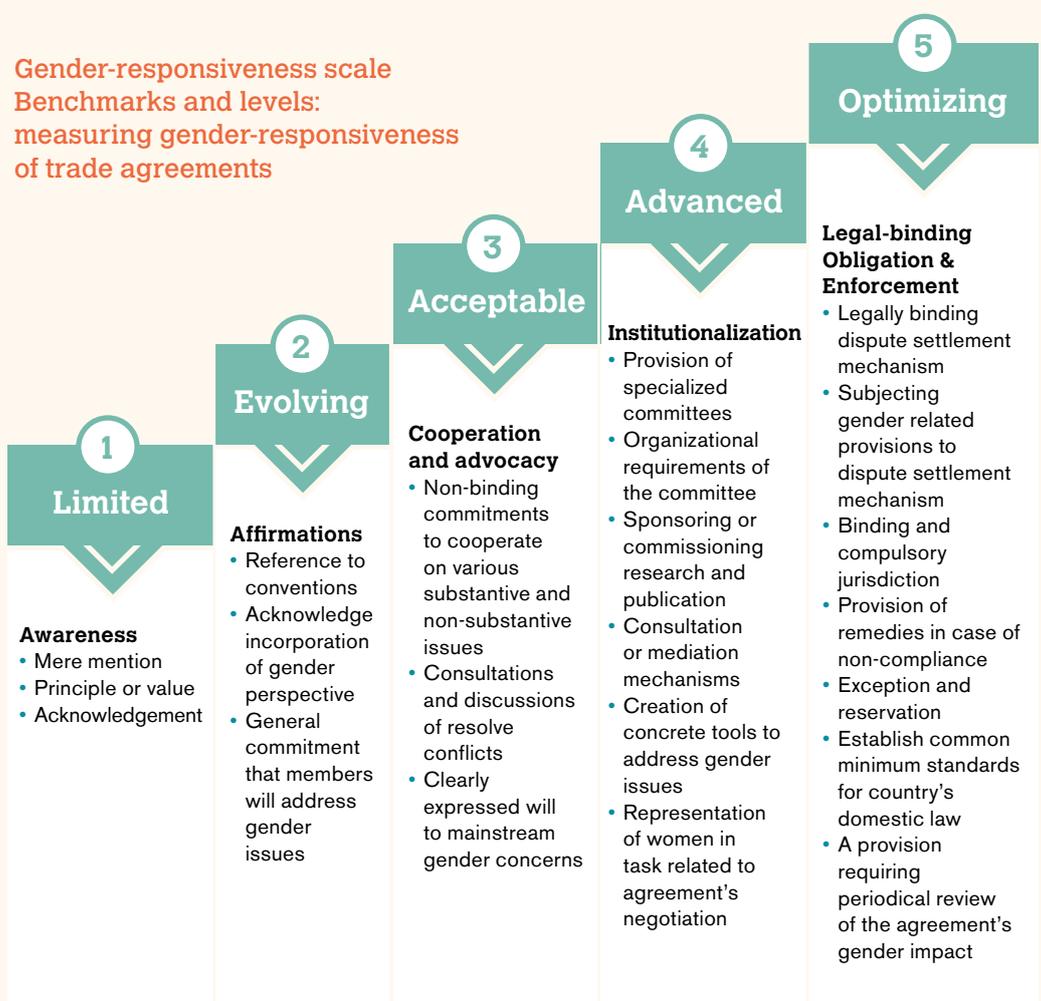
If African women are to grasp the full benefit of the proposed gender protocol, understanding the areas that affect gender equality on the continent is crucial. Determining areas of gender inequalities has generally been addressed through indicators.¹⁶ A gender-responsive or gender-sensitive indicator measures gender-related changes over time and can be either quantitative or qualitative (OECD, 2009). It is also an indicator to evaluate how sensitive, committed or informed the provisions of a trade agreement are to issues relating to gender (Bahri, 2019).

The use of well-defined and articulated indicators improves public understanding of the constraints and policy trade-offs and helps create broader consensus on social priorities (United Nations, 2013). Considering this, scholars like Bahri (2019), and institutions such as the World Bank and the International Trade Centre (ITC, 2020), have all created indicators which seek to measure the main barriers to gender equality and to demonstrate whether any changes have occurred. While recognizing the impracticality of formulating an ideal level of gender considerations for FTAs, Bahri (2019) takes note of the importance of incorporating gender perspectives tailored to the economic, political and cultural context of the countries involved using a maturity framework (Bahri, 2019). With research on the continent evidencing the impact of institutional, legal, cultural and religious settings on gender, this gender-responsive scale is ideal for analysing the level of sensitivity of gender chapters and provisions in the treaties establishing the RECs (Gamage and Momodu, 2020). Also, the benchmark and levels propounded in this framework allow for comparison across provisions that go beyond their structure and evaluate their impact (Kuhlmann, 2021).

Effectiveness of pre-existing gender chapters as a foundation for the protocol

By adopting the Bahri (2019) gender-responsiveness maturity framework, this section analyses the level of sensitivity and responsiveness of the gender chapters discussed in the previous sections to assess their usefulness as a foundational tool for the proposed gender protocol. The section will also discuss how provisions in the proposed protocol should be shaped or framed to meet the interests and needs of women on the continent, the need for coherence with existing AfCFTA protocols under phase I, such as the protocol on trade in Goods, Services and Dispute settlement and the Protocol on Intellectual Property, Competition Policy and Digital Trade under phase II.

Figure 1: Gender-responsiveness Maturity Framework



Source: Bahri (2019).

The gender-responsive scale adopted for analysis in this section seeks to measure the gender-responsiveness of trade agreements to help policymakers and negotiators measure the gender-responsiveness of trade agreements, identify areas where such agreements need critical improvement and receive recommendations on how to make improvements. This is done by assessing the gender chapters under consideration through five benchmarks: awareness; affirmation; cooperation; advocacy; institutionalization; and finally legal bindingness and enforcement (see Figure 1). Progression on the scale starts from the first benchmark and optimizes at the fifth and final benchmark.

Applying the first benchmark, all five gender chapters discussed previously satisfy this benchmark requirement. Examples of these benchmark requirements are found in provisions in Articles 154 and 155 of the COMESA Treaty, Articles 121 and 122 of the EAC Treaty, Article 3 of the ECOWAS Treaty, Article 78 of the ECCAS Treaty and, Article 5(1)(k) of the SADC Treaty.

At the next benchmark level, COMESA members' acknowledgement of women's significant contribution towards socioeconomic transformation and sustainable growth and their commitment to promote effective integration and participation of women at all levels of development, especially at the decision-making levels, satisfies this requirement (COMESA Treaty, Article 154(a)). Similarly, EAC partner commitments to eliminate laws, regulations and practices that hinder women's access to financial assistance, including credit, also satisfies this benchmark requirement. In addition, Article 78(2) of the ECCAS Revised Treaty, Chapter 24 of the COMESA Treaty, Article 12 of the SADC Treaty and Article 63 of the ECOWAS Revised Treaty also meet the benchmark criteria on this level.

At the third benchmark, only the ECOWAS Revised Treaty in Chapter 19 and the ECCAS Revised Treaty (Article 77(2)(c)) contain provisions that met this criterion. Chapter 19 of the ECOWAS Revised Treaty, for instance, provides that "the community with a view to mobilizing the various actors in socio-economic life for the integration of the region, shall cooperate with socio-economic organizations and associations in particular producers, transport operators, women, artisans and other professional organizations and associations to ensure their involvement in the integration process of the region".

Gender chapters at the institutionalization level are expected to contain provisions that establish institutions and procedures that provide the implementation architecture for gender-specific clauses. Such provisions could be in the form of the establishment of committees to oversee and monitor the implementation of gender-focused provisions and gender-impact of trade, establishment of consultation or mediation mechanisms that can facilitate consultations to resolve conflicts arising from gender-related concerns and identification of procedures for carrying out an *ex-ante* or *ex-post* gender-focused impact assessment. Gender chapters containing these elements and elements from the previous benchmarks attain advanced levels of gender responsiveness. Article 155(3) of the COMESA Treaty and Article 12(2)(a)(iv) of the SADC Treaty are the only chapters that meet the threshold requirements at this level. Both treaties make provisions for the establishment of committees on gender. For instance, Article 12(2)(a)(iv) of the SADC mandates the sectoral committee to oversee activities on core areas of integration, including gender, even though it falls short of prescribing financial arrangement requirements and requirements for the functioning of this committee.

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Gender chapters containing legally binding and enforceable obligations have an optimizing level of gender responsiveness at the fifth and final benchmark. These include provisions subjecting gender-related issues to compulsory dispute settlement and provision of remedies in the absence of non-compliance with decisions of the dispute settlement body. Although all the treaties under consideration include provisions in gender chapters to the agreements' dispute settlement mechanisms, none contains remedies for breach of obligations in the event of non-compliance, thus partially satisfying the threshold at this level. Despite the adoption of binding provisions, the availability of effective remedial provisions is still lacking and represents a matter of concern. Specifically, Article 23(1) of the COMESA Treaty, Article 27 of the EAC Treaty, Article 98 of the ECCAS Revised Treaty, Article 76 of the ECOWAS Revised Treaty and Article 98 of the SADC Treaty all subject the provisions in the gender chapters to dispute settlement and nothing further.

From the above analysis, the treaties establishing the various RECs present an opportunity for trade negotiators to build the continental Gender Protocol. There is, however, a need for adjustments and improvements to the provisions in the treaties, particularly in the monitoring, evaluation and enforceability of commitments and obligations if the Protocol is to attain the highest level of gender responsiveness.

Shaping/framing the Protocol's provisions

Gender inequalities on the continent in social, economic and cultural areas remain highly prominent even though African countries have been pioneers in mainstreaming gender in their trade agreements (Laperle-Forget, 2022). These inequalities significantly impact women's role, rights and contribution to economic development. Therefore, if the AfCFTA Gender Protocol is to meet its objective of addressing the needs, interests and challenges of women traders and entrepreneurs on the continent, it will have to contain considerations touching and addressing these areas of inequalities.

First, African women can achieve their full economic potential where an enabling legal, regulatory and institutional framework exists. This calls for enacting, reforming and strengthening laws that address harmful sociocultural norms, ensure gender equality at all levels and in all areas and prohibit all forms of discrimination against women. Such considerations in the Protocol should call for the prohibition of all gender-based discrimination laws. AfCFTA parties, by prohibiting legal discrimination based on gender, can achieve gender equity under the law, which will help mitigate gendered differences in trade impact and grow export markets (Brodsky *et al.*, 2021).

During the 77th session of the United Nations General Assembly on 28 July 2022, the Secretary-General reported that discriminatory laws, policies and social norms persisted in impeding women's full and equal participation in the economy through the existence of customary laws and practices that threaten the physical integrity of women and girls and their access to education, justice, productive and financial resources, and paid employment, among others.¹⁷ These constraints inhibit women's ability to exercise human rights and participate in the economy (OECD, 2019b) and thus affirming the need to eliminate laws, social norms and practices in all areas and at all levels that discriminate against women. At the continental level, Article 154 of the COMESA Treaty and Article 6(2) of the SADC Treaty present a foundation to shape such considerations.

Second, the AfCFTA Gender Protocol should be framed to contain considerations on informal cross-border trade. Research suggests that informal cross-border trade accounts for about 40 per cent of trade among COMESA and SADC members (Nshimbi and Moyo, 2017). With the AfCFTA's likelihood of strengthening intraregional cooperation on trade-related matters, there is an urgent need to ensure that trade laws and policies take account of the needs of informal cross-border traders. More importantly, women are estimated to account for about 70 per cent of informal cross-border traders in Africa (Luke and MacLeod, 2019). As such, the Protocol must contain provisions addressing barriers women informal cross-border traders face on the continent.

Third, trade in services is a primary area where women are employed and dominate, surpassing even the agricultural sector (ILO, 2016). This applies to both high-skilled (recreational, insurance, real estate, financial) and small-scale, informal services (hairdressing, house cleaning, washing), thus calling for considerations to be made on cross-border trade in services addressing gender barriers to trade in services on the continent. Such considerations could be in the form of provisions acknowledging the presence of barriers disproportionately affecting women and committing parties to mitigate them. It could also call for parties' commitment to follow through on due diligence (Brodsky *et al.*, 2021).

Fourth, there are no specific provisions addressing labour and social protection in the current AfCFTA framework (FES, 2017). While this omission is regrettable, it allows negotiators to address this shortcoming in the proposed Gender Protocol by including provisions that commit parties to women's labour and social protection rights. Moreover, including explicit labour provisions within the framework of the Gender Protocol would also provide the opportunity for parties to address gender disparities by clearly prohibiting discrimination in the workplace based on gender or sex (Brodsky *et al.*, 2021). An ideal provision in this regard will be a clause containing minimum legal standards obligating parties to prohibit gender-based discrimination in the workplace.

Finally, without clause subjecting provisions in the Protocol to an effective and all-encompassing dispute resolution mechanism that bolsters the accountability of parties to act in accordance with provisions and commitments in the Protocol, none of the above considerations will attain the required level of efficiency and effectiveness (Sophie Cohen, 2021). There is therefore the need to frame a provision that subjects the commitments in the Protocol to the ambit of the Protocol on Dispute Settlement to ensure the enforcement of obligations and commitments while bolstering the Gender Protocol's credibility and legitimacy.

“ With the AfCFTA's likelihood of strengthening intraregional cooperation on trade-related matters, there is an urgent need to ensure that trade laws and policies take account of the needs of informal cross-border traders.

Achieving coherence with existing AfCFTA protocols and agreements

Cross-cutting issues impact women's participation in trade. Some of these issues may already have been negotiated under phase I of AfCFTA negotiations, such as trade in goods and services, as well as areas yet to be negotiated, such as intellectual property rights and digital trade under phase II. A gender protocol isolated from other sectors of the economy addressed in these other protocols will not yield the expected results. Therefore, if the proposed Gender Protocol is to be truly effective and efficient, there is a need to mainstream gender across all protocols and their associated annexes and appendices that form an integral part of the AfCFTA Agreement (Bayat, 2022).

To achieve coherence, provisions in the Gender Protocol, just like the Protocols on Trade in Goods and Trade in Services, should be included within the scope of the AfCFTA Protocol on Dispute Settlement. This will ensure that member parties have recourse to dispute resolution for all matters under the AfCFTA Agreement, ensuring uniformity to commitments under the various protocols.

Again, under phase I, for instance, agreements on trade facilitation, market access, safeguards and subsidies, just to mention a few, will all impact women entrepreneurs and traders. This will require a gender impact assessment of key women-dominated sectors in merchandised trade. In this regard, there is the need to pay attention to the differential impact of the AfCFTA on women in their multiple roles as entrepreneurs, consumers and traders, among others.

Similarly, gender mainstreaming in phase II should extend to the drafting of phase II protocols which will, in turn, inform the design of explicit gender-related provisions that serve as entry points for promoting women's economic empowerment objectives under protocols like competition policy, intellectual property rights and digital trade (Bayat, 2022). In this regard, expediting negotiations on the Gender Protocol, so it occurs concurrently with ongoing negotiations in these areas, would promote a coordinated and cooperative approach to developing the legal framework for women and youth in trade.

Looking to other international free trade agreements for lessons

The gender chapters in the Canada–Chile, Canada–Israel and Chile–Uruguay FTAs, although not gender protocols in themselves, have been described as containing the most transformative and comprehensive provisions in the world to date (Monteiro, 2018). Identifying inherent weaknesses in these chapters will thus be crucial to African trade negotiators in their negotiations for a continental gender protocol.

First, although all three gender chapters contain provisions on monitoring, none of the chapters includes clear guidelines on how the monitoring is to be carried out or the standard for assessment. Worst still, none of the provisions on monitoring includes specific indicators for tracking, monitoring and evaluating the set objectives. For instance, Article 14.1 of the Chile–Uruguay FTA provides that “each party reserves the right to establish, modify or monitor compliance with its gender standards and policies in accordance with its priorities”. Establishing a gender committee has become a decorative centerpiece in all three FTAs. Yet, there is no articulated goal to assess, making these committees nothing more than a voice to broadcast gender-related conferences and workshops (Sophie Cohen, 2021).

Secondly, the Canada–Israel FTA is the only gender chapter among the three with a binding dispute resolution mechanism. This suggests that the gender chapters in the remaining two FTAs are non-binding and merely symbolic. This implies further that, in case of breach of any of the provisions in the chapters, the aggrieved party cannot seek enforcement through a binding and compulsory dispute settlement mechanism.

Third and related to the immediately preceding paragraph, even the celebrated dispute resolution clause in the Canada–Israel FTA does not allow for the imposition of sanctions upon breach. What Article 19 of the FTA does is to defer the right of compensation to the parties to decide. Therefore, to confer legitimacy and strengthen the AfCFTA Gender Protocol, policymakers and trade negotiators will have to consider not just subjecting the provisions to a binding and compulsory dispute settlement mechanism but confer on it the ability to issue sanctions.

One way of doing this will be to subject provisions in the Gender Protocol to the AfCFTA Dispute Settlement Protocol or create a specialized mechanism for enforcing gender commitments under the protocol. Although this may seem an overstretch and overly ambitious, it is the only way to give muscle and teeth to the proposed Gender Protocol. Admittedly, RECs such as the EAC and the SADC are further ahead in placing women and gender at the heart of their trade and developmental agenda and as such putting in place specialized enforcement mechanisms may not be as challenging compared with RECs like the AMU, the CEN-SAD and the IGAD, which have made little to no progress on gender. In this regard, the AfCFTA Secretariat could take on a central role by providing support to the efforts of RECs and parties in advancing gender in their trade and developmental agenda (UNECA, 2021).

Conclusion

This chapter has demonstrated that to promote gender responsiveness under the AfCFTA Agreement, opportunities exist within the legal frameworks of the RECs to provide foundational support for a gender protocol. However, as shown, the treaties establishing the RECs lack some basic requirements needed to be truly responsive to the needs of African women traders and entrepreneurs.

To curb these shortcomings, there is the need for trade negotiators to take lessons of best practice examples from FTAs such as the Canada–Israel to include provisions such as binding dispute settlement mechanisms and monitoring and evaluation of set objectives and commitments.

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Endnotes

1. According to the United Nations Economic and Social Council (ECOSOC), building upon the Platform for Action adopted at the 1995 United Nations Fourth World Conference on Women, in Beijing, China, gender mainstreaming is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in any area and at all levels. It is a strategy for making the concerns and experiences of women as well as of men an integral part of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres, so that women and men benefit equally, and inequality is not perpetuated (see <https://www.ilo.org/public/english/bureau/gender/newsite2002/about/defin.htm>).
2. As for the meaning of the notion of “gender-responsiveness” or “gender sensitivity”, our paper adopts the definition adopted by Bahri (2019). Bahri (2019) defines the term as an indicator which evaluates how sensitive, informed, or committed the provisions of a trade agreement are to issues relating to gender.
3. As of October 2022, 44 African countries had ratified the AfCFTA Agreement and deposited their instruments of ratification (see <https://au-afcfta.org>).
4. According to UN Women, gender equality refers to all society members’ equal rights, opportunities and responsibilities regardless of their sex (see <https://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm>).
5. UNFPA (2008) defines women’s empowerment as the process of correcting inequality in a society that rests on systemic imbalances in power by gender and serves that hold women and girls in subordinate positions in all spheres of their lives.
6. Article 296 of the Lagos Plan of Action: “The importance of giving special attention to women in the analysis of the reported situation and to measures to be taken in each of these sectors (industry, agriculture and trade, etc.), which have been previously considered, is acknowledged. The steps to be taken to solve the problems of African women should not be marginal and separate from the question of overall development.”
7. Article 75(2): “Member states agree to formulate, harmonize, 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. To this end, member states shall take all measures necessary to ensure greater integration of women in development activities within the community.”
8. Agenda 2063, Aspiration 6: An Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children (see https://au.int/sites/default/files/documents/36204-doc-agenda2063_popular_version_en.pdf).
9. COMESA members include Burundi, Comoros, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Uganda, Zambia and Zimbabwe.
10. World Bank research on women, business and the law found that, 90 per cent of economies measured in the research had at least one law impeding women’s economic opportunities (World Bank, 2015).
11. EAC members include Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda.
12. ECCAS members include Angola, Burundi, Cameroon, Central African Republic, Chad, Congo, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Rwanda, and Sao Tomé and Príncipe.
13. Translation of provisions in the ECCAS Revised Treaty from Laperle-Forget (2022).
14. ECOWAS members include Benin, Burkina Faso, Cabo Verde, Côte d’Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.
15. SADC members include: Angola, Botswana, Comoros, Democratic Republic of the Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe.
16. An indicator is a pointer. It can be a measurement, a number, a fact, an opinion or a perception that points at a specific condition or situation, and measures changes in that condition or situation over time. In other words, indicators provide a close look at the results of initiatives and actions. For this reason, they are front-line instruments in monitoring and evaluating development work (see https://eugender.itcilo.org/toolkit/online/story_content/external_files/TA_Edu_CIDA.pdf).
17. *Women in Development: Report of the Secretary-General*, UN document A/77/243, 28 July 2022.