

# Interrogating inclusion under the African Continental Free Trade Area

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**ABSTRACT:** Contemporary discourse concerning international trade has highlighted the distributional consequences of trade liberalisation. The African Continental Free Trade Area (AfCFTA), although new, has been subjected to a distributional analysis in the emerging literature on it and is expected to provide several economic opportunities for different actors on the continent subject to proper implementation and full participation. Debates surrounding whether or not the structure of AfCFTA is inclusive of different actors on the continent have featured in this discourse. The overarching goal of this article is to explore the discourse on inclusion and inclusive trade under the AfCFTA regime. The article does this by examining the various strands of literature on AfCFTA, the arguments foregrounded in this literature and the different conceptualisations of differentiation and inclusion. The article thereafter moves beyond this discourse, challenges the background ideas underlying such conceptualisations and presents an alternative lens that emphasises the heterogeneity of the political economies of African nations, thus complexifying the question of inclusion.

## TITRE ET RÉSUMÉ EN FRANÇAIS:

### Questionnement du principe d'inclusion dans le cadre de la Zone de libre-échange continentale africaine

**RÉSUMÉ:** La doctrine dominante sur les questions relatives au commerce international a mis en évidence les conséquences distributives de la libéralisation du commerce. La Zone de libre-échange continentale africaine (ZLECAf), bien que récente, a déjà fait l'objet de questionnement dans la doctrine. La ZLECAf devrait offrir plusieurs opportunités économiques aux différents acteurs du continent, sous réserve d'une mise en œuvre adéquate et d'une participation pleine et entière. Les débats autour de la question de savoir si la structure de la ZLECAf inclut ou non les différents acteurs du continent ont fait l'objet des débats doctrinaux. Cette contribution vise à explorer le discours sur l'inclusion et le commerce inclusif dans le cadre du régime de la ZLECAf. Elle examine les différents courants de la littérature sur la ZLECAf, les arguments mis en avant dans cette littérature et les différentes conceptualisations de la différenciation et de l'inclusion. Il va au-delà de ce discours, remet en question les idées de fond qui sous-tendent ces conceptualisations et présente un point de vue alternatif qui met l'accent sur l'hétérogénéité des économies politiques des nations africaines, complexifiant ainsi la question de l'inclusion.

**KEY WORDS:** trade liberalisation, African Continental Free Trade Area, economic inclusion

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**1 INTRODUCTION**

The normative design of the African Continental Free Trade Area (AfCFTA) is often presented in emerging literature on AfCFTA as an alternative innovative trade model that is attentive to vulnerabilities that accrue when countries trade with one another.<sup>1</sup> Unchecked trade liberalisation has been linked to a number of negative outcomes, such as the loss of livelihoods for less skilled labour due to offshoring manufacturing, the stifling of middle and small-scale businesses that fail to compete internationally, increased climate vulnerability, among others.<sup>2</sup> AfCFTA's structure is argued to possess legal principles and mechanisms that serve as building blocks for fostering a trade regime that is attentive to these vulnerabilities and seeks to enhance inclusion of those that have lost their livelihoods under a free-trade regime.<sup>3</sup> Some of these mechanisms include the legal provisions on special and differentiated treatment (S&D); flexibility; variable geometry; equity; sustainable development; and the additional protocols such as that on women and youth.<sup>4</sup> The emerging literature and contemporary discourse on AfCFTA endorse this approach to inclusion under AfCFTA and is descriptive of it as an alternative innovative trade model of which the mechanisms allow for sufficient policy space for states to pursue domestic policies that foster inclusion and also act as a kind of buffer against the negative dynamics trade liberalisation may create or exacerbate on the continent.<sup>5</sup> The AfCFTA trade regime, therefore, is

1 See eg D Luke & J Macleod *Inclusive trade in Africa: the African Continental Free Trade Area in comparative perspective* (2019); T Masiko *Flexible regional economic integration in Africa: lessons and implications for the multilateral trading system* (2022); V Songwe, J Macleod & SN Karingi 'The African Continental Free Trade Area: a historical moment for development in Africa' (2021) 8(2) *Journal of African Trade* 12; K Kuhlmann & AL Agutu 'The African Continental Free Trade Area: towards a new legal model for trade and development' (2019) 51 *Georgia Journal of International Law* 753.

2 See eg D Rodrik *The globalisation paradox: why global markets, states and democracy can't co-exist* (2011).

3 See eg V Songwe 'Intra-African trade: a path to economic diversification and inclusion' in BS Coulibaly *Foresight Africa: Top priorities for the continent* (2019) 97; D Luke & J Macleod 'Introduction: Bringing about inclusive trade in Africa with the African Continental Free Trade Area' in Luke & Macleod (n 1).

4 Art 5(c) & (d) of the Agreement Establishing The African Continental Free Trade Area (AfCFTA), <https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area> (accessed 8 December 2023).

5 See, eg, The World Bank *The African Continental Free Trade Area: Economic and distributional effects* (2020); L Abrego and others 'The African Continental Free Trade Agreement: Welfare gain estimates from a general equilibrium model' IMF Working Paper, African Department, WP/19/124; ET Aninche 'African Continental Free Trade Area and African Union Agenda 2063: the roads to Addis Ababa and Kigali' (2020) 41 *Journal of Contemporary African Studies* 1-16.

perceived as one that is not exclusively about free trade, but one of qualified openness.

It is against this backdrop that this article seeks to interrogate the overall background conceptualisation on inclusion that undergirds the AfCFTA normative design. The analysis will examine this background conceptualisation on inclusion alongside what the literature on AfCFTA considers differentiation, which justifies the mechanisms employed under AfCFTA as tools of inclusion. The article will interrogate whether or not this is a sufficient lens through which vulnerabilities may be addressed and alleviated. An alternative conceptualisation of differentiation will be foregrounded in contrast to the predominant one. This alternative approach will focus on an examination of the market structure, relations of production and consumption, the labour market and background rules such as property rights. Further, this alternative lens will draw on literature that examines the political economies of African states, which will illuminate the differences internal and external to the countries that are likely to be enhanced once the countries start to trade with one another under a regime of free trade. Showing this alternative conceptualisation of differentiation is important in assessing the extent of inclusion under the current AfCFTA structure. Taking small and medium-sized enterprises (SMEs) as the subject group for thinking about inclusion, the article will analyse whether a differentiation that focuses on levels of economic development, special economic situations or trade and financial needs of state parties as espoused in the AfCFTA protocols on trade goods and services is a sufficient lens through which questions of inclusion are dealt with.

The article is presented in four parts. Part 2 examines emerging literature on AfCFTA and looks at the different strands and arguments about inclusion foregrounded in it. Part 3 presents an alternative lens through which the question of inclusion may be conceptualised. Part 4 looks at small and medium-sized enterprises, in fairly general terms, as a point of analysis on what an alternative conceptualisation of inclusive trade would consider.

## **2 CONCEPTUALISING INCLUSION UNDER AfCFTA**

Contemporary discourse on trade liberalisation is cognisant of the negative implications that emerge when nations trade with one another under a regime of trade liberalisation.<sup>6</sup> It now is common for the discourse on international trade to speak of the ‘distributional consequences’ of openness, creation of ‘losers’ and ‘winners’, poverty alleviation, loss of employment and income inequality.<sup>7</sup> As the newest

6 See, eg, J Bhagwati *Free trade today* (2002); Rodrik (n 2); A Roberts & N Lamp *Six faces of globalisation: who wins, who loses and why it matters* (2021).

7 See, eg, N Pavcnik ‘The winners and losers from international trade’ (2019) 61 *Global Politics and Strategy* 97; EB Kapstein ‘Winners and losers in the global

trade agreement in contemporary times, AfCFTA has been hailed in the emerging literature, as an alternative legal arrangement characterised by an inbuilt structure that considers the different needs of African nations. In doing so, AfCFTA creates sufficient policy space<sup>8</sup> for countries to pursue domestic economic policies that are favourable to the nation's respective economic and political needs while participating in the regional trade agreement.<sup>9</sup> AfCFTA has also been hailed as a game changer in its projected potential of boosting intra-African trade, having positive distributional effects in terms of lifting approximately 30 million people out of poverty, boosting industrialisation, creating more employment opportunities and reducing inequality across African countries.<sup>10</sup> By doing this, AfCFTA is argued to foster inclusive participation of nations regardless of their economic, political and social differences. This part examines the emerging literature on AfCFTA and how arguments foregrounding AfCFTA as an inclusive trade regime have conceptualised inclusion and differentiation. It will look at some of the provisions and principles in AfCFTA that are argued to enhance inclusion and provide policy space or autonomy<sup>11</sup> to sovereign states to pursue economic policies favourable to their countries while participating in a regional trade agreement with other countries. It is also important to note that this literature on AfCFTA is not homogenous. As such, this part attempts to tease apart the different strands of arguments in the literature by focusing on the differences in their theoretical underpinnings.

economy' (2000) 54 *International Organisation* 359; M Gasiorek, JM Garrett & I Serwicka 'Winners and losers from international trade: What do we know and what are the Implications for policy?' Briefing Paper 33 July 2019, UK Trade Policy Observatory.

- 8 Policy space or policy autonomy is a concept used by Santos in his work to show the indeterminacy of rules of international trade. In this article, policy autonomy and space are used to mean both the indeterminacy of rules, broadness and actual legal autonomy provided for under Special and Differentiated Treatment that allows nations to pursue domestic policies. Policy space gives room for nations to pursue domestic economic and political policies that may be deemed contradictory to the goals of free trade agreements. See, eg, A Santos 'Carving out policy autonomy for developing countries in the World Trade Organisation: the experience of Brazil and Mexico' (2012) 52 *Va J Int'l L* 551.
- 9 T Masiko *Flexible regional economic integration in Africa: Lessons and implications for the multilateral trading system* (2022); K Kuhlmann & AL Agutu 'The African Continental Free Trade Area: towards a new legal model for trade and development' (2019) 51 *Geo J Int'l* 753.
- 10 See S Mevel, S Karingi & S Sadio Diallo 'Country-level implications of AfCFTA agreement's implementation on inequality and poverty' 2023 Global Economic Analysis Conference, <https://www.gtap.agecon.purdue.edu/resources/download/11798.pdf> (accessed 8 December 2023); United Nations Economic Commission for Africa 'An empirical assessment of the African Continental Free Trade Area modalities on goods' November 2018, <https://repository.uneca.org/bitstream/handle/10855/41828/b1192911x.pdf?sequence=1&isAllowed=y> (accessed 8 December 2023); V Songwe, J Macleod & KN Stephen 'The African Continental Free Trade Area: A historical moment for development in Africa *Journal of African Trade*' (2021) 8 *Atlantis Press, Paris*, 12.
- 11 Santos (n 8).

The first strand of emerging literature on AfCFTA<sup>12</sup> is grounded in mainstream market economics that advances trade liberalisation as an engine for economic growth. In this strand of literature, there is less focus on the creation of policy space through legal levers such as variable geometry, flexibility and special and differentiated treatment and more focus on the creation and maintenance of free market dynamics. The underlying theoretical premise is that the market system and its undistorted price mechanism are an effective distributional tool that re-orientates nations resources to productive activities that will, in the aggregate (subject to proper implementation of the AfCFTA), lift approximately 30 million people from extreme poverty and 68 million from moderate poverty,<sup>13</sup> thus effectively fostering their full participation under AfCFTA. This first strand of literature therefore argues along mainstream economic discourse lines focusing on, for instance; formalising the informal sector, particularly cross-border informal trade through regulation in order to boost intra-African trade;<sup>14</sup> arguing for more trade liberalisation in the manufacturing sector to promote knowledge transfer among countries;<sup>15</sup> creating more value chains and boosting export diversification among countries; and calling for harmonisation of regulatory standards across the African continent to reduce the costs of trade and do away with fragmented regulatory spaces. The lack of fragmented legal regimes will ultimately create a unified model of political economy among African states.<sup>16</sup> Fragmented regulatory spaces in this literature are seen as a form of non-tariff barrier that hinders market entry for small-scale and medium-sized enterprises that have to bear the cost of navigating multitudes of regulations in legally fragmented spaces.<sup>17</sup> For this strand of literature, the background conceptualisation of inclusion is one that seeks to bring into the market system different players, particularly those in the informal economy. Full participation in the AfCFTA therefore means full participation in the market system, undergirded by an undistorted price mechanism.

12 See, eg, The World Bank 'The African Continental Free Trade Area: Economic and distributional effects' 2020; United Nations Conference on Trade and Development (UNCTAD) 'Reaping the potential benefits of the African Continental Free Trade Area for inclusive growth' 2021; International Trade Centre 'Opportunities for youth employment and entrepreneurship: understanding the African Continental Free Trade Area' 2021, Abrego and others (n 5).

13 World Bank (n 12).

14 See, eg, TV Warikandwa 'Financial inclusion, intra-African trade and the AfCFTA: a law and economics perspective' in H Chitimira & TV Warikandwa *Financial inclusion and digital transformation regulatory practices in selected SADC countries* (2023) 207-228. Warikandwa argues that formal financial services can help boost intra-African trade. Since most small-scale enterprises cannot afford formal financial services, the use of mobile money for enterprises in the informal sector would be helpful in lowering the cost of international transfers and making the informal transaction visible in the formal sector.

15 See eg, Songwe (n 3) 97.

16 The World Bank (n 12) 13-16.

17 As above.

This strand of literature falls short in several respects when it comes to the question of inclusion. First, the literature assumes that the market system and undistorted price mechanism are the best tool to guarantee aggregate welfare for all that participate in it. Although the discussion obviously does not hold the market as a panacea for negative distributional impact and pushes for corrective measures, it falls short in as far as it disguises several dynamics, sometimes referred to as unintended consequences,<sup>18</sup> that perpetuate inequality and thus work against the goal of having inclusive trade. For instance, a regime of trade liberalisation will cause expansion and contraction of certain sectors in the market as resources are re-oriented to the most efficient producer. What is not adequately captured in this literature is the implication of expansion and extent of contraction that is felt by firms, particularly those that are susceptible to being outcompeted by larger and more seasoned firms. Second, the literature does not adequately discuss characterisations of firms that make them susceptible to negative dynamics of trade liberalisation. Studies have shown, for instance, that firms possessing certain characteristics such as being woman led, being a SME, or being in a conflict zone increases a firm's vulnerability to being outcompeted in the market, leading to the loss of livelihoods for vulnerable populations.<sup>19</sup>

The second strand in the emerging literature on AfCFTA and regional trade agreements in Africa<sup>20</sup> is one that presents the question of inclusion as having been adequately addressed in the legal provisions and principles inbuilt into the structure of AfCFTA (as well as some regional economic communities) which include provisions on special and differentiated treatment; flexibility; variable geometry; equity; sustainable development as well as the additional protocols such as that on women and youth.<sup>21</sup> These legal tools provide a plethora of alternative arrangements for countries with varying economic and political challenges to favourably participate in the regional trade agreements given their needs. The literature argues that considering the integration history of the African continent – from the moment of decolonisation to contemporary times – African nations have sought to accommodate their differences in an effort to cooperate economically at sub-regional levels and thereafter at the continental level.<sup>22</sup> As such, the legal arrangements born out of the compromises made between African nations' attempts to cooperate are more flexible and

18 See TK Tiekou 'Analysing the African Continental Free Trade Area (the AfCFTA) from an informality perspective: a beautiful house in the wrong neighbourhood' (2003) 3 *Global Studies Quarterly* 1; F Kelleher 'The African Continental Free Trade Area [AfCFTA] and Women: a pan-African feminist analysis' FEMNET, 2021.

19 Kelleher (n 18).

20 See, eg, JT Gathii *African regional agreements as legal regimes* (2011); Luke & Macleod (n 1); Masiko (n 1); ET Aninche 'African Continental Free Trade Area and African Union Agenda 2063: the roads to Addis Ababa and Kigali' (2020) 41 *Journal of Contemporary African Studies* 1-16.

21 See, eg, arts 5(c) & (d) of the Agreement establishing the African Continental Free Trade Area, <https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area> (accessed 8 December 2023).

22 AA Mazrui (ed) *General history of Africa VII, Africa since 1935* (1993).

accommodative of the diverse economic and political exigencies of the nations.<sup>23</sup> In contemporary times, it is argued that African countries are less distinct particularly in economic terms and have moved towards some form of common capitalism, thus justifying deeper levels of integration.<sup>24</sup> It is against this backdrop that AfCFTA has gained so much traction and was adopted by 54 of the 55 African countries.<sup>25</sup>

As already mentioned, the provisions on special and differentiated treatment, flexibility, variable geometry, equity and sustainable development are argued to give room for African countries to participate in the AfCFTA in a manner that fosters cooperation and at the same time allows for a degree of policy autonomy. Policy autonomy is important for nations because it gives room for the pursuit of domestic policies that either cushion (such as protection of infant industries) or correct (allowing for stronger labour protections) the negative implications of trade liberalisation. It is argued that AfCFTA's structure centres flexibility and that this approach to flexibility in trade agreements is not new to the African context. The regional economic arrangements in Africa have already taken this approach and are committed to variable geometry and multiple ways of cooperating.<sup>26</sup> For instance, under the East African Community (EAC), the principle of variable geometry – which is also enshrined in AfCFTA – allowed for the conflicting economic and political interests of Rwanda, Uganda, Kenya, Tanzania and later Burundi and South Sudan to be mitigated, which encouraged cooperation between them.<sup>27</sup> The principle of variable geometry allowed these nations with different economic policies and levels of development to participate in the integration project at their pace and time, permitting the nations to pick and choose areas of cooperation, members to cooperate with and at varying speeds of cooperation.<sup>28</sup>

Further, it has been argued that in the African context, particularly in the EAC, flexibility in economic cooperation is of three characterisations.<sup>29</sup> The first allowed for flexibility in pursuit of policy changes by nations at different speeds. The second allowed for distribution of institutions across cooperating member states to avoid concertation in one dominant country and the third involved

23 Gathii (n 20).

24 Masiko argues that the ideological differences existing at the height of continental integration efforts leading to the divide between the Casablanca and Monrovia blocs have died down as African nations have converged to a similar level of capitalism. As such, cooperation between the nations becomes easier. See Masiko (n 1).

25 The World Bank 'Trade pact could boost Africa's income by \$450 billion, study finds' The World Bank Press Release Statement, 27 July 2020.

26 Gathii (n 20).

27 Masiko (n 1).

28 Masiko (n 1) ch 3.

29 Gathii (n 20).

distribution of industries across member states allowing states to almost exclusively pursue particular industries at the domestic level.<sup>30</sup> These characterisations arose from the colonial history in the EAC, which saw the concentration of institutions and industries in Kenya that caused tension with Tanzania and Uganda. In a bid to foster cooperation, in the face of varying levels of economic development and limited political will, the second and third approaches to flexibility were adopted to mitigate concentration of benefits in one country while allowing countries such as Tanzania and later on Burundi and South Sudan to integrate at their own pace.<sup>31</sup>

Another tool foregrounded in the second strand of literature is special and differentiated treatment (S&D).<sup>32</sup> S&D is argued to be a tool of inclusion, a 'central feature of multilateral trading system and a core element of many regional trade agreements and Mega Regional Trade Agreements (MRTAs)'.<sup>33</sup> Traditional S&D is of varying kinds targeting a range of issues. For instance, as per the World Trade Organisation (WTO) secretariat, S&D is classified along provisions on increased participation of developing countries, flexibility commitments, transitional time frames and technical assistance.<sup>34</sup> The issues targeted under these provisions include protection of infant industry, stabilisation of balance of payments, agricultural development and food security, investment, intellectual property policies, subsidies and countervailing measures and trade facilitation.<sup>35</sup> S&D is provided for under article 6 of the Protocol on Trade in Goods and article 7 of the Protocol on Trade in Services. The conditions for invoking S&D under the Protocol on Trade in Goods are 'different levels of economic development' and 'individual specificities' that are recognised by other state parties. With regard to the Protocol on Trade in Services, article 7 calls upon state parties to 'take into account the challenges that may be encountered by state parties' on a 'case-by-case basis', such as the levels of economic development, the nation's financial needs and also an obligation to accord technical assistance and capacity building. Authors such as Sommer and Macleod<sup>36</sup> argue that these S&D provisions under the AfCFTA protocols do not provide much leeway for countries to pursue favourable domestic policies, which brings into question their

30 As above.

31 Under the East African Community, institutions were distributed across the region. The headquarters of Air and Rail Transport were located in Kenya, Uganda had the East African Development Bank, while Tanzania had the headquarters of the East African Community. See Masiko (n 1).

32 Masiko (n 1).

33 See L Sommer & J Macleod 'How important is special and differential treatment for an inclusive AfCFTA' in Luke & Macleod (n 1).

34 See eg, World Trade Organizations 'Special and differential treatment', [https://www.wto.org/english/tratop\\_e/dda\\_e/status\\_e/sdt\\_e.htm#:~:text=The%20WTO%20agreements%20contain%20special,abbreviated%20as%20S%26D%20or%20SDT](https://www.wto.org/english/tratop_e/dda_e/status_e/sdt_e.htm#:~:text=The%20WTO%20agreements%20contain%20special,abbreviated%20as%20S%26D%20or%20SDT) (accessed 4 October 2023); also see A Keck & P Low 'Special and differential treatment in the WTO: Why, when and how?' World Trade Organisation, Economic Research and Statistics Division, Staff Working Paper ERSD-2004-03.

35 Sommer & Macleod (n 33).

36 As above.



relevance to fostering inclusion. Sommer and Macleod argue that given the homogenous nature of African economies as predominantly low income and a few middle-income economies, S&D provisions under AfCFTA are less expansive than those under the WTO because it is not logical for countries with relatively similar economic levels to pursue different obligations under the traditional S&D approach.<sup>37</sup> Further, S&D under the AfCFTA Protocol on Trade in services is vague and the technical assistance provided is non-binding in nature. The vague, non-binding nature of S&D under the Protocol on Trade in Services deprioritised questions of inclusion, although Sommer and Macleod argue that this voluntary approach to technical assistance and disbursement of best practices is a better approach.<sup>38</sup>

From the above discussion, it may be argued that the second strand of literature on AfCFTA is undergirded by a series of background ideas that influence the conceptualisation of inclusion. The first is the overarching constitutional architectural approach to inclusion that favours a traditional understanding of state sovereignty in international law.<sup>39</sup> This approach foregrounds the inbuilt legal provisions and principles – variable geometry, flexibility, S&D discussed above – that creates room for policy autonomy, which allows for the pursuit of favourable domestic policies. This approach is backed up by a background idea of traditional state sovereignty in international law, which prioritises inward-looking strategies and thereafter regional cooperation. In this conceptualisation, AfCFTA is understood along two axes of integration, namely, how unified the integration versus how variable the integration. The states, enabled by legal levers of inclusion discussed above, determine the extent of integration or variability. States are able to first turn internally, tend to their own domestic economic policies and make distributional choices, and thereafter come together to cooperate at the regional level in the reserve. What is variable and flexible is a matter that is organised according to the political exigencies of individual countries; in effect a bargain. Essentially, differentiation and, therefore, inclusion, is a nation-state issue and is conceptualised along those terms. Therefore, when one speaks of legal provisions and tools that foster inclusion, the background conceptualisation is that this matter is one of national interest determined by the nation state.

This conceptualisation is limited in two major respects. The first is that the constitutional architectural approach does not go into a substantive inquiry about the different rationale informing the distributional choices that the individual states take when designing domestic policy and strategies for regional cooperation and whether or

37 As above.

38 As above.

39 The traditional understanding of state sovereignty conceptualises sovereignty as being concentrated within the boundaries of the nation state. The nation state has full authority over its physical borders and has the power to determine its social, political and economic policies. See, eg, LF Damrosch & S Murphy *International law: cases and materials* (2019); O Schachter *International law in theory and practice* (1991).

not these choices are helpful or harmful to the states or their neighbours. Second, this approach takes a national approach to a transnational phenomenon. When one looks at AfCFTA as a transnational phenomenon due to its transnational effects, then taking a national approach to AfCFTA's effects falls short. AfCFTA as a continental project will have continental effects on many aspects, such as the structure of markets, the labour relations, the relations of production, among others. Through the law and other tools or actors such as the state and private sector, the internal political economies of African nations will shift – expand or contract – as the nations trade with one another and resources are reshuffled among who is and who is not most productive.<sup>40</sup> This is not a new theory as it is postulated predominantly by the first strand of literature on AfCFTA<sup>41</sup> and literature generally on international trade.<sup>42</sup> Addressing vulnerabilities and inclusion with the constitutional architectural approach backed by a background idea rooted in traditional state sovereignty may be one of the ways to go about the question of inclusion, but it is not the only one. A substantive approach that delves more into the political economies of African nations, a looser understanding of state sovereignty<sup>43</sup> and an assumption of AfCFTA as an inherently transnational phenomenon as the background idea would be suggestive of an alternative conceptualisation of the vulnerabilities and the question of inclusion.

### 3 DIFFERENTIATION UNDER AfCFTA THROUGH A POLITICAL ECONOMY LENS

The term 'political economy' has been a historically contested term<sup>44</sup> that has taken on different meanings ranging from a mainstream economic conceptualisation that foregrounds the 'application of rational choice models to government actors and institutions'<sup>45</sup> to a meaning that centres questions of distribution, power and democracy.<sup>46</sup> In this part, political economy is used to mean an alternative framework of analysis that foregrounds the intertwined

40 The World Bank (n 12).

41 As above; Abrego and others (n 12).

42 See D Ndonga, E Laryea & M Chaponda 'Assessing the potential impact of the African Continental Free Trade Area on least developed countries: a case study of Malawi' (2020) 46(4) *Journal of Southern African Studies* 773.

43 See, eg, R Malley, J Manas & C Nix 'Constructing the state extraterritorially: jurisdictional discourse, the national interest and transnational norms' (1990) 103 *Harvard Law Review* 1273.

44 See, eg, J Britton-Purdy and others 'Building a law-and-political-economy framework: beyond the twentieth-century synthesis' (2020) 129 *Yale Law Journal* 1791; also see Y Benkler 'Power and productivity: institutions, ideology and technology in political economy' in D Allen and others *A political economy of justice* (2022); MS Langevin *The political economy of Brazil's WTO case against the United States: inside the Cotton dispute* (2023); C Ake *A political economy of Africa* (1981).

45 See Britton-Purdy and others (n 44).

46 As above.

nature of political and economic power<sup>47</sup> which influences particular distributional choices, questions the assumption of an efficient self-regulating market and a supporting non-distortive legal framework as an effective tool for fostering inclusion and attempts to tease apart the various actors or groups involved when African nations begin to trade with one another. In the emerging literature on AfCFTA, the term ‘political economy’ has been used to describe the homogenous nature of African economies in terms of levels of income,<sup>48</sup> which need structural changes catalysed by increased intra-African trade. Regional trade between the countries is expected to spur greater productivity, create regional value chains, transform the agricultural sector in different African countries from subsistence to large-scale production and boost industrialisation.<sup>49</sup> AfCFTA is the legal instrument projected to stimulate these structural transformations subject to proper implementation so as to alleviate some of the continent’s economic ills.<sup>50</sup> In the alternative framework suggested in this part, the analysis will look at, in fairly general terms, different sources of literature, and go beyond the mainstream approach that homogenises African economies and tease out differences that exist in across different sectors of the economy such as the labour market, informal economic arrangements, class structures or even property ownership, in other words, attempting to describe the political economies of these African countries. This becomes instrumental in looking at the ways in which these political economies interact with legal arrangements such as AfCFTA.

In 2021 the United Nations Conference on Trade and Development (UNCTAD)<sup>51</sup> issued a report on inclusive growth in Africa under AfCFTA. This report encompassed perhaps the closest application of a political economy lens. Unlike the first and second strands of literature discussed in the previous part, this report conceptualises inclusion in terms of growth and not necessarily trade. First, the report states that in development discourse, the term ‘inclusive growth’ means ‘growth coupled with equal opportunities’.<sup>52</sup> Thereafter, the report distinguishes between two definitions of inclusive growth, namely, growth that benefits people of all income levels and multidimensional growth that encompasses human, social, economic and environmental development. Trade integration under this conceptualisation drives inclusive growth – particularly multidimensional growth – through the

47 As above. The authors argue that a political economy lens pays attention to the ways in which ‘economic and political power are inextricably intertwined with racialised gendered inequity and subordination’ (1792).

48 African economies have been described by Sommer & Macleod as ‘predominantly low-income and lower-middle income, with a handful of upper-middle income and in high income [but save] economy’; Sommer & Macleod (n 33) 72.

49 Songwe & others (n 1).

50 See, eg, M Diatta and others ‘AU summit: will free trade be Africa’s economic game changer?’ (2019) 114 *Peace and Security Council Report*; H Fofack ‘Making AfCFTA work for “The Africa we want”’ (2020) Working Paper Africa Growth Initiative, Part 2 3.

51 UNCTAD (n 12).

52 UNCTAD (n 12) 4.

creation of new jobs. This is due to increased access to wider markets, the creation of regional value chains and the adoption of regional integration measures that support groups such as women and youth in their participation in business, trade and labour markets.<sup>53</sup> The report further argues that for AfCFTA to promote inclusive growth, there must be effective and sustainable reduction of disparities between ‘diverse entities between and within countries’,<sup>54</sup> the ‘diverse entities’ being informal and formal actors, men and women, governments, regions, among others.

In an attempt to analyse the disparities between African countries, UNCTAD began with examining the disparities within the regional economic communities (RECs) with regard to income inequality as opposed to growth. The report noted that whereas poverty levels fell in Africa between 2010-2018, the question of income inequality remained unresolved. Countries that are members of the Arab Maghreb Union experienced economic growth with less inequality and poverty rates whereas those from the Southern African Development Community (SADC) and the Economic Community of Central African States (ECCAS) exhibited the highest inequality indices.<sup>55</sup> The report also looked at three countries, The Gambia, South Africa and Zambia, as case studies of inclusive growth. Gambia was postulated in the UNCTAD report as an example of a country that pursued policies of inclusive growth following the recommendation set out in a series of poverty reduction strategy papers issued and backed by the World Bank, the International Monetary Fund (IMF) and the African Development Bank (AfDB), as well as focus on development of the agricultural sector helped to alleviate rural poverty.<sup>56</sup> The South African economy was described as having reduced poverty by following free market principles and austerity measures but increased inequality due to entrenchment of pre-existing inequalities.<sup>57</sup> The Zambian economy was described as having experienced non-inclusive growth. In the description of the Zambian economy, UNCTAD highlighted several characteristics that are important for conceptualising the meaning of having a country such as Zambia participate in AfCFTA. Zambia is described as a landlocked country, with poor access to services and markets, high debt levels, under-sourced education and health services and vulnerable to climate shocks such as drought because of its heavy reliance on agriculture as the leading sector. In spite of the multiple poverty reduction strategy papers supported by the government of Zambia and the IMF, inequality levels in Zambia did not drop and poverty levels remained high.

Although the UNCTAD report attempted to tease apart the disparities in a manner that demonstrates the complexities involved in

53 UNCTAD (n 12) 6.

54 UNCTAD (n 12) 3.

55 UNCTAD (n 12) 20.

56 International Monetary Fund (IMF) ‘The Gambia: Poverty Reduction Strategy Paper 2007-2011’ IMF Country Report 07/308, September 2007; UNCTAD (n 12) 33.

57 UNCTAD (n 12) 35.

dealing with questions of inclusion, it did not get to the granular level that may suggest alternative perspectives as to why these disparities persist in different countries. An alternative approach that draws on political economy methods would for instance, consider the historical trajectory of different countries, the interests created as these countries went through different post-colonial transitions and what those interests would translate into when these countries begin to trade with each other in contemporary times. This approach would therefore desist from taking the quintessential approach to inequality that places large economies versus smaller ones as the focal point of analysis. Rather, it opens up the countries and looks at the different actors and the dynamics internal to these countries that are enhanced or stifled once a transnational point of view fostered by transnational trade is accounted for. In other words, a granular level analysis will highlight in more detailed terms the political economy of African nations showing how different aspects of their political economies will be impacted once the countries are subjected to a transnational phenomenon such as AfCFTA.

Take the example of the EAC and the dynamics that exist between the nations and within the nations. Starting from the impact of British colonialism, it has been argued that one of the implications of the colonial encounter was such that disparities were created between the different economies; with Kenya – being a white settler economy with British corporations, headquarters of institutions and ahead in infrastructural development – as the leading economy in East Africa.<sup>58</sup> Furthermore, in Kenya – as is the characteristic of most British colonies – the colonial architecture was such that the division of labour was organised along racial lines with European settlers dominating trade, finance, manufacturing and commercial agriculture: Asian populations played the role of junior officials and middlemen and African populations were mostly small-scale farmers and petty commodity producers.<sup>59</sup> The Kenyan political economy was complexified in the post-colonial nation-building process that saw the creation of an African political and capitalist class working in tandem with regional and multinational corporations that drove Kenyan economic policies more to the right, thus being a more favourable regulatory environment for foreign investment and a relatively open capital market compared to Tanzania and Burundi.<sup>60</sup> In contrast to Kenya, Tanzania's transition was twofold. First, a relatively easy post-colonial transition favoured socialist policies, nationalisation of corporations, creation of a single party state to forge national unity and a general move towards socialist policies with a few pockets of opposition, as well as lack of African capitalistic class. The second came with the rise of neoliberalism in the 1980s that saw a transition from the socialist experiment under the Nyerere government that was influenced by exogenous factors such as

58 B Cooksey 'Tanzanian in the East African Community: a comparative political economy' European Centre for Development Policy Management, Discussion Paper186, May 2016.

59 As above.

60 D Himbara *Kenyan capitalists, the state and development* (1994).

increased globalisation, structural adjustment policies, growing significance of foreign aid, abandonment of socialist policies as the Soviet countries collapsed and a general movement towards market logics late 1980s and 1990s.<sup>61</sup>

In light of this historical background, this article argues that the way in which regional integration in the EAC was carried out resulted in elevated tensions between the different political economies.<sup>62</sup> The glaring disparity is best exemplified by the domination of Kenyan industry over other nations with Kenyan exportation constituting well over 60 per cent of intra-regional trade in the EAC.<sup>63</sup> The response to this disparity by Tanzania, to take one example, was retreating behind its walls, resorting to nationalist policies while preaching free-market policies to attract investment.<sup>64</sup> Given Tanzania's history of economic transition and the development of neighbouring countries, pressured it to 'catch-up' to globalisation, attract foreign direct investment (FDI) and create more employment, which translated into a hybrid approach to international trade and integration. On the one hand, there was economic and political nationalism that led Tanzania to be described as dragging its feet to cooperate with the EAC in economic policies and at the same time allowing FDI with several qualifications. For instance, in the EAC Tanzania has side-stepped the requirement to harmonise laws and has preferred an ad hoc negotiation with its neighbouring countries regarding trade in food.<sup>65</sup> With regard to expansion of agricultural industry under the EAC, Tanzania has chosen to keep its land and labour markets relatively closed to foreign investment despite it having the most arable land in an attempt to hold off the negative dynamics that come with liberalising land markets such as the creation of a landless rural class once the prime land is taken.<sup>66</sup>

In the South African context, the political economy lens that this article goes beyond the perspective that highlights the industrial inequality between countries under RECs such as the SADC<sup>67</sup> and adds an additional layer that enquires into dynamics internal to South Africa that emerged out of the transition periods when interests were created and evolved through this process right up to contemporary times as

61 With regard to the second transition in Tanzania, it is argued that there was no complete sweep from the African socialist experiment under Nyerere's government to free-market economies. It is still a point of controversy as to the extent of the adoption of neoliberal policies. However, the point of consensus is that there was no complete sweep but a shift nonetheless. Cooksey (n 58).

62 AT Mugomba 'Regional organisations and African underdevelopment: the collapse of the East African Community' (1978) 16 *Journal of Modern African Studies* 261-272; M Godfrey & S Langdon 'Partners in underdevelopment? The trans-nationalisation thesis in a Kenyan context' (1976) *Journal of Common wealth and Comparative Politics* 42; Cooksey (n 58).

63 Cooksey (n 58).

64 As above.

65 As above.

66 As above.

67 Govender and others describe South African economic dominance in the SADC as 'extreme version [s] of industrial inequality' where South Africa's industrial sector is far ahead the other members and is now considered the 'service hub' meaning

well as external factors such as the influence of international financial institutions and the pressure of globalisation.<sup>68</sup> The major transition for South Africa was the move from an apartheid regime to democracy under the leadership of the African National Congress (ANC). What is of relevance to a political economy lens in this transition process are the ideological struggles between the different interest groups that took place behind the scenes.<sup>69</sup> The ideological struggles consisted of tensions between the adoption of free-market policies pushed by big businesses in South Africa<sup>70</sup> and residual socialist policies by the ANC that pushed for the unbundling of four of the massive corporations that dominated the South African economy, the insistence of providing workers with living wages, and the pursuit of growth alongside redistribution.<sup>71</sup> It is also important to mention the role of international financial institutions such as the IMF that also lobbied for neoliberal policies among top ANC political elite. The result was a concerted effort by big businesses, international investors and financial institutions to pursue economic reconstruction within an overarching vision of a free market economy.<sup>72</sup> The dynamics in the transition process also saw a shift in class alliances as exemplified in back ground rules such as the land reform policy. Hall argues that there has been a shift in land reform from a focus on the rural poor to what is described as ‘emerging black commercial farmers’.<sup>73</sup> The consequences of this dynamic were that little attention was paid to the structural inequalities that existed such as racialised division of labour resulting in living under one of the most unequal economies.<sup>74</sup>

The discussion above uncovers the dynamic interactions between economic and political power in the region. It goes beyond the quintessential discussion of inequality between nations that pits strong economies characterised by relatively strong industrial sectors against smaller and less developed economies. Instead, it takes a deep dive into each of these nations, showing that inequality is a phenomenon that is created by dynamics internal to each nation (for instance, the workings of political and business elite) and external to it (for instance, the

that it pulls more ‘developed service-consumer sectors’ and they occupy the position of an importer of skills from neighbouring markets to supply smaller neighbouring markets’. See D Govender, K Jules & C Wood ‘Trade in services in imbalanced regional markets: lessons from SADC for the AfCFTA’ (2023) *The Centre for Africa-Europe Relations*, ECDPM 53.

68 P Carmody ‘Between globalisation and (post) apartheid: the political economy of restructuring in South Africa’ (2002) 28 *Journal of Southern African Studies*; P Williams & I Taylor ‘Neoliberalism and the political economy of the “new South Africa”’ (2000) 5 *New Political Economy* 21.

69 P Williams & Taylor (n 68).

70 Williams & Taylor describe the ‘big business interests’ as the informal association of monopoly capitalists led by Harry Oppenheimer of the Anglo-American Company in South Africa known as the ‘Brenthurst Group’. Williams & Taylor (n 68).

71 Williams & Taylor (n 68).

72 As above.

73 R Hall ‘A political economy of land reform in South Africa’ (2004) 31 *Review of African Political Economy* 213.

74 Williams & Taylor (n 68).

influence of international financial institutions and the pressures of globalisation). It therefore follows that although the portrayal of African nations' political economies as homogeneous – although true in some respects – serves the purpose of concluding that more trade liberalisation is a catalyst for propelling nations, most prominently, moving out of the low-income bracket. However, as seen from the discussion above, homogeneous portrayals ignore a myriad of interests that are expected to intersect with one another once AfCFTA is implemented. What is often described as the unintended consequences of trade liberalisation that goes beyond the creation of losers and winners, and delves deeper into transnational inequalities that cannot be mitigated by a national state alone. These include the influx of migrant labour across regions; disparities in labour markets along lines of intersecting identities such as race, gender, HIV status that cut across income levels; the adoption of austerity measures and neoliberal policies by nations without safety nets;<sup>75</sup> and income inequalities both within 'city hubs' (for instance, Nairobi, Cape Town and Lagos) and between urban and rural regions of the nations.

It therefore follows that the question of inclusion and what constitutes inclusive trade under the law and political economy perspective proposed in this article complexifies how we should think about inclusion in general. First, it highlights the shortcomings of the contemporary conceptualisation of inclusion in the emerging literature on AfCFTA, which takes a national approach to a transnational phenomenon. More importantly, it illuminates the underlying ideological struggles and background assumptions underlying such the conceptualisation that foregrounds tools such as flexibility, variable geometry, S&D as promoting inclusive trade. The central challenge for AfCFTA, therefore, is whether inclusion should mean being attentive to the realities of different groups living in countries with distinct economic and political dynamics. The granulated approach foregrounded in this article, through its inherent complexities, brings out the nuances that are important when thinking about what 'inclusion' and 'inclusive trade' should mean when considering AfCFTA's effect on vulnerable groups such as women, youth, farmers and SMEs.

This granulated approach would inquire into what it would mean, for different groups, that their country moves from a low-income level to middle-income level, to have regional value chains, and to grow existing and new industries, all of which having significant

75 In the 2021 UNCTAD report, a study by Silungwe & Silungwe found that the persistent inequality and poverty in Zambia were a culmination of the Structural Adjustment Policies adopted in the 1990s that disproportionately impacted the poor, the HIV/AIDS pandemic and the privatisation of Zambia Consolidated Copper Mines. A political economy lens on the Zambia economy would identify the interests that sedimented after the turn to neoliberal policies under the SAPs; whether it meant the increased presence of foreign capital or the loss of livelihoods of a section of workers in the public sectors. See AS Silungwe & W Silungwe 'Implications of the Structural Adjustment Programme on Human Security in Zambia' (2019) 7 *International Journal of Management and Commerce Innovations* 826; UNCTAD (n 12).



distributional implications. In other words, whether increased industrialisation translates into stronger property rights for foreign investors in prime land at the cost of displacement of rural populations, or whether it translates to a regime of property rights that promote redistribution of wealth to vulnerable groups and lagging sectors in the economy. Some of the considerations in making these determinations include whether the creation of regional value chains is expected to result in the convergence of financial resources across nations and heightened income inequality transnationally and whether there are institutional checks at the regional level to rectify capital concentration, should it occur.

When industrial growth is discussed in the emerging literature on AfCFTA, it is often argued that AfCFTA presents opportunities for infant industries to tap into new markets, as the deregulation and legal harmonisation required by AfCFTA render them attractive investment destinations that could potentially serve the growing middle class.<sup>76</sup> What is left out of this discussion, however, is an analysis of the implications for different actors once this choice is made. Specifically, the in-between steps involved in this transition, from reconstructing property (and intellectual property) rights to the expected by-product of exiting of small businesses from these 'new markets', leaving the low-income class unprotected and left in flux to respond to these distributional implications. To take one significant industry as an example, the agricultural sector, the questions that should be asked is what kind of agriculture is being targeted by AfCFTA and which actors are included or left out. It has been argued that the opportunities presented by AfCFTA would allow investors to tap into the agro-industry – a step that will increase food security and reduce the food import bill. The positive spill-over effects would be increased mechanisation, trade facilitation, and growth of trade-related infrastructure.<sup>77</sup> However, one should keep in mind that the majority of the agriculture in Africa is subsistent, with 70 per cent being performed by women.<sup>78</sup> In light of this, it is important to take into account what inclusion and inclusive trade will look like for the groups of people performing subsistence agriculture that is targeted to be transformed into agro-industry; what would their property rights look like; what would their source of livelihood relative to the amounts of capital injected into this sector.

76 UNCTAD (n 12) 74.

77 Sommer & Macleod (n 34) 76.

78 YI Ogunlela & AA Mukhtar 'Gender issues in agriculture and rural development in Nigeria: the role of women' (2009) 4 *Humanity and Social Sciences Journal* 19; E Boserup, Su Fei Tan & C Toulmin *Woman's role in economic development* (2013).

#### 4 SMALL AND MEDIUM-SIZED ENTERPRISES UNDER AfCFTA

This part will use small and medium-sized enterprises to assess whether the tools of inclusion discussed in the first and second strands of literature on AfCFTA are sufficient to address the negative dynamics that accrue from trade liberalisation and foster inclusion. The part will also examine the different factors that affect the extent of participation of SMEs in regional trade agreements such as; access to capital, protection of particular sectors, the role of the state in supporting SMEs, property rights, among other things. Looking at SMEs is important because they constitute 50 per cent of the gross domestic product (GDP) of most African countries and provide approximately 70 per cent of the employment opportunities in Africa.<sup>79</sup> Under the emerging literature on AfCFTA, the question of inclusion of SMEs is often addressed under the discourse on ‘financial inclusion’<sup>80</sup> and ‘digital trade’.<sup>81</sup> The literature links financial inclusion to digital transformation and the utilisation of e-commerce as tools for facilitating inclusion and effective participation under the AfCFTA.<sup>82</sup> E-Commerce – specifically the use of mobile money services – is foregrounded as a positive development towards the transformation of the financial sector in African countries<sup>83</sup> and fostering financial inclusion for those in the informal sector.<sup>84</sup> For SMEs digital trade has been linked to boosting growth, innovation and entry into export markets by reducing transaction costs, delivery of goods and services and fostering innovation and entrepreneurship.<sup>85</sup> Although these are

79 T Fafunwa & F Odufuwa ‘African micro, small and medium enterprises need to digitally transform to benefit from the Africa Continental Free Trade Area’ in C Daniel, B Erforth & C Teevan (eds) *Africa-Europe cooperation and digital transformation* (2022) 1.

80 Financial inclusion or having ‘inclusive financial systems’ means the availability of ‘broad access to financial services (savings, credit, payment, risk management) without price or nonprice barriers to their use’. See A Demirgüç-Kunt & F Klapper ‘Financial inclusion in Africa: an overview’ World Bank Policy Research Working Paper 6088, 2016 1.

81 United Nations Economic Commission for Africa ‘Next steps for the African Continental Free Trade Area: assessing regional integration in Africa, ARIAIX’ (2019).

82 An e-commerce protocol is to be negotiated under Phase III of the negotiations. The protocol is meant to harmonise regulations of African countries concerning the digital economy and harness the benefits of e-commerce. See, eg, B Karishma, J Macleod & M Mendez-Parra (2021-04) ‘Digital trade provision in the AfCFTA: what can we learn from South-South trade agreements?’ Addis Ababa, <https://repository.uneca.org/handle/10855/43949> (accessed 29 September 2023); Fafunwa & Odufuwa (n 79).

83 Y Ismail ‘Mobilising e-commerce for development in Africa through AfCFTA’ CUTS International Geneva, German Federal Ministry for Economic Cooperation and Development 2020.

84 As above.

85 BA Hagos, ‘Digital trade in the African Continental Free Trade Agreement: exploring its promises and challenges, 2022’, <https://www.afronomicslaw.org/category/analysis/digital-trade-african-continental-free-trade-agreement-exploring-its-promises-and> (accessed 27 September 2023).

positive developments, SMEs still face challenges such as a lack of access to capital and bank lines and underdeveloped equity markets which stifle growth.<sup>86</sup>

Although the emerging literature on AfCFTA is cognisant of the challenges faced by SMEs in domestic or regional markets, the analysis falls short in elucidating the multi-faceted nature of these markets<sup>87</sup> that further complexities the participation of SMEs. This complexity is exemplified in the interaction of the said social and economic challenges with state policies such as the accelerated drive towards technology diffusion or the harmonisation of digital trade rules and regulations. Despite the fact that state policies such as the harmonisation of laws and technological advancement *per se*, is not a negative thing; they are experienced differently by a wide range of actors that are homogeneously categorised in the literature, under the blanket description of SMEs. Take the example of the gendered dimension of SMEs in the agricultural sector.<sup>88</sup> The main arguments presented in the literature are that, under AfCFTA, the challenges that women ordinarily face in international trade due to their high participation in the informal sector – such as border delays, transaction costs and gender-based sexual harassment – are addressed through the harmonisation of regulations and the adoption of simplified trade regimes as seen under RECs such as the Common Market for East and Southern Africa (COMESA) and the Southern Africa Development Community (SADC). Such legal arrangements foster inclusion because they are able to cover small-scale traders (SMEs) who handle small consignments. Simplified trade regimes are foregrounded as an avenue for penetration into new markets and fostering export opportunities<sup>89</sup> for SMEs.

The analysis in the literature falls short in the following respects. First, the SMEs are not homogenous and navigate markets in widely different ways facing different challenges. For instance, one study demonstrated that SMEs that are run by women face additional structural challenges relating to ownership of property, influence on unpaid care work and access to credit.<sup>90</sup> Another study described

86 Fafunwa & Odufuwa (n 79).

87 Boakye-Ansah, B Nana & A Parbin 'Internationalisation prospects of small and medium enterprises (SMEs) in Africa through AfCFTA, DiVA, <https://www.diva-portal.org/smash/record.jsf?pid=diva2%3A1781813&dswid=-7128> (accessed 25 July 2023).

88 Women 's labour is predominantly found in the agricultural sector contributing to 70% of food production and also constituting the majority of the small-scale farmers. They also occupy the post-harvest production sector and contribute direct income. See Kelleher (n 18).

89 UN Women 'Opportunities for women entrepreneurs in the context of the African Continental Free Trade Area, 2018; UNECA 'Gender mainstreaming in African Continental Free Trade Area national implementation strategies: an inclusive and sustainable pathway towards gender equality in Africa' 2020.

90 EF Jaiyeola & MM Adeyeye 'Obstacles along the path of women enterprises in Africa: a case study of Ogotun women in Ekiti state, Nigeria' (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8327673/> (accessed 6 October 2023).

women-led SMEs to be ‘precarious, primarily survivalist, horizontal’ – and are hugely burdensome for women.<sup>91</sup> While there was a demonstrated increase in income for women, the structural changes stifled full participation and growth of these SMEs. Second, the literature is silent about the unintended consequences of trade liberalisation on SMEs, such as the creation of low-wage, unprotected, gender-segregated jobs through export-oriented policies that disproportionately impacts women. Women participating in regional markets are susceptible to these consequences because they already occupy an economically disadvantaged position.<sup>92</sup> Given that trade liberalisation causes expansion in some sectors and lines of business and contraction in others, women-run SMEs are vulnerable to economic shock and dislocation once exposed to larger well-established markets. Unchecked free trade sets in motion dynamics where women will look towards labour where they have ‘competitive advantage’<sup>93</sup> in low-wage, unregulated labour located, for instance in special economic zones or export processing zones. These zones are legally created and operate outside of the legally-acceptable employment regulations. Studies have empirically shown that special processing zones have negatively impacted women.

Furthermore, the emerging literature focuses more on increased productivity that is fostered by their full participation under AfCFTA rather than the structural challenges that inhibit participation of groups such as women. The argument in the literature is to the effect that participation under AfCFTA shall open up productive resources such as finance, new markets, technology and other assets that in turn would facilitate women’s transition from subsistence agriculture to higher value crops for export in regional value chains.<sup>94</sup> This analysis misses the mark in under-estimating the nature of agro-industrialisation in relation to women. Women’s experiences in the agro-industry are characterised by patriarchal traditions and rules relating to property ownership, structural inequalities of rural livelihood and hierarchical power dynamic between large agro-processors and small-scale subsistence women farmers.<sup>95</sup>

Furthermore, an empirical and theoretical study done on Nigerian SMEs examined the impact of trade liberalisation from a time frame of 1981 to 2019.<sup>96</sup> The study found that from the literature and empirical data, openness has a ‘positive but insignificant’ impact on the performance of SMEs in Nigeria. The explanation for this finding is to

91 Kelleher (n 18).

92 As above.

93 As above.

94 M Ngom AfCFTA: ‘Reaping the benefits of the world’s most youth and women-friendly trade agreement’ UN Africa Renewal, February 2023, <https://www.un.org/africarenewal/magazine/february-2023/afcfta-reaping-benefits-world%E2%80%99s-most-youth-and-women-friendly-trade-agreement#:~:text=The%20AfCFTA%20will%20address%20the,undermining%20the%20continent’s%20overall%20development> (accessed 6 October 2023).

95 Kelleher (n 18).

96 L Effiom and others ‘Does trade openness influence the performance of small and medium enterprises in Nigeria? a re-evaluation of the evidence’ (2022) *Heliyon* 8.

the effect that SMEs benefit from external economies; but the benefit is too low and inconsiderable because the major beneficiaries of trade liberalisation are countries of which the 'domestic economic conditions are robust enough to attract and adapt the dynamic benefits arising from trade and economic relations with other countries'.<sup>97</sup> Furthermore, the study refers to other literature that argues that firms that produce local products are negatively impacted once the market is penetrated by well-established firms.<sup>98</sup> The study also points to factors internal to the countries such as poor basic infrastructure, double taxation, lack of venture capital, that inhibit the performance of SMEs. It also demonstrated that lack of safety nets that cushion the negative impacts of openness when SMEs are exposed to competition with larger foreign firms, inhibits the performance of SMEs in regional trade.<sup>99</sup>

## 5 CONCLUSION

This article has attempted to present an alternative conceptualisation of what inclusion means and therefore reveals the shortcomings of the current understanding of inclusion under emerging literature on AfCFTA. This alternative approach has focused, in fairly general terms, on the political economies of different African nations and RECs such as the East African Community. It has attempted to tease apart the different actors involved when countries begin to trade with one another. In so doing, it has presented a complex picture of the political and economic landscape that sets in motion different dynamics once AfCFTA is operationalised. The complexity shows whether or not the tools of inclusion foregrounded in the emerging literature are sufficient enough to address different vulnerabilities. As opposed to the constitutional architectural approach postulated in the emerging literature, the article has taken a substantive approach that examines some granular aspects of select countries, regional economic communities, the agricultural sector and SMEs to illustrate the different dynamics that will face different actors in an economy once trading begins.

This substantive approach to regional economic arrangements such as the AfCFTA, which delves more into the political economies of African nations, a looser understanding of state sovereignty and an assumption of AfCFTA as an inherently transnational phenomenon as the background idea, suggests an alternative conceptualisation of the vulnerabilities, the question of inclusion and possible tools and legal arrangements for fostering inclusion. Such a conceptualisation would be more apt in capturing the consequences of trade liberalisation that have been described as unintended. The tools for inclusion under this perspective would vary widely and be more context specific as well as highly innovative to capture, absorb and deal with the dynamics of

97 As above.

98 A Abiodun Eniola & H Entebang 'SME firm performance: financial innovation and challenges' (2015) 195 *Procedia - Social and Behavioural Sciences* 334.

99 Effiom and others (n 96) 8.

increased openness. Principles such as variable geometry would be re-conceptualised to move beyond the boundaries of the nation state. For instance, variability could also mean variability along sectors in particular regional economic arrangement or variability along labour markets. Institutions would have to be strengthened to deal with transnational phenomenon and not just left to states. This is so because the market dynamics arising out of free-trade regimes such as AfCFTA transcend nation states. This will consequently require state-like institutions at a transnational level that are equipped enough to curb negative free-trade dynamics and protect vulnerable groups.