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COORDINATING AFRICA'S EXTERNAL VOICE: THE CASE FOR AN EXTERNAL ENGAGEMENT PROTOCOL UNDER THE AFRICAN CONTINENTAL FREE TRADE AREA

Emmanuel Amoah[1*]

Abstract

The African Continental Free Trade Area has created a sophisticated framework for internal trade liberalisation, yet it contains no mechanism to govern how its fifty-four Member States engage the world beyond Africa's borders. Each Member State retains the legal capacity to conclude bilateral trade and investment agreements with external partners on terms that progressively undermine the AfCFTA's customs union trajectory, without any obligation to notify the continental framework, without compatibility assessment, and without any mechanism for developing a common continental position on external trade matters. This paper argues that it is vital and urgent that we adopt an External Engagement Protocol under the AfCFTA Agreement before too many cross-continental bilateral obligations make it legally impossible to do so.

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Introduction

The African Continental Free Trade Area has created a sophisticated framework for internal trade liberalisation, yet it contains no mechanism to govern how its fifty-four Member States engage the world beyond Africa's borders. Each Member State retains the legal capacity to conclude bilateral trade and investment agreements with external partners on terms that progressively undermine the AfCFTA's customs union trajectory, without any obligation to notify the continental framework, without compatibility assessment, and without any mechanism for developing a common continental position on external trade matters. Existing scholarship has diagnosed this fragmentation; none has proposed a legally grounded institutional remedy. This paper fills that gap. It argues for the adoption of an External Engagement Protocol under the AfCFTA Agreement, grounding the proposal in three legal foundations that do not require interpretive innovation: the AfCFTA's treaty text, the Abuja Treaty's continental customs union mandate under Article 6(2)(d), and the AU Constitutive Act's overarching institutional obligations. The Protocol's design draws on ASEAN's demonstrated feasibility of non-supranational collective external engagement, corrects for MERCOSUR's enforcement failures, and adapts the converse of the WTO Appellate Body's Turkey-Textiles necessity test as its incompatibility standard. More broadly, the article contributes to international economic law by identifying the role of transitional governance instruments in staged integration systems, a dimension that has received limited doctrinal attention. It argues that coordination mechanisms are not merely ancillary to integration but constitutive of its progression, particularly in the transition from free trade areas to customs unions. The AfCFTA provides a uniquely salient case through which to develop this broader theoretical insight. The case for action is urgent: the window for preventive institutional design closes as cross- continental bilateral obligations accumulate, make it legally impossible to do so.

The paper develops as follows. Part 2 situates the AfCFTA within the Abuja Treaty's six-stage trajectory, arguing that pre-CET coordination is constitutive of customs union formation rather than merely preparatory to it. Part 3 documents the institutional vacuum's four functional consequences, tariff divergence, rules of origin divergence, regulatory fragmentation, and eroded bargaining leverage, illustrated by the Kenya-EAC, Ghana-EPA, and AGOA episodes and situated within a TWAIL/LPE account of structural asymmetry. Part 4 grounds the Protocol in three foundations requiring no interpretive innovation: the AfCFTA's treaty text, the Abuja Treaty's Article 6(2)(d) mandate, and the AU Constitutive Act's Article 3(i) obligation, with VCLT Articles 31(1) and 26 as supporting threads. Part 5 selects among comparative models: the EU's common commercial policy as the appropriate long-run trajectory but premature template, ASEAN's consultative architecture as the present design reference, and MERCOSUR's enforcement failures as the cautionary constraint. Part 6 proposes the resulting architecture, Secretariat-anchored coordination, pre-negotiation notification, compatibility standards drawn from the converse of Turkey-Textiles, a three-stage graduated enforcement mechanism, and EPA-calibrated transitional provisions. Part 7 establishes WTO compatibility under GATT Article XXIV, the Transparency Mechanism, and the Enabling Clause. The paper concludes by situating the Protocol within the broader category of transitional governance instruments.

Fragile harmony

In February 2020, Kenya announced its intention to negotiate a bilateral free trade agreement with the United States.[2] The East

2 Office of the United States Trade Representative, 'President Trump Announces Intent to Negotiate Trade Agreement with Kenya' (USTR Press Release, 6 February 2020) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/february/president-trump-announces-intent-negotiate-trade-agreement-kenya> accessed 30 June 2026; Luke Anami, 'Kenya Will Be in Breach of EAC, AfCFTA Rules in Proposed Trade Deal with America' *The East African* (Nairobi, 16 February 2020) <https://www.theeastafrican.co.ke/news/ea/Kenya-

African Community Secretariat raised compatibility concerns, noting that the EAC's treaty obligations required member states to adopt common negotiating positions in trade agreements with third parties.[3] The negotiations proceeded regardless.[4] Kenya was characterised at the time as being on the brink of becoming the first violator of AfCFTA commitments before their fruition.[5] The negotiations were ultimately never concluded, but the structural problem they exposed was not resolved by their failure: no continental coordination mechanism had existed to interrupt them, and none emerged from the episode.[6]

The Kenya episode was not an isolated event. Africa's formal admission as a permanent member of the G20 through the African Union marked a significant shift in its global economic standing,[7] yet that presence has not been matched by any coordinated continental trade position. Individual African states continue to engage major trading partners bilaterally, on their own terms, without reference to the AfCFTA's integration objectives, while the AU's G20 seat remains an institutional achievement without the technical and legal coordination machinery necessary to give it substantive trade

US-trade-deal-sparks-dispute-with-EAC-partners/4552908-5456950-55r9wrz/index.html> accessed 30 June 2026.

3 Protocol on the Establishment of the East African Customs Union (adopted 2 March 2004, entered into force 1 January 2005) art 37(2), (4)(b); Protocol on the Establishment of the East African Community Common Market (adopted 20 November 2009, entered into force 1 July 2010) art 37(3)(a), (4)(b); *Christopher Ayieko and Emily Osiemo v Attorney General of the Republic of Kenya and Secretary General of the East African Community*, Reference No 5 of 2019 (East African Court of Justice, First Instance Division, 2 December 2022) paras 21, 67, 69, 108(a), (c), (e); United Nations Economic Commission for Africa, *Assessing Regional Integration in Africa XI: Delivering on the African Economic Community* (UNECA 2025) 153, fn 310.

4 *Ayieko* (n [2]) paras 64, 98.

5 Luke Anami (n [1])

6 Jamie MacLeod, David Luke and Jonathan Bashi, 'Africa's Trade Arrangements with the United States, the United Kingdom and Other Prominent Partners' in David Luke (ed), *How Africa Trades* (LSE Press 2023) 85; Office of the United States Trade Representative, 'United States and Kenya Announce the Launch of the U.S.-Kenya Strategic Trade and Investment Partnership' (USTR Press Release, 14 July 2022) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/july/united-states-and-kenya-announce-launch-us-kenya-strategic-trade-and-investment-partnership> accessed 30 June 2026.

7 G20, 'New Delhi Leaders' Declaration' (G20 India Presidency, 9-10 September 2023) para 76.

content. The pattern is systemic: Africa's formal negotiating presence consistently outstrips its practical bargaining capacity, because the AfCFTA's internal architecture does not extend to the external trade domain.

This institutional incompleteness is not incidental to the AfCFTA's design. The AfCFTA is a framework agreement whose protocols are intended to develop incrementally as the integration process deepens.[8] Existing protocols have progressively elaborated disciplines on goods, services, investment, intellectual property, and competition. None addresses external trade engagement.[9] The gap exists because external trade policy is politically sensitive and Member States, at the AfCFTA's formation, were unwilling to accept binding coordination obligations on their bilateral trading relationships.[10]

The scholarship on this structural gap has been predominantly diagnostic. The fragmentation threat has been identified with precision in the AfCFTA literature;[11] the institutional limitations of the AfCFTA's external engagement architecture have been catalogued;[12] and the specific implications for the African Growth and Opportunity Act context have also been examined.[13] Each of these contributions is diagnostic; none proposes a legal design. This paper fills that gap.

8 AfCFTA Agreement art 8.

9 Melaku Desta, Guillaume Gérout and Jamie MacLeod, 'Safeguarding the African Continental Free Trade Area from Externally-Imposed Threats of Fragmentation' (Afronomicslaw, 14 March 2019) <https://www.afronomicslaw.org/2019/03/14/safeguarding-the-african-continental-free-trade-area-from-externally-imposed-threats-of-fragmentation> accessed 30 June 2026, 5–7.

10 Desta, Gerout and MacLeod (n 8) 5-7

11 Ibid

12 United Nations Economic Commission for Africa, *Assessing Regional Integration in Africa XI: Delivering on the African Economic Community* (UNECA 2025) 228, 230–231, 244; David Luke (ed), *How Africa Trades* (LSE Press 2023) 63.

13 Emmanuel Kwabena Owusu Amoah, 'Reimagining AGOA in the Era of AfCFTA: Opportunities for Sustainable Economic Growth in Africa' in Katrin Kuhlmann (ed), *Next-Generation Approaches to Trade and Development: Balancing Economic, Social, and Environmental Sustainability* (CITD Georgetown Law 2023) 43.

The paper does so by developing and applying the concept of transitional governance instruments: legal mechanisms that operate between formal stages of economic integration to manage the structural gaps that arise during progression from one stage to another. Integration theory has traditionally focused on end-states, the characteristics of free trade areas, customs unions, and common markets.[14] Less attention has been paid to the institutional mechanisms that facilitate movement between these stages. This article argues that external coordination mechanisms constitute a distinct and under-theorised category of such transitional instruments, and that the proposed External Engagement Protocol under the AfCFTA exemplifies this function. The Protocol is not merely a technical addition to the AfCFTA's protocol architecture; it is an instance of a broader class of instruments whose role in staged integration systems deserves doctrinal attention in its own right.

The argument proceeds as follows. Part II establishes the Abuja Treaty trajectory and the AfCFTA's relationship to it, developing the concept of pre-Common External Tariff (CET) coordination as a constitutive element of customs union formation. Part III documents the institutional vacuum and its four functional consequences, illustrated by three empirical episodes. Part IV develops the legal case for the Protocol on three foundations that do not require interpretive innovation. Part V applies a comparative institutional logic to select the appropriate design model. Part VI proposes the Protocol's institutional architecture in detail. Part VII establishes WTO compatibility. Part VIII concludes.

14 Bela Balassa, *The Theory of Economic Integration* (George Allen & Unwin Ltd 1961) 1–17.

PART 2: THE ABUJA TREATY TRAJECTORY AND THE AFCFTA

The Sequencing Logic and the Continental Customs Union Mandate

The AfCFTA is not a terminus. It is a stage within an integration trajectory that the Abuja Treaty established over thirty-four years ago.[15] The Abuja Treaty's six-stage model traces a linear progression from strengthened regional economic communities through continental free trade area, customs union, common market, and monetary union to political union. [16]The AfCFTA operates at the third and fourth stages of that model, advancing the continental free trade area and laying the institutional foundations for the Continental Customs Union.[17]

The AfCFTA's Preamble cites the Abuja Treaty as foundational authority.[18] AfCFTA Article 3(d) commits Member States to 'lay the foundation for the establishment of a Continental Customs Union at a later stage.'[19] The AfCFTA does not establish the customs union objective independently; it inherits and advances it.[20]

The Abuja Treaty's fourth-stage obligation, under Article 6(2)(d), requires the coordination and harmonisation of tariff and non-tariff systems among the various regional economic communities 'with a view to establishing a Customs Union at the continental

15 Treaty Establishing the African Economic Community (Abuja Treaty) (adopted 3 June 1991, entered into force 12 May 1994) arts 6, 88; Agreement Establishing the African Continental Free Trade Area (adopted 21 March 2018, entered into force 30 May 2019) preamble.

16 Abuja Treaty (n [1]) art 6(2)

17 Abuja Treaty (n [1]) art 6(2)(c)–(d); AU Assembly, Decision on the African Continental Free Trade Area (Assembly/AU/Dec.714(XXXII), 32nd Ordinary Session, 10–11 February 2019) para 8; United Nations Economic Commission for Africa, *Assessing Regional Integration in Africa XI: Delivering on the African Economic Community* (UNECA 2025) 228–231.

18 AfCFTA Agreement (n 14) preamble, recitals 2-3

19 AfCFTA Agreement (n [14]) art 3(d).

20 AfCFTA Agreement (n [14]) art 1(j) (defining 'Continental Customs Union' by cross-reference to the Abuja Treaty); UNECA, *ARIA XI* (n [11]) 13.

level by means of adopting a common external tariff.'[21] This is a continental obligation, requiring the consolidation and progressive harmonisation of what the RECs have already built. While elements of the Abuja Treaty's sequencing framework have not been judicially enforced and may operate in part as programmatic commitments, their legal significance lies in establishing a directional obligation and institutional trajectory that the AfCFTA expressly adopts and must be interpreted and developed consistently with.[22] The Protocol does not create obligations that the Abuja Treaty does not already imply at the fourth stage; it gives operational institutional form to the coordination requirements that Article 6(2)(d) makes necessary but that existing instruments leave without expression.

The AfCFTA is also a stepping-stone toward a Continental Customs Union in the sense contemplated by Balassa's foundational typology. .[23] A customs union requires coordination of external commercial policy as a constitutive element: without a common external tariff and collective bargaining, the arrangement is a free trade area, not a customs union.[24] The AfCFTA is currently the former and is committed to becoming the latter.

21 Abuja Treaty (n [1]) art 6(2)(d).

22 Arinze B Okiche, 'Are African Regional Trade Agreements Intended to Create Legally Binding Obligations?' (2026 29(1) *Journal of International Economic Law* (advance article, 2026) doi:10.1093/jiel/jgag009; James Thuo Gathii, 'African Regional Trade Agreements as Flexible Legal Regimes' (2010) 35 North Carolina Journal of International Law and Commercial Regulation 571, 572–578; UNECA, *ARIA XI* (n [3]) 13; Gerhard Erasmus, 'Does Africa Have Two Trade Liberalisation and Economic Integration Strategies? Comparing the AfCFTA Agreement with the Abuja Treaty' (TRALAC Trade Brief No S24TB02/2024, 25 February 2024) <https://www.tralac.org/publications/article/16323-does-africa-have-two-trade-liberalisation-and-economic-integration-strategies-comparing-the-afcfta-agreement-and-the-abuja-treaty.html> accessed 30 June 2026.

23 Balassa (n 13) 1-17, UNECA, *ARIA XI* (n [11]) 403.

24 Gathii (n 21) 572-579; UNECA, *ARIA XI* (n [11]) 13.

Pre-CET Coordination as a Constitutive Element of Customs Union Formation

For Africa, the common external tariff presents a particularly acute challenge. The continent's fifty-four economies differ significantly in their tariff structures, their dependence on import duties as a source of government revenue, and the depth of their existing bilateral trade commitments with major external partners.[25] The UNECA has identified CET negotiation as the principal stumbling block in AfCFTA's customs union trajectory, requiring levels of political consensus and technical harmonisation that are not achievable in the near term and that no credible institutional timetable currently anticipates.[26]

The difficulty of negotiating a common external tariff does not mean that nothing can or should be done in the interim. This observation leads to what this paper identifies as the core theoretical insight of transitional governance in staged integration systems: customs unions are not created solely by tariffs; they are created by coordination.

Customs union formation comprises at least three distinct elements: the eventual agreement on a common external tariff schedule; the technical infrastructure for assessing and monitoring external obligations against that schedule; and the coordination practices that build the institutional habits and common positions without which neither the tariff negotiation nor its enforcement can succeed. Integration theory has focused primarily on the first element as the defining characteristic of a customs union.[27] This paper argues that the second and third elements are equally constitutive: a common external tariff cannot be negotiated without the coordination

25 United Nations Economic Commission for Africa, *Assessing Regional Integration in Africa XI: Delivering on the African Economic Community* (UNECA 2025) 192, 228–231; Trudi Hartzenberg, 'Regional Integration in Africa' (WTO Staff Working Paper ERSD-2011-14, October 2011) 15–16.

26 UNECA, *ARIA XI* (n [11]) 192, 228-231; Trudi Hartzenberg, 'Regional Integration in Africa' (WTO Staff Working Paper ERSD-2011-14, October 2011) 15-16

27 Balassa (n [13]) 1–17; UNECA, *ARIA XI* (n [11]) 403.

practices that enable common positions, and it cannot be maintained without the institutional machinery that monitors external obligations for compatibility. Pre-CET coordination is therefore not merely preparatory to customs union formation; it is constitutive of it.

The habits of consultation, the institutional infrastructure for common position development, the compatibility standards that prevent external agreements from foreclosing future harmonisation, and the technical capacity to assess external engagements against continental objectives are all elements of customs union logic that can be built before the CET is negotiated. Building these coordination habits early may itself facilitate the CET negotiation: the confidence-building that standing consultation mechanisms generate gives member states assurance that their interests will be considered in collective frameworks, which is a necessary precondition for the sovereignty-sharing that a common external tariff requires.[28] An External Engagement Protocol does precisely this. It begins building customs union coordination infrastructure during the transitional period, moving the continent functionally closer to the customs union stage while the CET negotiation process develops.

The Institutional Vacuum

The AfCFTA's building bloc architecture was designed to accommodate precisely this kind of incremental institutional development.[29] The framework agreement does not define its protocols exhaustively; it expressly contemplates their expansion as the integration process deepens, with Article 8 providing the

28 Luke (ed), (n 11) 217

29 AfCFTA Agreement (n [14]) preamble, recital 10; Gerhard Erasmus, 'The Meaning of Building Blocks for African Integration Is Defined by the Applicable Legal Instruments and Subsequent Practice' (Tralac, 2021) <https://www.tralac.org/blog/article/15546-the-meaning-of-building-blocks-for-african-integration-is-defined-by-the-applicable-legal-instruments-and-subsequent-practice.html> accessed 8 March 2026.

institutional procedure through which new protocols are negotiated and adopted.[30] That architecture has unfolded across three phases. Phase I, concluded at the AfCFTA's formation, produced the foundational protocols on Trade in Goods, Trade in Services, and Dispute Settlement.[31] Phase II, adopted by the AU Assembly in February 2023, added protocols on Investment, Competition Policy, and Intellectual Property Rights.[32] Phase III, adopted in February 2024, introduced protocols on Digital Trade and Women and Youth in Trade.[33] None of these existing protocols addresses external trade engagements. The institutional vacuum this creates reflects the political sensitivity of external trade policy and the caution of states seeking to preserve existing bilateral trading relationships with major external partners.[34] That political explanation does not, however, eliminate the legal and functional consequences of the vacuum's existence.[35] The absence of a coordination mechanism means that the AfCFTA's internal integration ambitions coexist, uneasily and at increasing cost, with an external trade governance environment in which any individual state can at any time conclude an agreement that cuts across the continental framework.[36]

30 AfCFTA Agreement (n [1]) art 8(3).

31 UNECA, *ARIA XI* (n [11]) 339–340; AfCFTA Agreement (n [1]) art 8(1).

32 Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment (adopted 19 February 2023, 36th Ordinary Session of the AU Assembly); UNECA, *ARIA XI* (n [11]) 350.

33 Protocol to the Agreement Establishing the African Continental Free Trade Area on Digital Trade (adopted 18 February 2024, 37th Ordinary Session of the AU Assembly); Protocol to the Agreement Establishing the African Continental Free Trade Area on Women and Youth in Trade (adopted 18 February 2024, 37th Ordinary Session of the AU Assembly); UNECA, *ARIA XI* (n [11]) 350, 372.

34 UNECA, *ARIA XI* (n [11]) 228, 230–231; Luke (ed) (n 11) 63

35 Okichie (n 21)

36 Desta, Gerout and MacLeod (n 8) 5-7; UNECA, *ARIA XI* (n [11]) 230; MacLeod, Luke and Bashi (n 5) 88-89; Okiche (n [21]).

PART 3: THE EXTERNAL ENGAGEMENT GAP: CONSEQUENCES AND ILLUSTRATIONS

What the AfCFTA Agreement Does Not Do

The AfCFTA's agreement text is characterised by a significant asymmetry. The Agreement contains detailed disciplines for intra-African trade liberalisation: tariff reduction schedules, rules of origin frameworks, services liberalisation modalities, investment protection standards, and competition disciplines. It contains nothing that regulates, constrains, or even acknowledges the external trade negotiations of its Member States.[37]

The treaty's general objectives acknowledge the external dimension without operationalising it institutionally. Article 3(d) commits to laying the foundation for a customs union, which by definition has an external dimension. Article 3(a) directs the AfCFTA to create a single market to deepen economic integration. Article 3(f) commits to enhancing the competitiveness of Member States' economies within the global market. Article 3(h) commits to resolving the challenge of multiple and overlapping memberships. Article 4(d) obliges State Parties to cooperate on all trade-related areas.[38] At the foundational level, the AU Constitutive Act's Article 3(i) commits the Union to establishing the necessary conditions enabling the continent to play its rightful role in the global economy and in international negotiations.[39] The AU Assembly has reinforced this commitment through successive decisions requiring Member States to engage external partners collectively and to ensure that any third-party partnerships do not undermine the continental market vision.[40]

37 UNECA, *ARIA XI* (n [11]) 228, 230–231; Luke (ed) (n 11) 63

38 AfCFTA Agreement (n [1]) arts 3(a), 3(d), 3(f), 3(h), 4(d).

39 Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) art 3(i).

40 AU Assembly, Decision on the AfCFTA (Assembly/AU/Dec.692(XXXI), 31st Ordinary Session, 1 July 2018); AU Assembly Dec.714(XXXII) (n 16) para 7, AU Assembly, Decision on Post-2020 Partnership with the European Union (Assembly/AU/Dec.715(XXXII), 32nd Ordinary Session, 10–11 February 2019) para 2.

Together, these provisions establish a clear directional commitment to collective external engagement. They do not, however, establish the institutional mechanisms through which that commitment is given operational form. That is the gap.

The Functional Consequences of the Gap

The absence of external coordination produces four distinct functional consequences, each of which impairs either AfCFTA's current objectives or its customs union trajectory. These effects are mutually reinforcing: fragmentation in one domain accelerates fragmentation in others, progressively increasing the institutional cost of transitioning to a customs union.[41]

First, tariff divergence undermines CET formation. When an AfCFTA Member State concludes a bilateral agreement with an external partner that grants preferential tariff access on terms more favourable than those available to other AfCFTA members, it creates a preference asymmetry that distorts the internal liberalisation project. More fundamentally, bilateral tariff commitments widen the divide between African states' tariff books and prevent the formation of a common external tariff, which is a prerequisite for the Continental Customs Union.[42] The ECOWAS groupings already demonstrate this problem at the regional level, their common external tariff disciplines having been undermined by separate bilateral agreements concluded by Côte d'Ivoire and Ghana with the European Union and replicated under the United Kingdom's post-Brexit trade arrangements.[43]

Second, rules of origin divergence generates trade deflection and value chain distortion. The AfCFTA has developed continental rules of origin covering the substantial majority of tariff lines, representing a

41 Desta, Gerout and MacLeod (n 8) 5-7; UNECA, *ARIA XI* (n [11]) 228, 230–231.
42 UNECA, *ARIA XI* (n [11]) 192, 230–231; Desta, Gérout and MacLeod (n [8]) 5–7.
43 Desta, Gerout and MacLeod (n 8) 5-7; UNECA, *ARIA XI* (n [11]) 230.

significant technical achievement designed to support regional value chain development.[44] When individual Member States conclude bilateral agreements with different and potentially conflicting rules of origin, they create incentives for trade deflection through the member with the most favourable external access, undermining both the coherence of the continental framework and the investment decisions that firms make in reliance on it.[45] The spaghetti bowl effect captures the systemic consequence: as bilateral agreements proliferate with divergent rules of origin, the resulting regulatory complexity progressively renders preferential arrangements inoperable in practice.[46]

Third, regulatory divergence fragments investment patterns. The proliferation of bilateral investment treaties and economic partnership agreements concluded by individual states on divergent terms creates overlapping and conflicting regulatory disciplines that complicate the development of continental investment frameworks. Investors seeking to structure continental operations face inconsistent signals about the applicable regulatory environment, with the terms of investment protection, dispute resolution, and market access varying depending on which bilateral agreements the host state has concluded.[47] The AfCFTA's investment protocol, designed to create a coherent continental investment architecture addressing the continent's fragmented landscape of overlapping bilateral investment disciplines, faces a structural limitation: it governs only intra-African investment, leaving the accumulation of inconsistent extra-African bilateral disciplines, the larger source of investor uncertainty, entirely unaddressed.[48]

44 AfCFTA Agreement (n [1]) Protocol on Trade in Goods, Annex 2; UNECA, *ARIA XI* (n [11]) 339–340.

45 MacLeod, Luke and Bashi (n 5) 95; UNECA, *ARIA XI* (n [8]) 230.

46 Jagdish Bhagwati, 'US Trade Policy: The Infatuation with Free Trade Agreements' in Claude Barfield (ed), *The Dangerous Obsession with Free Trade Areas* (AEI Press 1995) 4–5; Gathii (n [8]) 656–664.

47 UNECA, *ARIA XI* (n [11]) 228, 244; Desta, Gérout and MacLeod (n [8]) 5–7.

48 Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment

Fourth, bilateral negotiation weakens collective bargaining leverage. The AfCFTA's most significant potential contribution to Africa's position in global trade is the aggregation of its member states' market size into a negotiating unit that external partners must engage collectively. A combined GDP exceeding three trillion dollars and a population exceeding 1.4 billion represents, in principle, a transformation of Africa's negotiating position.[49] The practice of allowing external powers to negotiate with each state individually, behind closed doors, represents a concession of collective leverage that AfCFTA's market aggregation should prevent. The structural constraints on developing country negotiating capacity in international trade forums confirm that this concession is not merely a diplomatic inconvenience but a structural transfer of advantage to better-resourced external partners.[50]

The same structural deficit operates at the multilateral level. Africa accounts for over a quarter of WTO membership, yet its collective engagement at the WTO has been characterised as nominal and largely ineffectual relative to that membership share.[51] The Africa Group, which coordinates African positions across WTO negotiations, is structurally ad hoc: its effectiveness depends on the capacity and initiative of whichever country holds the coordination role at a given moment, with coordination between Geneva missions

(adopted 19 February 2023, 36th Ordinary Session of the AU Assembly) (n [31]); Gerhard Erasmus, 'Substantive Issues The AfCFTA Investment Protocol Should Address' (Tralac, 27 March 2020) <https://www.tralac.org/blog/article/14468-substantive-issues-the-afcfta-investment-protocol-should-address.html> accessed 30 June 2026; Amani Khalifa and others, 'The AfCFTA Investment Protocol Will Change the Landscape of Investment Protection in Africa' (Freshfields Bruckhaus Deringer, 5 April 2023) <https://www.freshfields.com/en/our-thinking/blogs/risk-and-compliance/the-afcfta-investment-protocol-will-change-the-landscape-of-investment-protection-102ic8t> accessed 30 June 2026.

49 African Continental Free Trade Area, 'About The AfCFTA' <https://au-afcfta.org/about/> accessed 30 June 2026.

50 Luke (ed) (n 11) 63; UNECA, *ARIA XI* (n [11]) 228, 231.

51 World Trade Organization, 'WTO Members and Observers' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 30 June 2026 (Africa accounts for 44 of 166 WTO members, approximately 26.5 per cent); UNECA, *ARIA XI* (n [11]) 228.

and home capitals described as consistently challenging.[52] The AfCFTA Secretariat has been identified as a potential institutional anchor for Africa Group coordination. Without a legal mandate, however, that engagement remains informal and episodic.[53] The cumulative effect of both dimensions, bilateral and multilateral, is a continent whose formal negotiating presence consistently outstrips its practical bargaining capacity. That gap is structural, and the Protocol is a structural response to it.

Empirical Illustrations

The functional consequences identified above are not theoretical. They are visible in two documented episodes, each of which illustrates a different dimension of the external engagement gap.

Ghana's position as both a founding AfCFTA Member Party and an EPA implementing state illustrates the rules of origin and tariff compatibility problem with particular clarity. Ghana initialled an Interim EPA with the European Union in 2007, committing to progressive tariff liberalisation on approximately 80 per cent of EU imports over a 15-year period.[54] Both the EPA and the AfCFTA are simultaneously in force, creating competing legal commitments on tariff treatment and rules of origin that pull in structurally divergent directions.[55] The UNECA has identified the divergence between

52 Luke (ed) (n 11) 63; UNECA, *ARIA XI* (n [11]) 231.

53 United Nations Economic Commission for Africa, 'African Group Convenes in Chavannes-de-Bogis to Advance a Strong, Development-Centred Agenda for WTO MC14' (UNECA, 3 December 2025) <https://www.uneca.org/stories/african-group-convenes-in-chavannes-de-bogis-to-advance-a-strong%2C-development-centered> accessed 30 June 2026; Luke (ed) (n 11) 63.

54 EU-Ghana Joint Statement, 'Start of Trading under the EU-Ghana Interim Economic Partnership Agreement' (European Commission, 1 July 2021) <https://policy.trade.ec.europa.eu/news/joint-statement-eu-and-ghana-start-trading-under-eu-ghana-interim-economic-partnership-agreement-2021-07-01_en> accessed 8 April 2026; European External Action Service, 'The European Union and Ghana' <https://www.eeas.europa.eu/ghana/european-union-and-ghana_en?s=101> 8 March 2026.

55 AfCFTA Agreement (n [1]) Protocol on Trade in Goods, Annex 2; Jamie MacLeod, David Luke and Jonathan Bashi, 'Africa's Trade Arrangements with the United States, the United Kingdom

EPA liberalisation schedules and AfCFTA tariff schedules as one of the most technically complex implementation challenges facing West African AfCFTA states.[56]

The AGOA reform process illustrates the institutional consequence of coordination without legal backing. The December 2022 Memorandum of Understanding between the USTR and the AfCFTA Secretariat created a formal channel for collective engagement on US-Africa trade policy, positioning the Secretariat to advocate for AGOA reform aligned with the continent's integration objectives, including harmonisation of rules of origin that would have supported regional value chain development.[57] What it lacked was the legal mandate to require Member States to coordinate their engagement with the AGOA renewal process collectively. The programme expired in September 2025 and was reauthorised only through December 2026 under a short-term extension.[58] Capacity without legal mandate produced consultation without consequence.

The TWAIL and Law and Political Economy Dimension

The fragmentation described above is not accidental. From a Third World Approaches to International Law and Law and Political Economy perspective, the structural conditions under which African states negotiate externally have historically reproduced rather than disrupted patterns of external dependency, precisely because African integration frameworks have addressed internal liberalisation while

and Other Prominent Partners' in David Luke (ed), *How Africa Trades* (LSE Press 2023) 95; UNECA, *ARIA XI* (n [11]) 230.

56 UNECA, *ARIA XI* (n [11]) 228, 231, 244.

57 MacLeod, Luke and Bashi (n [41]) 91–92.

58 Consolidated Appropriations Act 2026 (P.L. 119-75) s 5019 (signed 3 February 2026); United States Trade Representative, 'Statement from Ambassador Jamieson Greer on the Reauthorization of the African Growth and Opportunity Act' (USTR, 3 February 2026) <https://ustr.gov/about/policy-offices/press-office/press-releases/2026/february/statement-ambassador-jamieson-greer-reauthorization-african-growth-and-opportunity-act> accessed 8 April 2026.

leaving external asymmetries intact.[59] Formal sovereign equality does not produce substantive equivalence where the conditions of negotiation, including market size, technical capacity, economic vulnerability, and institutional sophistication, are asymmetric: African states are formally equal as negotiating parties but structurally disadvantaged as negotiating actors.[60] The external engagement gap is not merely an institutional oversight but a structural feature of AfCFTA's architecture that perpetuates the asymmetries the continental project was designed to address.[61] The Protocol is a structural response to a structural problem.

PART 4: THE LEGAL AND INSTITUTIONAL CASE FOR THE PROTOCOL

What Existing Law Clearly Supports

At its most defensible, the legal case for the Protocol rests on three foundations that do not require interpretive innovation or doctrinal extension.

The first is the AfCFTA's treaty text itself. Article 3(d)'s commitment to laying the foundation for a continental customs union, read alongside Articles 3(a), 3(f), 3(h), and 4(d)'s obligations of cooperation on all trade-related areas, establishes a clear directional commitment to collective trade governance that extends to the external dimension. These provisions provide the positive law foundation upon which a Protocol can be grounded.[62]

59 James Thuo Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3 Trade Law and Development 26, 30; James Thuo Gathii, *African Regional Trade Agreements as Legal Regimes* (Cambridge University Press 2011) 2–17; 'Okiche (n 21)'.

60 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004) 245–268; 'Luke (ed) (n 11) 63'.

61 Desta, Gerout and MacLeod (n 8) 5-7; UNECA, *ARIA XI* (n [11]) 228, 230–231.

62 'AfCFTA Agreement (n 14) arts 3(a), 3(d), 3(f), 3(h), 4(d).

The second is the Abuja Treaty's sequencing logic. The AfCFTA Preamble explicitly cites the Abuja Treaty as foundational authority, and the AfCFTA's Article 3(d) commitment to laying the foundation for a Continental Customs Union is the direct treaty-level expression of what the Abuja Treaty already mandates at the fourth stage.[63] Article 6(2)(d) requires the coordination and harmonisation of tariff and non-tariff systems among the various regional economic communities 'with a view to establishing a Customs Union at the continental level by means of adopting a common external tariff.' That consolidation logic is reinforced by the REC-level provisions of the Abuja Treaty: Articles 29(b) and 32(1)–(2) committed Member States to building REC-level customs unions and common external tariffs at stage three and to eliminating differences between those tariffs at stage four, while Article 34(2) required Member States to notify the Community of prior bilateral agreements that conflict with those obligations and to refrain from extending or renewing them.[64] Reading these provisions together, the Abuja Treaty establishes a clear directional principle: integration progresses forward and is not reversed by bilateral agreements with third parties. The Protocol operationalises that principle at the continental level. It does not create obligations that the Abuja Treaty does not already imply at the fourth stage; it gives institutional form to the forward-progression logic that the treaty's sequencing architecture already demands.

The third is the AU Constitutive Act's overarching institutional mandate. Article 3(i) commits the Union to establishing the conditions enabling the continent to play its rightful role in international negotiations.[65] These provisions establish a structurally grounded institutional authority rather than merely aspirational commitments: they generate obligations of means and direction

63 AfCFTA Agreement (n [14]) preamble, recitals 2–3; 'Abuja Treaty (n 14) art 6(2)(d)
64 Abuja Treaty (n [49]) arts 6(2)(c), 6(2)(d), 29(b), 32(1)–(2), 34(2).
65 Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) art 3(i).

that subsequent instruments, including the AfCFTA, are expected to advance. The AfCFTA Secretariat, as the AU's primary trade integration instrument, is the appropriate body through which this mandate is given operational form in the external trade context. The Protocol delegates to the Secretariat the specific authority necessary to discharge this mandate, converting structurally grounded legal obligations into institutional machinery with enforceable disciplines.[66]

What Existing Law Plausibly Implies

Beyond what existing law clearly supports, two interpretive arguments provide additional grounding for the Protocol. Both are advanced with appropriate qualification as supporting threads rather than primary foundations.

The first is the purposive interpretation argument under Article 31(1) of the Vienna Convention on the Law of Treaties, which requires treaty interpretation in light of the treaty's object and purpose. [67]The object and purpose of the AfCFTA, as established by Article 3(d) read in conjunction with the Abuja Treaty's Article 6(2)(d) continental customs union mandate, is progressive continental economic integration culminating in a customs union achieved through the coordination and harmonisation of tariff systems across the RECs.[68] A customs union's essential attributes are by their legal nature external-facing: a common external tariff and coordinated external commercial policy are not optional features but constitutive elements of what a customs union is.[69] An interpretation

66 AfCFTA Agreement (n [14]) arts 3(d), 4(d), 8(1); AU Assembly Dec.714(XXXII) para 7; AU Assembly Dec.715(XXXII) (n 39) para 2.

67 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31(1).

68 AfCFTA Agreement (n [14]) art 3(d); Abuja Treaty (n [49]) art 6(2)(d).

69 General Agreement on Tariffs and Trade 1994 (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187, art XXIV:8(a); Balassa (n 13) 1-17.

of the AfCFTA that treats its obligations as entirely confined to the internal dimension fails to give adequate weight to the treaty's own stated trajectory. This interpretive argument supports the Protocol's legal coherence; it does not establish a justiciable present duty of coordination.

The second is the non-frustration principle derived from VCLT Article 26, which provides that every treaty must be performed in good faith.[70] The ILC's commentary on this principle confirms that good faith performance encompasses a duty to refrain from acts calculated to frustrate the object and purpose of the treaty.[71] Applied to the AfCFTA, the conclusion of bilateral agreements that progressively widen the divide between Member States' tariff books and prevent the formation of a continental common external tariff is precisely the kind of conduct the non-frustration principle addresses. Notably, the Abuja Treaty itself recognised this dynamic at the REC level in Article 34(2), which required Member States to refrain from extending or renewing prior agreements that conflict with the integration obligations.[72] Whether Article 3(d)'s directional commitment to a customs union, in the absence of express institutional machinery, generates a justiciable present duty of coordination is a contested question in international law that this paper does not require to be resolved. The non-frustration principle is invoked as an interpretive support rather than a primary legal foundation.

A structural analogy from the ERTA doctrine provides further support. In *Commission v Council*, the Court of Justice held that internal Community rules generated restrictions on Member States' capacity to conclude external agreements affecting those rules.[73] The

70 VCLT (n [66]) art 26.

71 ILC, 'Draft Articles on the Law of Treaties with Commentaries' [1966] II Yearbook of the International Law Commission 169, 211 (commentary to draft art 23, para 4).

72 Abuja Treaty (n [19]) art 34(2).

73 Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263, paras 17–22.

value of this analogy for present purposes is limited but real. The ERTA doctrine emerged in a legal order fundamentally different from the AfCFTA's, and its specific requirements of direct effect, supranational institutional competence, and established jurisprudence of competence allocation are not replicated in AfCFTA's design. The analogy is confined to the structural observation that when states commit to a particular form of integration, that commitment tends to generate corresponding considerations about external conduct inconsistent with that form.[74] That structural logic is independently supported by the Abuja Treaty's own Article 34(2) obligation.

What the Protocol Supplies That Existing Law Does Not

The Protocol's functional necessity is established not by proving that existing law already demands it but by demonstrating that existing law, together with the functional consequences of fragmentation and the institutional logic of the integration trajectory, makes inaction irrational. Existing law provides the directional commitment and the interpretive support. What it does not provide, and what the Protocol supplies, is the institutional machinery through which that commitment is given enforceable operational form.

Without the Protocol, the AfCFTA Secretariat has no authority to require notification of external negotiations, no mandate to assess compatibility between external agreements and AfCFTA objectives, no mechanism for developing common continental positions on external trade matters, and no legal basis for addressing the cumulative fragmentation that is progressively undermining the customs union trajectory.[75] The AU Constitutive Act's Article 3(i) mandate, the AfCFTA's Article 4(d) cooperation obligation, and the

74 Balassa (n [13]) 1–17; Hartzenberg (n [10]) 2.
75 AfCFTA Agreement (n [48]) art 8; Desta, Gérout and MacLeod (n [47]) 5–7.

Abuja Treaty's Article 6(2)(d) continental customs union mandate together provide the foundational legal basis for these functions.[76] The Protocol converts those foundations into operational authority, institutional machinery, and enforceable disciplines. That is the function of transitional governance instruments: they give legal and institutional form to the coordination requirements that the transition from a continental free trade area to a Continental Customs Union already implies but that existing law leaves without operational expression.[77]

PART 5: COMPARATIVE INSTITUTIONAL LOGIC: SELECTION, NOT DESCRIPTION

Three comparative models illuminate the Protocol's design. The analytical question is not what each model does but which is appropriate for the AfCFTA at its current integration stage and which represents the appropriate trajectory. Separating these questions produces a selection argument rather than a descriptive survey.

The European Union model is the appropriate trajectory. Under Articles 206 and 207 of the TFEU, the Union exercises exclusive competence over the common commercial policy.[78] As documented in the comparative literature, this exclusivity developed incrementally from *ERTA* through *Opinion 1/94* to the Lisbon Treaty, tracking the deepening of internal market integration over five decades.[79] The EU model is the logical legal endpoint of a customs union's external dimension: full common commercial policy, single negotiating

76 Constitutive Act (n [38]) art 3(i); AfCFTA Agreement (n [24]) art 4(d); Abuja Treaty (n [49]) art 6(2)(d).

77 UNECA, *ARIA XI* (n [11]) 228, 230–231; Hartzenberg (n [10]) 2.

78 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU) arts 206, 207; TFEU art 3(1)(e) (exclusive competence).

79 Commission v Council (ERTA) (n 72) paras 17-22; Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community (signed 13 December 2007, entered into force 1 December 2009) [2007] OJ C306/1, amending TFEU art 207.

authority, and exclusive competence over external trade agreements. It is not, however, the appropriate design model for the Protocol's current stage. It required a degree of political and legal integration, including supranational institutions, legal hierarchy, and judicial enforcement, that Africa has not yet achieved and that the AfCFTA's gradualist methodology does not contemplate. The distinguishing feature of the EU model is the availability of supranational institutions and legal hierarchy as enforcement mechanisms from the outset, neither of which the AfCFTA currently possesses. The Protocol should be designed as the first institutional building bloc toward the EU model's structural logic, not as its premature replication.

The ASEAN model is the appropriate design reference for the Protocol's current stage, though not an unqualified success story. ASEAN has demonstrated that meaningful coordination of external trade engagement is achievable without supranational authority, through a consultative culture, consensus-based decision-making, and institutional channels enabling unified external positions without formal competence transfer.[80] The negotiation of the ASEAN Plus frameworks with China, Japan, South Korea, Australia, New Zealand, and India resulted from precisely the kind of institutionalised consultation that the Protocol proposes for the AfCFTA Secretariat.[81] The AfCFTA context is structurally similar in three respects: both blocs involve heterogeneous economies at different levels of development; both operate through institutional centres that must work by consensus rather than by legal compulsion;

80 ASEAN Charter (adopted 20 November 2007, entered into force 15 December 2008) art 20 (consensus-based decision-making); UNECA, *ARIA XI* (n [11]) 228, 231.

81 ASEAN–China Free Trade Agreement (Framework Agreement on Comprehensive Economic Co-operation, signed 4 November 2002); ASEAN–Japan Comprehensive Economic Partnership Agreement (signed 14 April 2008); ASEAN–Korea Free Trade Agreement (signed 13 December 2005); ASEAN–Australia–New Zealand Free Trade Agreement (signed 27 February 2009); ASEAN–India Free Trade Agreement (Framework Agreement on Comprehensive Economic Cooperation, signed 8 October 2003); ASEAN Secretariat, 'Regional Comprehensive Economic Partnership (RCEP)' <https://asean.org/our-communities/economic-community/integration-with-global-economy/regional-comprehensive-economic-partnership-rcep/> accessed 8 April 2026.

and both face the challenge of translating aggregated market size into negotiating leverage without the formal competence transfer mechanisms available in supranational systems. However, individual ASEAN members have simultaneously pursued bilateral agreements alongside collective ASEAN-level negotiations, generating divergent rules of origin and overlapping obligations that reproduce the fragmentation problem the collective framework was designed to address.[82] ASEAN therefore demonstrates both the institutional feasibility of non-supranational collective external engagement and the structural weakness that results when coordination obligations lack enforcement architecture. The Protocol draws on the former as its design model and addresses the latter through its graduated enforcement mechanism. Its transferability to the AfCFTA context rests not on institutional identity but on structural similarity, tempered by the lessons of ASEAN's limitations.

MERCOSUR supplies the cautionary constraint. Established in 1991 with an explicit commitment to a common external tariff and coordinated external trade policy, the Southern Common Market was systematically undermined from within by individual members' pursuit of separate external arrangements and persistent deviations from the agreed tariff schedule.[83] Around thirty per cent of MERCOSUR's tariff lines have been subject, in at least one member country, to external deviations from the common external tariff, leading commentators to characterise the arrangement as an incomplete customs union rather than a functioning one.[84] Individual members pursued unilateral trade measures while failing to coordinate external tariff policy toward third parties, and Uruguay's attempt to negotiate an independent free trade agreement

82 Gathii, *African Regional Trade Agreements as Legal Regimes* (n [58]) 2–17; Bhagwati (n [45]) 4–5.

83 Treaty Establishing the Southern Common Market (Treaty of Asunción, adopted 26 March 1991, entered into force 29 November 1991) art 1.

84 Marcelo Olarreaga and Isidro Soloaga, 'Endogenous Tariff Formation: The Case of Mercosur' (1998) 12 World Bank Economic Review 297, 297.

with China created tensions that exposed the absence of any binding coordination mechanism.[85] MERCOSUR's failure is not one of ambition but of enforcement architecture: coordination obligations were adopted without the institutional mechanisms necessary to give them operational effect. The Protocol must be designed with this failure mode directly in mind.

PART 6: THE PROTOCOL: LEGAL DESIGN

Legal Basis and Institutional Architecture

The External Engagement Protocol should be adopted as a formal protocol under the AfCFTA Agreement, utilising the framework agreement's building bloc architecture for incremental legal development. Its composite legal basis, Articles 3(d), 3(f), 3(h), and 4(d) of the Agreement, AU Constitutive Act Articles 3(i) and 3(l), the Abuja Treaty's Article 6(2)(d) continental customs union mandate, and the interpretive support of VCLT Articles 26 and 31, points toward a Protocol that does not require amendment of the framework agreement and can therefore be initiated through the Council of Ministers without triggering the more politically demanding process of treaty revision.[86]

The Protocol's adoption would follow the AfCFTA's institutional procedure under Article 8 of the framework agreement.[87] The Council of Ministers would adopt a negotiating mandate and

85 Wilson Center, 'Uruguay, China and South America's Most Talked-About Trade Talks' (Wilson Center, 12 August 2022) <https://www.wilsoncenter.org/blog-post/uruguay-china-and-south-americas-most-talked-about-trade-talks> accessed 30 June 2026; Silvia Laens and María Inés Terra, 'MERCOSUR: Asymmetries and Strengthening of the Customs Union: Options for the Common External Tariff' (IADB, 2005)

86 AfCFTA Agreement (n [14]) arts 3(d), 3(f), 3(h), 4(d); Constitutive Act of the African Union (n [48]) arts 3(i), 3(l) (coordination and harmonisation of existing and future REC policies); Abuja Treaty (n [49]) art 6(2)(d); VCLT (n [66]) arts 26, 31.

87 AfCFTA Agreement (n [48]) arts 8–13; UNECA, 'Deepening the AfCFTA: Celebrating the Adoption of New Protocols on Investment, Intellectual Property Rights and Competition Policy' (UNECA, 16 March 2023) <https://uneca.org/stories/%28blog%29-deepening-the-afcfta-celebrating-the-adoption-of-new-protocols-on-investment%2C> accessed 30 June 2026.

terms of reference, specifying the Protocol's scope, objectives, and institutional design parameters. A negotiating committee of senior trade officials would then develop the Protocol text through a process of consultations with Member States, RECs, and the Secretariat. The completed Protocol text would be submitted to the Assembly of Heads of State and Government for adoption. The Protocol would enter into force upon ratification by a defined minimum number of State Parties, consistent with the threshold approach adopted for the AfCFTA framework agreement itself. [88]States that have signed but not yet ratified may be expected to apply the Protocol's first-stage notification and consultation obligations on a good faith basis pending formal ratification, consistent with VCLT Article 18.[89]

The Protocol should vest primary coordination functions in the AfCFTA Secretariat. The Secretariat is the appropriate institutional home for four reasons. First, it is the AfCFTA's permanent operational centre and the natural focal point for coordination across Member States and RECs.[90] Second, it already exercises coordination functions in the AfCFTA-RECs interface, giving it both the institutional relationships and the technical expertise the Protocol requires. Third, its technical orientation and functional independence from individual Member State political pressures make it better suited than the Council of Ministers to perform compatibility assessments. Fourth, the December 2022 USTR-AfCFTA Secretariat Memorandum of Understanding confirmed the Secretariat's capacity and credibility to engage external partners on behalf of the continent; the Protocol converts that demonstrated capacity into legal authority.[91] The Council of Ministers retains

88 AfCFTA Agreement (n [48]) art 23(3).

89 VCLT (n [53]) art 18

90 AfCFTA Agreement (n [14]) art 13; Erasmus, 'The AfCFTA's Institutions are Vital for Effective Implementation' (TRALAC, 28 July 2020) <https://www.tralac.org/blog/article/14805-the-afcfta-s-institutions-are-vital-for-effective-implementation.html> accessed 30 June 2026.

91 USTR, Statement from Ambassador Greer on AGOA Reauthorisation (USTR, 3 February 2026) (n [44]); MacLeod, Luke and Bashi in Luke (ed) (n [29]) 91–92.

policy oversight and the authority to adopt binding determinations at the Protocol's second and third enforcement stages. Decision-making at those stages should proceed by consensus but structured as negative consensus: a Secretariat compatibility determination takes effect unless a consensus of Member States votes to set it aside. This design, modelled on the WTO Dispute Settlement Understanding's adoption mechanism, ensures that individual dominant states cannot unilaterally block assessments while preserving the formal consensus architecture that AfCFTA's intergovernmental structure requires.[92]

Scope and Definitions

The Protocol's scope should extend to all trade, investment, and economic partnership agreements between a State Party and a third party or group of third parties. The key definition is that of an 'external agreement' subject to the Protocol's disciplines: any treaty, agreement, arrangement, or understanding between a State Party and a non-AfCFTA party that creates obligations relating to tariffs, rules of origin, services market access, investment protection, intellectual property, or competition, being areas covered by the AfCFTA's existing or prospective protocols.[93] The breadth of this definition, extending to arrangements and understandings as well as formal treaties, is deliberate: instruments that fall short of treaty status can generate obligations with equivalent practical effect and must therefore fall within the Protocol's institutional awareness.[94]

92 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401, art 16(4); AfCFTA Agreement (n [48]) art 14.

93 AfCFTA Agreement (n 14) arts 3(a), 3(b), 6–8; Protocol to the Agreement Establishing the African Continental Free Trade Area on Trade in Goods (adopted 21 March 2018, entered into force 30 May 2019); Protocol on Investment (n 31); Protocol on Digital Trade (n 32); AfCFTA Protocol on Intellectual Property Rights (adopted 19 February 2023, 36th Ordinary Session of the AU Assembly; AfCFTA Protocol on Competition Policy (adopted 19 Februiary 2023, 36th Ordinary Session of the AU Assembly)

94 VCLT (n [66]) art 3; MacLeod, Luke and Bashi in Luke (ed) (n [5]) 91–92; Desta, Gérout and MacLeod (n [47]) 5–7.

The scope should be prospective: it applies to new negotiations and agreements, not to external obligations already in force at the time of the Protocol's adoption. This prospective limitation addresses the conflict-of-laws problem posed by existing EPA obligations while avoiding the legally and politically untenable position of requiring retrospective modification of binding international commitments.[95]

Notification Obligations and Proactive Engagement Mandate

The Protocol's foundational obligation requires State Parties to notify the AfCFTA Secretariat of any intention to enter into negotiations for an external agreement before formal negotiations commence. Notification should include: the identity of the negotiating partner; the proposed scope and subject matter of the agreement; the State Party's preliminary assessment of the agreement's relationship to its AfCFTA commitments; and the proposed timeline for negotiations. This obligation is designed not to prevent bilateral engagement but to bring it within the continental framework's institutional awareness before compatibility conflicts arise and become entrenched. The notification requirement operationalises, in binding institutional form, the political commitment already made at the highest AU level: the January 2019 Assembly decision that Member States wishing to enter into partnerships with third parties should inform the Assembly with assurance that those efforts would not undermine the vision of one African market.[96]

Beyond its reactive compatibility review function, the Protocol should vest in the Secretariat a proactive external engagement mandate in defined circumstances of continental significance. Where an external negotiation affects the trade interests of multiple

95 VCLT (n [66]) art 30; Desta, Gérout and MacLeod (n [8]) 5–7; UNECA, *ARIA XI* (n [11]) 228, 230–231, 244; MacLeod, Luke and Bashi in Luke (ed) (n [29]) 91–95.

96 AU Assembly Dec.715(XXXII) para 2 (n [39]).

Member States or has implications for the continental customs union trajectory, the Secretariat should be empowered to engage the external partner directly, developing and advancing a common continental position on the continent's behalf. This function is distinct from the exclusive competence model of the European Union: it does not displace Member States' bilateral negotiating capacity but supplements it with an institutional voice that aggregates continental interests where individual state engagement would be structurally disadvantaged. [97]The AGOA renewal process illustrates the mandate's practical application: without a proactive engagement mandate, the Secretariat's expertise remained advisory rather than authoritative. The Protocol supplies that authority.[98]

The same mandate should extend to multilateral forums. The Secretariat should serve as the institutional backbone for African delegations at the WTO and other multilateral trade bodies, providing technical support, common position papers, and institutional memory to the Africa Group.[99] The Secretariat's permanent technical capacity, if given a legal mandate to support multilateral African delegations, would convert the Africa Group's ad hoc coalition into an institutionally grounded collective voice, consistent with the AU Constitutive Act's Article 3(i) commitment to establishing the conditions enabling the continent to play its rightful role in international negotiations.[100]

Notification should trigger a thirty-day Secretariat compatibility assessment, calibrated to allow meaningful review without creating procedural delay sufficient to function as a de facto veto over bilateral negotiations. At the first stage, that assessment carries persuasive rather

97 TFEU (n [17]) arts 206–207; *Commission v Council (ERTA)* (n [72]) paras 17–22; cf Constitutive Act (n [38]) art 3(i).

98 MacLeod, Luke and Bashi in Luke (ed) (n [29]) 91–92; USTR, Statement from Ambassador Greer (n [57]).

99 UNECA, 'African Group Convenes in Chavannes-de-Bogis' (n [52]); Luke (ed) *How Africa Trades* (n [14]) 63.

100 Constitutive Act (n [38]) art 3(i).

than binding authority. Its function is informational and diplomatic: to surface potential conflicts, to create a record of engagement with the continental framework, and to enable the development of a common continental position where multiple Member States are engaged with the same external partner. Where a State Party fails to notify, the Secretariat may initiate a review on its own motion and the failure to notify constitutes a first-stage breach.[101]

Minimum Compatibility Standards

The Protocol should establish minimum substantive standards that external agreements must satisfy to be regarded as compatible with AfCFTA obligations. These standards define the boundary between bilateral engagement consistent with the integration trajectory and bilateral engagement that undermines it. They address three areas of legal sensitivity.

First, tariff commitments. External agreements should not require a State Party to apply tariff rates to third-party goods that undercut the preferences extended to AfCFTA members or that would lock in tariff levels structurally inconsistent with any future common external tariff schedule under Article 3(d).[102] The specific risk is that a bilateral agreement commits a Member State to tariff rates that it could not later adjust to align with a continental CET without breaching its bilateral obligations, thereby making that state a structural obstacle to CET formation rather than a building bloc within it.

Second, rules of origin. External agreements should not adopt rules of origin that conflict with the AfCFTA's continental framework, creating incentives for trade deflection or undermining the coherence

101 Jennifer Hillman, 'Conflicts Between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO — What Should WTO Do?' (2009) 42 Cornell International Law Journal 193, 195.

102 AfCFTA Agreement (n [14]) art 3(d); AfCFTA Agreement Protocol on Trade in Goods, Annex 2; Abuja Treaty (n [14]) arts 29(b), 32(1)–(2), 37; UNECA, *ARIA XI* (n [11]) 228, 231.

of the continental rules of origin regime.[103] Secretariat assessment of any external agreement's rules of origin provisions before entry into force should be a standard Protocol requirement.

Third, regulatory disciplines. External agreements should not impose investment protection, intellectual property rights, or services regulation standards that would prevent a Member State from fulfilling its existing AfCFTA obligations or from participating in future rounds of AfCFTA protocol deepening.[104] The practical risk is that investment protection disciplines in bilateral agreements, particularly stabilisation clauses and broad expropriation standards, may constrain a Member State's regulatory space in ways that make it legally or financially impractical to implement future AfCFTA disciplines.

The legal standard of incompatibility should be formulated as follows: an external agreement is incompatible if it creates obligations that materially impede a Member State's ability to fulfil its AfCFTA commitments or to participate in the progressive realisation of the customs union objective under Article 3(d).[105] This standard adapts established WTO jurisprudence to the AfCFTA context rather than creating a novel legal construct. The WTO Appellate Body's necessity test in Turkey — Restrictions on Imports of Textile and Clothing Products established that customs union formation generates corresponding constraints on Member State external conduct: measures are permissible only to the extent necessary for customs union formation.[106] The Protocol applies the converse of that logic: an external agreement that would prevent or materially impede the AfCFTA's customs union trajectory is incompatible

103 AfCFTA Agreement Protocol on Trade in Goods, Annex 2; Bhagwati (n [45]) 4–5; Gathii, *African Regional Trade Agreements as Legal Regimes* (n [58]) 2–17.

104 Protocol on Investment (n [31]); Erasmus, 'Substantive Issues the AfCFTA Investment Protocol Should Address' (TRALAC, 2020) (n [47]); UNECA, *ARIA XI* (n [11]) 350.

105 AfCFTA Agreement (n [14]) art 3(d).

106 *Turkey — Restrictions on Imports of Textile and Clothing Products* (Appellate Body Report, WT/DS34/AB/R, adopted 19 November 1999) paras 58–62.

with the framework for the same structural reason that the Turkey-Textiles test identified in the positive direction. This reliance is analogical and structural rather than doctrinally determinative. An agreement that creates competing obligations manageable through good faith interpretation does not meet this threshold; an agreement that structurally forecloses a Member State's capacity to align with a future common external tariff does.[107]

A Graduated Enforcement Mechanism

The Protocol's enforcement architecture operates across three stages. At the first stage, notification triggers a Secretariat compatibility assessment within thirty days. The assessment carries persuasive authority: its function is transparency, record-creation, and diplomatic signalling. The WTO's Trade Policy Review Mechanism demonstrates that transparency obligations generate reputational and diplomatic pressure that shapes state behaviour even in the absence of binding legal consequences.[108] A Member State that proceeds notwithstanding a negative assessment must provide a formal written explanation to the Secretariat and all Member States, creating a documented record of engagement with the continental framework, triggering the second stage, and activating the Secretariat's proactive mandate to develop a common continental position on the external negotiation concerned.

107 'Turkey - Textiles (n 105) para 58', on the necessity test for customs union formation. The Protocol applies the converse of that logic: an external agreement that would prevent or materially impede the AfCFTA's customs union trajectory is incompatible with the framework for the same structural reason that the Turkey-Textiles test identified in the positive direction. This reliance is analogical and structural rather than doctrinally determinative. AfCFTA Agreement art 3(d); Abuja Treaty art 34(2).

108 Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154'Annex 3 (Trade Policy Review Mechanism), para A(i); World Trade Organization, *The History and Future of the World Trade Organisation* (WTO, 2013) ch 8

At the second stage, the matter is referred to a Committee of Permanent Representatives and Senior Trade Officials, constituted under the authority of the Council of Ministers and composed of the ambassadors and trade diplomats who represent Member States on a continuous basis at the AU and AfCFTA institutional level. This Committee performs the technical and diplomatic work of engaging the Member State, examining the compatibility concerns identified in the Secretariat assessment, and attempting resolution before the matter escalates to adjudication. The Committee issues its recommendation by negative consensus within forty-five days: the recommendation stands unless a consensus of Member States votes to set it aside.[109]

At the third stage, where the Committee's recommendation has not produced resolution, the matter proceeds directly to the AfCFTA Appellate Body for final and binding determination. The panel stage is dispensed with because the Secretariat assessment and the Committee proceedings have already generated a sufficiently developed factual and legal record for appellate determination. The Appellate Body issues its determination within ninety days and may order modification of the external agreement, termination, or where neither is immediately possible, defined mitigation obligations with a fixed compliance timeline. The Appellate Body's determination is final, binding, and directly enforceable under the AfCFTA dispute settlement framework.[110]

Dispute Settlement, Standing, and Remedies

The Protocol's dispute settlement provisions should vest jurisdiction in a streamlined mechanism within the AfCFTA's existing institutional framework. Where all prior stages have been exhausted, the matter

109 AfCFTA Agreement (n [14]) arts 10–11; DSU (n [91]) art 16(4).

110 AfCFTA Agreement Protocol on Rules and Procedures on the Settlement of Disputes (adopted 21 March 2018); DSU (n [91]) arts 17, 19–21.

proceeds directly to the AfCFTA Appellate Body for final and binding determination. The panel stage is dispensed with because the Secretariat's compatibility assessment and the Committee's formal recommendation have already performed the equivalent function of first-instance factual and legal analysis.[111]

Standing to initiate dispute settlement proceedings under the Protocol should extend to two categories of complainant. First, any Member State with a demonstrated trade interest may initiate proceedings in relation to substantive compatibility disputes after the staged enforcement process has been exhausted. Second, any Member State irrespective of demonstrated trade interest may initiate proceedings in relation to notification failures, reflecting the systemic character of the notification obligation: every Member State has an institutional interest in the integrity of the Protocol's transparency architecture regardless of whether it is directly affected by the specific external agreement in question. The Secretariat participates in Appellate Body proceedings as amicus rather than as a party.[112]

The Appellate Body's remedial powers should include: an order requiring modification of the external agreement to address identified incompatibilities within a defined timeline; an order requiring termination of the external agreement where modification is not possible; and where neither modification nor termination is immediately achievable due to obligations owed to the third party, an order requiring defined mitigation measures and a fixed compliance schedule. Monetary compensation between Member States is not an appropriate remedy under the Protocol; the objective is prospective compliance with the integration trajectory, not retrospective compensation for harm already done.[113]

111 AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes (n 109), Hillman (n 100) 195-200.

112 AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes (n 109), Gathii (n 6) 285-290.

113 Gathii (n 58) 285-290; Hillman (n 51) 195-200.

Transitional Clauses and EPA Provision

The Protocol's transitional provisions must address the most politically sensitive design question: the treatment of external agreements already in force at the time of the Protocol's adoption. A Protocol that purported to require immediate modification or termination of existing bilateral commitments would not attract the minimum ratification threshold necessary for entry into force. The transitional framework must therefore distinguish between three categories of existing external agreement. First, agreements that are fully compatible require no action beyond registration with the Secretariat. Second, agreements that are partially compatible require defined modification within a negotiated transitional period, with the Secretariat providing technical assistance. Third, agreements that are fundamentally incompatible but whose modification or termination is prevented by obligations owed to the third party require a managed non-compliance pathway: the Member State must notify the Secretariat of the incompatible obligations, refrain from extending or renewing the agreement when it expires and implement defined mitigation measures. Ghana's simultaneous operation of an interim EPA with the European Union and AfCFTA membership is the paradigm case for the third category.[114] This approach is directly modelled on the Abuja Treaty's Article 34(2) obligation, operationalising at continental level what the Abuja Treaty already prescribed at the regional level.[115]

The Protocol should include a specific provision addressing Economic Partnership Agreements concluded between AfCFTA Member States and the European Union. EPAs represent the most systemically significant category of existing external agreement affecting AfCFTA's integration trajectory. They are simultaneously in

114 EU-Ghana Interim Economic Partnership Agreement (signed 28 July 2016, entered into force 5 March 2021); MacLeod, Luke and Bashi in Luke (ed) (n [5]) 95; UNECA, *ARIA XI* (n [8]) 230, 244; Desta, Gérout and MacLeod (n [47]) 5–7.

115 Abuja Treaty (n [49]) art 34(2).

force with AfCFTA obligations for a significant number of Member States,[116] they impose tariff liberalisation schedules and rules of origin disciplines that diverge structurally from AfCFTA's internal framework, and they were negotiated with individual RECs before the AfCFTA framework existed, making the resulting conflicts structurally inevitable.[117] The EPA-specific provision should operate on three levels: requiring notification of conflicting EPA provisions at the individual Member State level; requiring structured engagement with the European Union at the collective level, supported by Secretariat technical assistance; and empowering the Secretariat to advance a common African position in any renegotiation of EPA disciplines at the continental level. This provision transforms what is currently an unmanaged conflict between two simultaneously operative legal frameworks into a structured process with defined obligations, timelines, and institutional support.

PART 7: WTO LAW COMPATIBILITY

The Protocol's WTO compatibility must be established on two dimensions: whether the Protocol itself is consistent with WTO obligations; and whether the compatibility standards it imposes on Member States' external agreements introduce any new WTO-inconsistent obligations. Both dimensions yield favourable conclusions. The Protocol neither restricts trade with third parties nor imposes new barriers to market access; it creates an internal coordination mechanism that governs how AfCFTA Member States manage their external trade diplomacy collectively. That distinction, between internal coordination and external restriction, is the foundation of the WTO compatibility analysis.

116 European Commission, 'Economic Partnerships' (DG Trade, 2024) <https://policy.trade.ec.europa.eu/development-and-sustainability/economic-partnerships_en> accessed 30 June 2026 (fifteen African countries party to EPAs in application as of 2024).

117 Vusi Gumede, 'The African Continental Free Trade Agreement and the future of regional economic communities' (2021) 39(3) Journal of Contemporary African Studies 470.

The Protocol is consistent with GATT Article XXIV. Article XXIV:5 permits departures from the MFN obligation for customs unions and free trade areas provided that the duties and other regulations of commerce applied after formation are not on the whole higher or more restrictive than those applicable before formation.[118] The Protocol does not impose any new tariffs, quotas, or other restrictions on trade with third parties. It creates notification, assessment, and coordination obligations running between AfCFTA Member States and the Secretariat. These are internal governance disciplines, not external trade restrictions. The strongest counterargument is that the Protocol's compatibility standards could in practice discourage AfCFTA Member States from concluding market access agreements with third parties, producing an indirect chilling effect. While coordination mechanisms may indirectly influence the content of external agreements that Member States conclude, such effects do not constitute WTO-relevant restrictions unless they translate into measures directly affecting third-party market access rights.[119] The compatibility standards are calibrated to the customs union trajectory under Article 3(d) of the AfCFTA Agreement and Article 6(2)(d) of the Abuja Treaty, not to protectionism; and GATT Article XXIV expressly contemplates the formation of customs unions with corresponding external tariff coordination.[120]

The Protocol's notification obligations are consistent with and complementary to WTO transparency disciplines. WTO Members are already subject to notification obligations under multiple WTO agreements, including the obligation to notify regional trade agreements under GATT Article XXIV:7 and the WTO Transparency Mechanism for Regional Trade Agreements adopted

118 GATT 1994 (n [68]) art XXIV:5.

119 GATT 1994 (n [68]) arts III:4, XI; *Turkey — Restrictions on Imports of Textile and Clothing Products* (n [105]) paras 58–62.

120 AfCFTA Agreement (n [14]) art 3(d); Abuja Treaty (n [14]) art 6(2)(d); GATT 1994 (n [68]) art XXIV:8(a).

in 2006.[121] The Protocol adds a layer of continental notification running to the AfCFTA Secretariat that operates in parallel with, not in substitution for, these WTO obligations. Moreover, the Protocol's pre-negotiation notification trigger addresses a structural weakness in the WTO Transparency Mechanism, which has been criticised for generating notifications after agreements are already in force. A continental mechanism that requires notification before negotiations commence represents a more effective model of transparency governance consistent with the preventive logic that the Protocol is designed to advance.

The Protocol is additionally supported by the WTO Enabling Clause, which permits developing country Members to enter into differential and more favourable arrangements among themselves without extending equivalent treatment to all WTO Members.[122] All AfCFTA Member States have self-designated as developing or least-developed countries in their WTO schedules, satisfying the Enabling Clause's personal scope.[123] The Protocol's coordination disciplines apply exclusively among AfCFTA Member States and impose no obligations on third party WTO Members, satisfying its substantive scope. The Enabling Clause therefore provides an independent WTO law basis for the Protocol's differential treatment architecture, supplementing the GATT Article XXIV analysis.

Conclusion

Africa's external trade governance presents a structural paradox. The AfCFTA has created the largest free trade area by number of

121 AfCFTA Agreement (n [14]) art 3(d); Abuja Treaty (n [14]) art 6(2)(d); GATT 1994 (n [68]) art XXIV:8(a).

122 GATT Contracting Parties, 'Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries' (Decision of 28 November 1979) L/4903 (Enabling Clause) paras 1, 2(c).

123 WTO, 'Members and Observers' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 8 April 2026; UNECA, *ARIA XI* (n [11]) 228.

participating states, aggregating fifty-four economies into a single market framework with the explicit trajectory of a Continental Customs Union.[124] Yet each of those fifty-four economies retains the legal capacity to conclude bilateral trade and investment agreements with external partners on terms that progressively undermine that trajectory, without any obligation to notify the continental framework, without any assessment of compatibility, and without any mechanism for developing a common African position on external trade matters. The AfCFTA's internal architecture is increasingly sophisticated; its external architecture is non-existent.

This paper has argued that the gap is not merely a policy preference but a legal and institutional deficit with measurable functional consequences. Ghana's simultaneous EPA and AfCFTA obligations, and the AGOA renewal process each illustrate a different dimension of the same structural problem: the absence of a coordination mechanism that gives AfCFTA's integration trajectory institutional expression in the external trade domain.[125] The legal case for an External Engagement Protocol rests on three foundations that do not require interpretive innovation: the AfCFTA's treaty text, the Abuja Treaty's sequencing logic and continental customs union mandate under Article 6(2)(d), and the AU Constitutive Act's overarching institutional obligations.[126] Interpretive support is provided by the purposive interpretation principle under VCLT Article 31(1) and the non-frustration principle under VCLT Article 26.[127] The Protocol's institutional design draws on ASEAN's demonstrated feasibility of non-supranational collective external engagement while correcting for MERCOSUR's enforcement failures.[128] Its incompatibility

124 AfCFTA Agreement (n [48]) arts 1, 3(d); UNECA, *ARIA XI* (n [11]) 13, 228; ISS African Futures <https://futures.issafrica.org/thematic/08-afcfta/> accessed 30 June 2026.

125 EU-Ghana Interim Economic Partnership Agreement (n [95]); MacLeod, Luke and Bashi in Luke (ed) (n [29]) 91–92; USTR, Statement from Ambassador Greer (n [44]).

126 AfCFTA Agreement (n [14]) arts 3(d), 4(d); Abuja Treaty (n [14]) art 6(2)(d); Constitutive Act (n [38]) art 3(i).

127 VCLT (n [66]) arts 26, 31(1).

128 ASEAN Secretariat (n [80]); 'Olarreaga and Soloaga (n 83)

standard applies the converse of the *Turkey-Textiles* necessity test, grounding a novel African institutional instrument in established WTO jurisprudence rather than self-created legal constructs.[129]

The normative stakes of this institutional gap extend beyond trade law. From a Third World Approaches to International Law and Law and Political Economy perspective, the external engagement deficit is not an oversight but a structural feature of international economic law that systematically reproduces asymmetric bargaining conditions for African states.[130] The AfCFTA was designed to change those conditions by aggregating market size and political weight into a collective negotiating presence. That design is progressively defeated by the bilateral engagement practices it was intended to displace, because no mechanism exists to convert the AfCFTA's collective potential into collective practice. The Protocol is not merely a technical instrument. It is the institutional expression of the AfCFTA's deepest ambition: to ensure that Africa negotiates with the world as a continent, not as fifty-four separate economies whose individual vulnerabilities are systematically exploited by better-resourced external partners.

The paper's contribution extends beyond the AfCFTA context. It identifies a broader category of transitional governance instruments whose role in staged integration systems has received insufficient doctrinal attention. The claim that customs unions are created by coordination and not merely by tariffs is not specific to Africa: it applies to any integration arrangement whose members have committed to a common external tariff but must traverse the institutional distance between a free trade area and a functioning customs union. The pre-CET coordination problem is structural and recurring; the design solutions proposed here are generalisable. In this sense, the AfCFTA

129 *Turkey — Restrictions on Imports of Textile and Clothing Products* (n [91]) paras 58–62.

130 Gathii, 'TWAIL: A Brief History' (n [45]) 30; Anghie, *Imperialism, Sovereignty and the Making of International Law* (n [46]) 245–272; Okiche (n [59]).

provides not only a problem to be solved but a case study through which to develop a broader analytical framework for understanding how integration progresses between its formal stages.

The case for action is urgent. The AfCFTA's tariff liberalisation schedules are operational. Rules of origin negotiations are substantially complete. The investment protocol has been adopted.[131] Each passing month in which Member States conclude external agreements without continental coordination is a month in which the customs union trajectory becomes harder to achieve, not because the legal commitment has weakened but because the practical landscape of bilateral obligations becomes more complex and more entrenched. The window for preventive institutional action is finite and closing. A Protocol adopted now, before the common external tariff becomes negotiable, establishes the coordination habits, the institutional infrastructure, and the compatibility disciplines that the CET negotiation will itself require. A Protocol adopted after bilateral obligations have proliferated beyond manageable complexity addresses a problem that has already become structural rather than preventing one that is still preventable. The AfCFTA's foundational legal instruments provide the authority. The Secretariat provides the institutional home. The comparative models provide the design template. The time for this instrument is now, and the institutional machinery to adopt it already exists.

131 Protocol on Investment (n [31]); AfCFTA Agreement (n [14]) arts 8–13.