HARMONIZING PROPERTY RIGHTS UNDER THE AfCFTA: CHALLENGES FOR CROSS-BORDER INVESTMENT AND TRADE IN SERVICES

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ABSTRACT

The Agreement Establishing the African Continental Free Trade Area (AfCFTA) represents the most ambitious integration project in Africa's post-colonial history, aimed at creating a single market for goods and services. Central to this vision is the liberalization of Trade in Services, specifically through Commercial Presence (Mode 3), which necessitates the acquisition and protection of physical and intangible property across 54 Member States. Despite the supranational mandates of the AfCFTA, property law remains a bastion of national sovereignty, governed by the principle of *lex situs* and fragmented across diverse legal traditions (Common Law, Civil Law, and Customary Tenure). This paper identifies a Property Paradox: while the AfCFTA facilitates market entry, behind-the-border barriers such as discriminatory land ownership restrictions, opaque Governor's Consent requirements in ECOWAS, and a lack of interoperable digital registries, act as significant Non-Tariff Barriers (NTBs). These disparities create a Compliance Tax on cross-border investors, rendering property rights illiquid and insecure. This paper seeks to critically assess the extent to which property law fragmentation obstructs the objectives of the AfCFTA. It aims to evaluate the efficacy of the AfCFTA Protocols on Services and Investment as corrective mechanisms and provides a comparative analysis of the East African Community (EAC) and ECOWAS to determine best practices for regional property regulation. The study finds that AfCFTA liberalization without property harmonization produces incomplete integration. While the EAC has made strides through digitized registries and lease-based access for non-citizens, the ECOWAS region suffers from significant Proprietary Friction due to unrecorded customary titles and rigid constitutional prohibitions. Furthermore, while the Protocol on Investment provides a shield against unlawful expropriation, it lacks the administrative handshaking required to harmonize the actual registration and enforcement of security interests across regional frontiers. To bridge this gap, the paper recommends a Functional Harmonization Model predicated on three pillars: (1) the adoption of Minimum Continental Property Standards to guarantee non-discriminatory leasehold access; (2) the implementation of a Mutual Recognition Framework for commercial leases and security interests; and (3) the development of a blockchain-based Pan-African Digital Property Ledger to ensure administrative interoperability.

Keywords: AfCFTA, Property Rights and Land Tenure, Commercial Presence, Legal Harmonization, ECOWAS and EAC.

1. Introduction

The inauguration of the African Continental Free Trade Area (AfCFTA) represents a seismic shift in the continent's economic architecture which aims to consolidate a market of 1.3 billion people into a single legal entity for trade and investment. While the primary discourse often centers on the elimination of tariffs on goods, the true litmus test for the AfCFTA's success lies in its Protocol on Trade in Services and its ability to facilitate Commercial Presence (Mode 3). For a service provider, be it a Nigerian financial institution expanding into Kenya or an Ethiopian logistics firm entering Ghana, establishing a commercial presence necessitates the acquisition, leasing, or securing of proprietary interests in land and capital.

Despite the ambitious goals of the AfCFTA, the agreement inherits what has been termed a "spaghetti bowl" of conflicting legal frameworks. Property rights, which serve as the bedrock of stable trade, remain fragmented across the continent. This fragmentation is rooted in a complex history of Legal Pluralism, where Civil Law, Common Law, and Customary Law regimes often operate simultaneously within a single jurisdiction. In the context of regional integration, these divergent property laws do not merely exist as domestic preferences; they function as Invisible Non-Tariff Barriers (NTBs). Thus, this creates high entry costs through restrictive land ownership laws, inconsistent collateral registries, and opaque title systems which are legal discrepancies create a compliance tax that discourages intra-African investment.

This paper argues that the absence of a harmonized property law framework across African Regional Economic Communities (RECs), specifically the Economic Community of West African States (ECOWAS) and the East African Community (EAC), acts as a *de facto* barrier to the free movement of services. Under Article 1(p) of the AfCFTA Protocol on Trade in Services, Mode 3 requires a service supplier of one State Party to establish a territorial presence in another.[1] Strategically, this is the primary engine for Foreign Direct Investment (FDI). However, when property laws in a host state are discriminatory or incompatible with the investor's home country standards, the right to establish granted by the AfCFTA becomes legally precarious. As noted by the United Nations Conference on Trade and Development

[1] Agreement Establishing the African Continental Free Trade Area, Protocol on Trade in Services, Art. 1(p)(iii) (2018)

(UNCTAD), legal certainty regarding property rights is the single most significant determinant for long-term investment in emerging markets.[2]

2. Conceptual Framework

2.1 The Taxonomy of Property Rights

In the context of international economic law, property is not merely physical res (thing), but a complex bundle of rights that defines the legal relationship between a person, an object, and the state. This Honoréan conception of property, which encompass the rights to use (*jus utendi*), exclude others, and dispose of or transfer the asset (*jus disponendi*), is central to the functionality of the AfCFTA.[3] Within the African legal landscape, this bundle is often fragmented across multiple tiers of recognition. This phenomenon reflects the broader "fragmentation of international law," where specialized regimes often operate in isolation from general international principles.[4]

The distinction between Land Ownership (Freehold) and Leasehold Interests is the primary point of friction for cross-border service providers. While freehold represents the most absolute form of tenure, many African jurisdictions, particularly in the ECOWAS region, restrict land ownership to citizens or the State which offer foreign investors only Leasehold Interests or Concessions.[5] Furthermore, the civil law tradition prevalent in many West African states emphasizes Usufruct Rights, the right to enjoy the fruits and profits of another's property without altering its substance, which may not provide the same level of investment security as common law fee simples found in parts of the EAC.

For a service provider operating under Mode 3, the ability to leverage property as a Security Interest is as vital as the right of occupancy itself. A security interest is a legal right granted by a debtor to a creditor over a property to secure the repayment of a debt. In a sophisticated trade environment, property must be liquid; it must be capable of being mortgaged to raise capital for expansion.

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[2] UNCTAD, *World Investment Report 2023: Investing in Sustainable Energy for All*, UN Publ. (2023), p. 45

[3] A.M. Honoré, 'Ownership' in A.G. Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press 1961) 107-147

[4] International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (Report of the Study Group of the International Law Commission, 13 April 2006) UN Doc A/CN.4/L.682

[5] T.W. Bennett, *Customary Law in South Africa* (Juta 2004) 380; See also *Constitution of the Republic of Ghana 1992*, Art. 266

The conceptual divide between the Common Law Mortgage (which traditionally involves a transfer of title or a legal charge) and the Civil Law Hypothec (which functions as a right *in rem* without possession) creates significant hurdles for cross-border trade finance.[6] If a Kenyan bank (EAC) cannot seamlessly register a charge over a subsidiary's warehouse in Senegal (ECOWAS/OHADA) due to incompatible registry requirements, the property effectively loses its economic utility as a tool for capital formation. This immobilization of capital is what De Soto identifies as dead capital, where assets exist but cannot be converted into active investment due to legal opacity.[7]

Security of tenure, the certainty that a person's rights to land or assets will be recognized and protected by the state, is the *sine qua non* for long-term Foreign Direct Investment (FDI). For cross-border commercial activity, this security must be both internal (protection against arbitrary state seizure) and external (recognition of the interest by foreign creditors and partners).

Under the AfCFTA, the lack of a harmonized definition of property means that what constitutes a protected investment in one State Party may be viewed as a mere revocable license in another. As the Permanent Court of International Justice noted in the *Certain German Interests in Polish Upper Silesia*[8] case, the protection of vested rights (including property) is a general principle of international law. However, without a synchronized conceptual framework across African RECs, the bundle of rights remains untethered, leaving investors vulnerable to the shifting sands of domestic land policies and regulatory creep.

2.2 Trade in Services under the AfCFTA

The AfCFTA Protocol on Trade in Services constitutes the primary legal instrument for the progressive liberalization of service markets across the continent. Modeled after the World Trade Organization's General Agreement on Trade in Services (GATS), it provides a comprehensive framework for the removal of barriers to the supply of services across four distinct modes.[9] However, while the liberalization of Cross-Border Supply (Mode 1) or Consumption Abroad (Mode 2) primarily concerns regulatory and digital hurdles, the

[6] *OHADA Uniform Act Organizing Securities* (2010), Arts. 190–195
[7] Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books 2000) 39
[8] *Certain German Interests in Polish Upper Silesia (Germany v Poland)* [1926] PCIJ (ser A) No 7, p. 42
[9] *Agreement Establishing the African Continental Free Trade Area*, Protocol on Trade in Services (2018), Art. 1

realization of Commercial Presence (Mode 3) is intrinsically and inextricably linked to the host state's property law regime.

Under Article 1(p)(iii) of the Protocol, commercial presence is defined as any type of business or professional establishment, including through the constitution, acquisition, or maintenance of a juridical person, or the creation of a branch or a representative office within the territory of a Member State.[10] This definition presupposes a territorial nexus. To establish a presence, a service supplier, whether in telecommunications, financial services, or construction, must transition from a foreign entity to a domestic stakeholder. This transition requires the acquisition of Real Property Rights (land for offices, data centers, or branches) and Intellectual Property Rights (trademarks and licenses), both of which are governed by the domestic private law of the host state rather than the overarching trade treaty.

In scholarly discourse, market entry is often viewed through the lens of National Treatment and Market Access under Articles 18 and 19 of the Protocol.[11] However, a purely trade-centric analysis overlooks the Property Gatekeeper effect. Even where a State Party has opened a sector in its Schedule of Specific Commitments, the domestic property regime may act as a residual barrier. For example, if a State's land law restricts the duration of leases for foreign-owned subsidiaries to a period shorter than the depreciation cycle of the required infrastructure, the market access granted by the treaty is effectively nullified by the property restriction of the domestic code.[12]

Consequently, property access is not merely a consequence of market entry; it is a pre-condition for it. The ability of a firm to exercise its right of establishment is contingent upon the transparency of the host state's land registry and the enforceability of its tenancy laws. Where these systems are opaque or discriminatory, they create a regulatory thicket that increases the risk premium of the investment, thereby functioning as a barrier to the very liberalization the AfCFTA seeks to achieve.

Moreover, the concept of Competitive Neutrality requires that foreign service suppliers compete on an equal footing with domestic firms. In many African jurisdictions, domestic firms

[10] *Ibid*, Art. 1(p)(iii)
[11] Rudolf Adlung, 'Public Services and the GATS' (2006) 9(2) *Journal of International Economic Law* 455, 460
[12] See *Metalclad Corp v United Mexican States (Award)* ICSID Case No ARB(AF)/97/1 (30 August 2000) para 103 (where the tribunal noted that the state's failure to ensure a transparent and predictable regulatory environment amounted to an indirect expropriation); see also FAO, 'Land Tenure and Rural Development' (FAO Land Tenure Studies 3, 2002) 18–22; see also Hernando de Soto, *The Mystery of Capital* (Basic Books 2000) 39

benefit from historical land titles or customary land rights that are unavailable to foreign entrants from other RECs.[13] This creates an inherent asymmetry. If a domestic bank in the EAC can use its freehold land as high-quality collateral to access cheap credit, while a cross-border entrant from ECOWAS is restricted to short-term, non-mortgageable leases, the latter suffers a competitive disadvantage. This disparity demonstrates that Property Law Convergence is a necessary corollary to Services Liberalization; without the former, the latter remains an aspirational rather than a functional reality.

2.3 Property Law Divergence as a Behind-the-Border Non-Tariff Barrier (NTB)

In the traditional nomenclature of international trade, Non-Tariff Barriers (NTBs) are often associated with quotas, subsidies, or technical standards at the border. However, the evolution of the global trade architecture, exemplified by the AfCFTA, has shifted the focus toward behind-the-border measures. As tariffs decline, the relative impact of domestic regulatory heterogeneity on trade costs increases proportionally.[14] In the context of the services trade, property law functions as a foundational regulatory barrier that operates long after a provider has crossed the national frontier.

The distinction between classical NTBs and regulatory barriers is one of intent versus effect. While classical NTBs are often protectionist instruments designed to shield domestic industries, regulatory barriers such as Property Law Divergence are often the byproduct of legitimate domestic policy choices or historical legal legacies. Under Annex 5 of the AfCFTA Protocol on Trade in Goods, NTBs are broadly identified as any measures other than tariffs which prohibit or restrict imports or exports.[15] When applied *mutatis mutandis* to services, a restrictive land tenure system, such as the prohibition of foreign ownership in the ECOWAS region, constitutes a quantitative restriction on the number of service providers that can realistically enter the market.

The core challenge for AfCFTA integration is not the existence of property laws per se, but the Regulatory Heterogeneity between Member States. Heterogeneity creates a compliance tax for firms operating across multiple Regional Economic Communities (RECs). For an East

[13] W. Odhiambo, 'The AfCFTA and Services Trade: Challenges and Opportunities for Africa' (2020) 28 *African Journal of International and Comparative Law* 112
[14] J. Pelkmans and A. Brito, *Enforcement in the EU Single Market* (Centre for European Policy Studies 2012) 14
[15] *Agreement Establishing the African Continental Free Trade Area,* Annex 5 on Non-Tariff Barriers, Art. 1

African firm expanding westward, the cost of navigating the OHADA system of secured transactions represents a sunk cost that a domestic firm does not bear.[16]

Empirical trade literature, notably by the OECD, suggests that regulatory heterogeneity can reduce trade volumes by up to 20% in service-intensive sectors.[17] In the African context, where an investor may encounter a Common Law system in Kenya, a Civil Law system in Senegal, and a hybrid Customary system in Ghana, the lack of Legal Interoperability acts as a friction that heat-maps as a trade barrier.

Property law divergence is uniquely insidious because it is often invisible to trade negotiators. Unlike a customs duty which is clearly tabulated, the difficulty of registering a mortgage or the risk of a "regulatory taking" through land use changes is embedded deep within the domestic judiciary. This makes property law a primary Behind-the-Border barrier.

Under Article 3 of the AfCFTA Protocol on Trade in Services, Member States commit to transparency and the objective administration of measures of general application.[18] However, the opaque nature of land registries in some regions and the lack of a centralized, digitized property ledger across the EAC and ECOWAS violate the spirit of this transparency. Consequently, property law fragmentation remains one of the most significant, yet under-analyzed, impediments to the realization of a seamless African single market.

2.4 Theoretical Framework

To systematically evaluate how property law affects the AfCFTA, this study adopts a multi-dimensional framework that balances the traditional "fragmentation" of legal systems against the "functional" necessity of market integration.

2.4.1 Legal Fragmentation Theory

At the core of this analysis is Legal Fragmentation Theory, which posits that the existence of autonomous, disconnected legal regimes within a single economic space increases institutional distance.[19] In Africa, this fragmentation is not merely a product of post-colonial boundaries but

[16] B.A. Oye-Adeniran, 'The OHADA System and its Impact on Regional Integration in West Africa' (2021) 15 *Journal of African Law* 88
[17] OECD/WTO, *Aid for Trade at a Glance 2024: Mainstreaming Trade for Sustainable Development* (OECD Publishing 2024) 72
[18] *AfCFTA Protocol on Trade in Services*, Art. 3
[19] G. Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in G. Teubner (ed), *Global Law Without a State* (Dartmouth 1997) 3-28

is reinforced by the "spaghetti bowl" of overlapping Regional Economic Communities (RECs). When an investor moves from the EAC to ECOWAS, they are not just crossing a border; they are entering a different legal family. This transition forces firms to internalize the costs of legal translation, converting their understanding of property from a common-law legal charge to a civil-law hypothèque.[20] Fragmentation thus acts as a centrifugal force which pushes investment toward familiar domestic markets and away from cross-border expansion.

2.4.2 The Dialectic of Market Integration vs. Sovereignty

The primary obstacle to harmonizing property law is the tension between Market Integration and Westphalian Sovereignty. Property law, specifically land tenure, is deeply embedded in a nation's social fabric, cultural identity, and political economy. Historically, states have guarded their eminent domain and land administration as the final frontiers of sovereign control.[21]

Under the AfCFTA, Member States are required to surrender a degree of regulatory autonomy to achieve a Single Market. However, as seen in the ECOWAS experience with OHADA, many states are hesitant to cede control over the *lex situs* (the law of the place where the property is situated). This paper argues that the current AfCFTA framework suffers from a sovereignty paradox; it seeks to integrate markets while leaving the most critical element of market participation, property rights, entirely within the disparate hands of domestic legislatures.

2.4.3 The Functional Harmonization Model

To resolve this tension, this paper proposes a Functional Harmonization Model as the optimal framework for the AfCFTA. Unlike Total Harmonization, which seeks to create a single, uniform continental land code (an impractical goal given Africa's legal diversity), functional harmonization relies on two pillars:

1. Minimum Standards: Establishing baseline protections for property rights under the AfCFTA Protocol on Investment, such as clear definitions of indirect expropriation and fair and equitable treatment.[22]

[20] C. Pamboukis, 'The OHADA System: A New Path for Regional Integration in Africa' (2018) 12 *Law and Development Review* 45, 52
[21] J.G. Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations' (1993) 47(1) *International Organization* 139
[22] *AfCFTA Protocol on Investment* (Draft/Adopted versions), Art. 14

2. Mutual Recognition: Applying the principle that if a property interest (like a security charge) is legally perfected in an EAC member state, it should be recognized, or easily transposed, within an ECOWAS member state for the purposes of trade finance.[23]
3. The final pillar is the development of a blockchain-based Pan-African Digital Property Ledger. This technological layer provides the administrative infrastructure for the first two pillars. By ensuring administrative interoperability, a digital ledger allows for the real-time verification of the Honoréan bundle of rights across borders. This reduces legal opacity and ensures that a vested right in one jurisdiction is visible and legally relevant in another, effectively converting dead capital into active, liquid investment.

By shifting from uniformity to interoperability, the AfCFTA can mitigate the effects of property law divergence without infringing upon the core sovereign rights of Member States. This framework allows for the preservation of local customary nuances while ensuring that the "bundle of rights" remains mobile and trade-ready across the continent.

3.0 Legal Framework under the AfCFTA

3.1 Trade in Services Obligations

The AfCFTA Protocol on Trade in Services is the primary legal instrument designed to create a single, liberalized market for services across Africa. Its architecture is largely inspired by the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS), adopting a positive list approach where Member States specifically commit sectors to liberalization while retaining the right to regulate. The Protocol is structured into three distinct layers of obligation:

1. General Obligations: These apply to all Member States regardless of specific sector commitments, including Most-Favoured-Nation (MFN) treatment (Article 4) and Transparency (Article 3).
2. Specific Commitments: These are negotiated on a sector-by-sector basis (e.g., financial services, telecommunications) and are detailed in each Member State's Schedule of Specific Commitments.

[23] See K. Roorda, 'Mutual Recognition of Security Interests in Europe' (2022) 19(2) *European Review of Private Law* 301

3. Institutional Framework: This governs the progressive rounds of negotiations and the dispute settlement mechanism under the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.[24]

The core of services liberalization rests on the twin pillars of Market Access (Article 18) and National Treatment (Article 19). Market Access prohibits Member States from maintaining quantitative restrictions, such as quotas on the number of service suppliers or the total value of service transactions. Critically, Article 18(2)(e) prohibits measures that restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service.[25] In property terms, if a domestic law mandates that a foreign firm can only operate through a locally-owned land-holding vehicle, it may constitute a prohibited restriction on the type of legal entity. On the other hand, National Treatment requires that in sectors where commitments are undertaken, a Member State must accord to foreign service suppliers treatment no less favourable than that accorded to its own like service suppliers.[26]

The National Treatment obligation is frequently tested by domestic property laws. If a domestic law grants indigenous firms perpetual usufruct over land while limiting foreign service providers to short-term renewable leases, the foreign provider faces a higher long-term capital risk. This differential treatment, while often framed as land sovereignty, creates an uneven playing field that contradicts the principle of competitive neutrality.

Unlike the digital delivery of services (Mode 1), Mode 3 is fundamentally anchored in the physical world. Under Article 1(p)(iii), commercial presence involves the "constitution, acquisition, or maintenance of a juridical person."[27] This "acquisition" phase is where trade law meets property law.

The requirement of physical establishment means that a service provider from the EAC (e.g., Equity Bank) must interact with the land tenure system of an ECOWAS state (e.g., Cote d'Ivoire) to set up branches. The Right of Establishment is therefore not an abstract trade right; it is a right to enter into a lease, a right to register a mortgage, and a right to have those proprietary interests protected against arbitrary state action. Without a harmonized or at least

[24] *Agreement Establishing the African Continental Free Trade Area*, Protocol on Trade in Services (2018), Part II-IV
[25] *Ibid*, Art. 18(2)(e)
[26] *Ibid*, Art. 19(1); see also J. Pauwelyn, 'The Role of National Treatment in International Economic Law' (2006) 10 *World Trade Review* 5
[27] *AfCFTA Protocol on Trade in Services*, Art. 1(p)(iii)

transparent property registration system, the Commercial Presence obligation remains a high-friction commitment that favors large multinationals over small-to-medium African cross-border enterprises.

3.2 Investment and Property Protection

While the Protocol on Trade in Services facilitates market entry, the AfCFTA Protocol on Investment provides the substantive legal shield for the assets acquired during that entry. In international economic law, the security of property is the functional equivalent of investment protection. For a cross-border service provider, property, whether it be a physical data center in Nairobi or a long-term lease in Lagos, constitutes the investment that triggers treaty protection.

The AfCFTA Protocol on Investment represents a new generation of investment treaties. Unlike traditional Bilateral Investment Treaties (BITs) that focused primarily on investor rights, this Protocol seeks to balance Investor Protection with the State's Right to Regulate for sustainable development.[28] Central to this balance is the definition of Investment under Article 1, which expressly includes moveable and immovable property and "other property rights, such as mortgages, liens, and pledges.[29] Thus through inclusion of these proprietary interests, the Protocol elevates domestic property rights to the status of internationally protected assets, providing a recourse mechanism that bypasses potentially inefficient domestic judiciaries.

Moreover, there is a symbiotic relationship between the bundle of rights identified in Section 2.1 and the Fair and Equitable Treatment (FET) standard. FET, often considered the most litigated standard in investment arbitration, requires host states to provide a stable and predictable legal framework.[30] When an ECOWAS member state abruptly changes its land tenure laws or cancels a renewable lease without due process, it does not just violate domestic property law; it breaches an international investment guarantee.

[28] M. Mbengue and S. Schacherer, 'The African Continental Free Trade Area: Introduction to the Special Issue' (2019) 20(3) *Journal of World Investment & Trade* 337
[29] *AfCFTA Protocol on Investment* (Draft/Adopted version), Art. 1
[30] *Neer v. Mexico*, General Claims Commission (1926) 4 RIAA 60; see also *Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/2 (2003)

Property security is thus the anchor of investment guarantees. If the underlying property right is fragile, for instance, if a title is customary and not statutory registered, the investor's ability to claim protection under the AfCFTA is weakened. This highlights the Formalization Gap in Africa: the AfCFTA protects property, but it cannot protect what is not legally recognized under domestic law.

The most critical intersection of property law and the AfCFTA lies in the protection against Expropriation. Under Article 14 of the Protocol, Member States are prohibited from nationalizing or expropriating investments except for a public purpose, on a non-discriminatory basis, under due process of law, and upon payment of adequate and effective compensation.[31]

A significant challenge for the AfCFTA is the rise of Indirect Expropriation (or Regulatory Taking). This occurs when a state does not seize the property title but enacts regulations that render the property economically useless, such as a sudden zoning change that prevents an EAC logistics firm from using its newly acquired warehouse. The Protocol adopts the Police Powers doctrine, suggesting that non-discriminatory regulatory measures designed to protect public health or the environment do not constitute expropriation.[32] However, the lack of harmonized property standards between RECs makes it difficult to distinguish between a legitimate regulatory change and a disguised expropriation of property rights.

3.3 Property Rights as an Implied Integration Requirement

The legal architecture of the AfCFTA is notably silent on the substantive harmonization of national property laws. Unlike the European Union, which has developed a sophisticated body of European Private Law to support its internal market, the AfCFTA remains a treaty of Public International Law that interfaces with, but does not yet displace, private domestic property regimes. This section argues that despite this silence, property rights constitute an implied integration requirement for the success of the continental market.

3.3.1 Absence of Express Harmonization

There is a conspicuous absence of express provisions within the AfCFTA Agreement mandating the convergence of land tenure or property registration systems. While Annex 5 on

[31] *AfCFTA Protocol on Investment*, Art. 14
[32] UNCTAD, *Expropriation: UNCTAD Series on Issues in International Investment Agreements II* (United Nations 2012) 65

Non-Tariff Barriers (NTBs) and the Protocol on Trade in Services address regulatory barriers, they do not explicitly list incompatible property laws as a prohibited category.[33] This omission suggests that the drafters viewed property law as a purely domestic concern (*domaine réservé*).

However, in international economic law, the Effectiveness Principle (*ut res magis valeat quam pereat*) implies that treaty obligations must be interpreted in a way that gives them practical effect. If a Member State commits to Commercial Presence (Mode 3) but maintains a property regime that makes it legally impossible for a foreign firm to acquire a secure lease or register a mortgage, that State has effectively frustrated the object and purpose of the treaty. Thus, a degree of de facto harmonization of property standards is functionally required to give life to the services and investment protocols.

3.3.2 The Sovereignty Paradox

The primary tension in African integration is the Sovereignty Paradox. Land is the ultimate symbol of national identity and political power in Africa, often tied to post-colonial redistribution and customary heritage. This leads to a conflict between Domestic Land Sovereignty and Continental Economic Commitments.

When a State Party signs the AfCFTA, it enters into a Contract of Integration. If that contract requires the free movement of capital and services, the State's insistence on maintaining opaque, discriminatory, or non-digital land registries becomes a barrier to its own international obligations. As noted by the African Court on Human and Peoples' Rights, while states have sovereignty over their natural resources, this must be exercised within the bounds of international legal standards that protect vested rights.[34]

3.3.3 Do Discriminatory Property Restrictions Violate National Treatment?

A central legal question is whether domestic property restrictions, such as the prohibition of land ownership by non-citizens, violate the National Treatment obligation under Article 19 of the Protocol on Trade in Services.[35]

If a domestic law allows a local insurance company to own the freehold of its headquarters but forces an EAC-based competitor to operate under a precarious 10-year lease,

[33] *Agreement Establishing the African Continental Free Trade Area*, Annex 5 (2018)
[34] See *SERAC v. Nigeria* (African Commission, 2001)
[35] *AfCFTA Protocol on Trade in Services*, Art. 19(1)

the foreign provider is subjected to less favourable treatment. This creates a higher Risk-Adjusted Cost of Capital for the foreign firm. While many states argue that land restrictions fall under General Exceptions (Article 15) for reasons of public order or national security, international tribunals have increasingly scrutinized such claims.[36] Under the AfCFTA, if a property restriction is not necessary to achieve a legitimate policy objective and acts as a disguised restriction on trade, it may be deemed a violation of the National Treatment standard.

4. 0 Regional Comparison: ECOWAS and EAC

4.1 Property Regulation in ECOWAS

The Economic Community of West African States (ECOWAS) presents a unique paradox in the African integration landscape. While it possesses one of the most advanced frameworks for the Free Movement of Persons, Right of Residence and Establishment, the underlying property law remains a bastion of national sovereignty, often shielded from the liberalizing forces of the regional bloc. This creates a friction between the supranational ambition of the AfCFTA and the localized reality of West African land administration.

4.1.1 The Free Movement Protocols vs. *Lex Situs*

The 1979 Protocol on Free Movement of Persons, Right of Residence and Establishment, and its subsequent Supplementary Protocols, theoretically grant ECOWAS citizens the right to establish commercial enterprises in any Member State.[37] Under Article 59 of the Revised ECOWAS Treaty, Member States commit to the removal of obstacles to the right of establishment.[38] However, the Right of Establishment is frequently truncated by the private law principle of *lex situs* (the law of the place where the property is situated).

In many West African jurisdictions, property law is not a unified field but a stratified system of statutory law, customary tenure, and, in some states, Islamic law (*Shari'ah*). This legal pluralism creates a high information asymmetry for cross-border investors. For instance, a firm from Ghana (Common Law) entering Senegal (Civil Law/OHADA) must navigate entirely different conceptualizations of land tenure and security interests. While the OHADA Uniform Act on General Commercial Law has attempted to harmonize the registration of certain movable assets, land administration remains fragmented. Consequently, the right to

[36] *Bernadus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6 (2009)
[37] ECOWAS Protocol A/P.1/5/79 on the Free Movement of Persons, Residence and Establishment (1979)
[38] *ECOWAS Revised Treaty* (1993), Art. 59

establish often remains a hollow promise if the investor cannot navigate the opaque and varied domestic property registries of the fifteen Member States.

4.1.2 Persistent National Control of Land and Ownership Restrictions

Despite the regional rhetoric of integration, many ECOWAS Member States maintain stringent constitutional or statutory restrictions on land ownership by non-nationals, viewing land as the ultimate sovereign asset. These restrictions function as "Sovereignty Filters" that significantly impede Mode 3 (Commercial Presence) under the AfCFTA.

The following table illustrates the divergence in land ownership accessibility within key ECOWAS economies:

Country	**Principal Property Law Framework**	**Restrictions on Foreign Entities**
Ghana	Constitution (1992) & Land Act (2020)	**Article 266** prohibits freehold interests for non-citizens; leases capped at 50 years.[39]
Nigeria	Land Use Act (1978)	All land vested in State Governors; foreigners require approval of the council of state as well as Governor's consent for "Right of Occupancy."[40]
Côte d'Ivoire	Civil Code & Rural Land Law (1998)	Rural land ownership strictly reserved for the State and Ivorian nationals.[41]
Senegal	Law on National Domain (1964)	Most land is "National Domain" and cannot be alienated, only granted via state concessions.

Source: The researcher's compilations

[39] Art. 266(1) and (4) of the *Constitution of the Republic of Ghana 1992*; See also *Land Act 2020 (Act 1036)*
[40] *Land Use Act 1978 (Nigeria)*, Section 1; See also *Savannah Bank (Nig) Ltd v. Ajilo* (1989) 1 NWLR (Pt. 97) 305
[41] Loi n° 98-750 du 23 décembre 1998 relative au domaine foncier rural (Côte d'Ivoire) (Law No. 98-750 of 23 December 1998 relating to the Rural Land Domain (Côte d'Ivoire))

In Nigeria, the Land Use Act of 1978 remains a significant hurdle. By vesting all land in the Governor of each state to be held in trust for the people, the Act makes property acquisition a highly political and administrative process rather than a purely commercial transaction.[42] For an EAC-based service provider, the requirement to obtain approval of the council of state as well as Governor's Consent for every mortgage or lease assignment represents a discretionary barrier that can lead to delays, rent-seeking, and legal uncertainty.

Furthermore, the prevalence of Customary Land Tenure in West Africa, where up to 80% of land may be held under unwritten, communal traditional systems, creates a formalization gap. Even where the AfCFTA Investment Protocol protects "property," the difficulty of proving a valid title in a customary setting makes many assets dead capital that cannot be leveraged for trade finance.[43] This persistent national control over the *res* (the thing) directly contradicts the AfCFTA's goal of a seamless continental market where capital should flow to its most productive use regardless of national origin.

4.1.3 Restrictions on Foreign Land Ownership

In the ECOWAS region, the intersection of property law and trade is characterized by a Sovereignty Filter a legal mechanism that nominally welcomes investment while strictly gatekeeping the underlying land. These restrictions represent a significant behind-the-border barrier to Mode 3 (Commercial Presence) under the AfCFTA, as they force foreign service providers into precarious and costly legal structures to secure a physical footprint.

In Nigeria, the restrictive regime is anchored in the Land Use Act (LUA) 1978 and the various state-level Acquisition of Lands by Aliens Laws. While the LUA vests land in the Governor, the Acquisition of Lands by Aliens Law of Lagos State, for instance, stipulates that no "alien" (defined as a non-Nigerian individual or a company where the majority shareholding is non-Nigerian) shall acquire an interest in land without the written approval of the Governor.[44] Furthermore, even when approval is granted, the duration is often limited to a maximum of 25 years for certain use cases, significantly shorter than the 99-year statutory right of occupancy typically granted to citizens.[45]

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[42] I.O. Smith, *Practical Approach to Law of Real Property in Nigeria* (Ecowatch 2007) 45-60
[43] Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books 2000) 39
[44] *Acquisition of Lands by Aliens Law*, Cap A1, Laws of Lagos State 2015, Section 1(1)
[45] I.O. Smith, 'Foreign Investment and Land Holding in Nigeria' in *The Journal of Private and Property Law* (2014) Vol. 32

In Ghana, the 2020 Land Act (Act 1036) reinforces the constitutional prohibition under Article 266, which explicitly forbids the creation of a freehold interest in land for non-citizens.[46] Foreign investors are restricted to leasehold interests for terms not exceeding 50 years at any one time. From a trade perspective, these duration-based restrictions function as a quantitative barrier on capital. A data center provider or an industrial manufacturer with a 40-year depreciation cycle finds little security in a 25-year lease that is subject to the discretionary renewal of a political office-holder. This disparity violates the spirit of National Treatment under the AfCFTA, as it imposes a risk-adjusted cost on foreign African firms that their domestic competitors do not bear.

The efficacy of the AfCFTA depends on Legal Interoperability, yet ECOWAS suffers from a deep fragmentation of land administration systems. This variability creates a Search Cost barrier that stifles cross-border trade finance. The region is split between two dominant administrative philosophies:

1. The Francophone/OHADA System: In states like Senegal, Benin, and Côte d'Ivoire, land administration is governed by the *Livre Foncier* (Land Book) system. Here, the OHADA Uniform Act on Securities allows for the creation of a *hypothèque* (mortgage), but its validity is strictly contingent upon registration in a centralized, often slow-moving, state registry.[47] The process is heavily notarized, adding significant transaction costs (up to 10% of the property value) that are not present in many EAC jurisdictions.
2. The Anglophone/Common Law System: In Nigeria and The Gambia, the system is largely deeds-based or title-based. In Nigeria, despite the existence of the Land Registry, a significant portion of commercial land is still held under unrecorded customary titles. This lack of formalization means that a Kenyan bank attempting to provide trade finance to a subsidiary in Nigeria cannot "see" the collateral through a transparent digital search.

This Administrative Heterogeneity means that there is no Mutual Recognition of property titles. A title deed in Lagos has no legal standing or translatability in Abidjan. For the AfCFTA to function, property must be liquid, but the current variability in ECOWAS registries keeps African capital frozen within national silos. As De Soto argues, when the legal system fails to

[46] *Constitution of the Republic of Ghana 1992*, Art. 266(1). See also *Land Act 2020 (Act 1036)*, Section 10(4)
[47] *OHADA Uniform Act Organizing Securities* (2010), Art. 190

convert physical assets into fungible capital, it creates a barrier to entry that no tariff reduction can overcome.[48]

4.2 Property Regulation in the EAC

The East African Community (EAC) represents perhaps the most integrated Regional Economic Community (REC) on the continent, characterized by a deliberate shift from mere trade cooperation to a functional Common Market. Unlike the fragmented property landscapes often found in other regions, the EAC has pioneered a more coordinated approach to land and property rights, viewing them not as isolated sovereign assets, but as critical infrastructure for the regional economy.

4.2.1 The EAC Common Market Protocol

The bedrock of property rights within the region is the EAC Common Market Protocol (CMP), specifically Article 13 (Right of Establishment) and Article 14 (Right of Residence).[49] Under the CMP, Member States commit to the Free Movement of Services and the Free Movement of Capital, both of which necessitate a transparent property framework.

Crucially, Annex V of the Protocol (Regulations on the Right of Establishment) explicitly addresses the acquisition of land for business purposes. While it respects the ultimate sovereign right of Partner States to manage land, it mandates that such management must be non-discriminatory toward EAC citizens.[50] This creates a Regional National Treatment standard that is more specific than the broad AfCFTA provisions. In practice, this means a Rwandan service provider seeking to establish a commercial presence in Kenya must be granted access to land and property under conditions no less favorable than those afforded to a Kenyan national, provided the land is used for the purpose of the business for which the establishment was created.

4.2.2 Greater Regulatory Coordination and Land Policy Harmonization

One of the distinguishing features of the EAC is its institutional commitment to Regulatory Coordination through the EAC Land Policy Framework. Recognizing that disparate land laws act as Non-Tariff Barriers (NTBs), the EAC Secretariat has facilitated the Regional Steering Committee on Land, which works toward the harmonization of land policies and land

[48] Hernando de Soto, *The Mystery of Capital* (Basic Books 2000) 44-48
[49] *Protocol on the Establishment of the East African Community Common Market* (2010), Arts. 13-14
[50] *EAC Common Market Protocol*, Annex V (Regulations on the Right of Establishment), Reg. 5

administration systems.[51] This coordination has led to several soft law convergences that reduce trade friction:

a) Digitization of Registries: Led by Kenya (via the *Ardhisasa* platform) and Rwanda, the region has moved aggressively toward digitized, blockchain-ready land registries. This reduces the Search Costs for cross-border investors and provides a level of transparency that is often missing in the analog systems of the ECOWAS region.[52]
b) Standardization of Collateral: Through the EAC Monetary Union roadmap, there is increasing coordination on the legal requirements for charges and mortgages. This ensures that a property title in Uganda is increasingly legally legible to a commercial bank in Tanzania, facilitating the cross-border trade finance essential for Mode 3 expansion.
c) The One-Stop Investment Center Model: Most EAC states have integrated property acquisition into their National Investment Centers (e.g., the Rwanda Development Board), which act as a bridge between trade protocols and domestic land offices, effectively de-risking the property acquisition process for regional investors.[53]

By treating property law as a functional component of the Common Market rather than a strictly guarded sovereign secret, the EAC provides a blueprint for how the AfCFTA might eventually address "behind-the-border" property barriers.

4.2.3 Structured Mechanisms for Dispute Resolution

A pivotal distinction of the EAC's property regime is the existence of a robust, supranational judicial oversight mechanism. While many regional blocs rely on diplomatic consultation, the EAC utilizes the East African Court of Justice (EACJ) to interpret the Common Market Protocol (CMP) and ensure that domestic property actions do not frustrate regional trade obligations.

[51] EAC Secretariat, *Report on the Harmonization of Land Policies in the EAC* (EAC Publ. 2021)
[52] T. Selassie, 'Digital Transformation of Land Administration in East Africa' (2023) 12 *Journal of African Land Policy* 89
[53] *Rwanda Investment Promotion and Facilitation Law (2015)*, which streamlines land access for registered investors.

Under Article 54 of the CMP, any dispute arising from the implementation of the Protocol is to be settled in accordance with the Partner States' constitutions and national laws, but also with the provisions of this Protocol.[54] This creates a dual-track system:

a) National Courts as First Responders: Domestic tribunals (such as the Environment and Land Court in Kenya) remain the primary venue for property litigation.
b) The EACJ as the Treaty Guardian: The EACJ has demonstrated a willingness to intervene where domestic property administration violates the Treaty's fundamental principles of "Good Governance" and the "Rule of Law" (Articles 6(d) and 7(2)).[55]

In cases such as *Grands Lacs Supplier v. The Attorney General of Burundi*,[56] the EACJ ruled that the seizure of a trader's property without due process was a violation of the rule of law provisions of the EAC Treaty. This jurisprudence signals to cross-border service providers that their Commercial Presence assets are protected by a regional "safety net" that can override arbitrary domestic administrative decisions—a level of legal recourse currently less accessible within the ECOWAS framework.

4.2.4 Lease-Based Access Models for Non-Citizens: A Pragmatic Compromise

The EAC has largely sidestepped the politically sensitive issue of absolute land ownership by adopting a Leasehold-Centric Model for non-citizens. This approach seeks to satisfy the investor's need for "Security of Tenure" while preserving the State's Eminent Domain. Across the EAC, several countries have modernized their land acts to create specific investor-friendly lease categories:

a) Rwanda's Tenure Regularization: Rwanda has pioneered a highly efficient, digitized leasehold system where even non-nationals can obtain long-term renewable leases (up to 99 years for commercial purposes) that are easily transferable and mortgageable.[57]
b) Tanzania's Derivative Rights: Under the Tanzania Investment Act, land is categorized as "General Land" or "Village Land," but foreign investors can access it through "Derivative Rights" granted by the Tanzania Investment Centre (TIC).[58] This acts as a legal bridge, converting communal or state-held land into a tradable, secure leasehold.

[54] *Protocol on the Establishment of the East African Community Common Market* (2010), Art. 54(2)
[55] *Treaty for the Establishment of the East African Community*, Arts. 6(d) and 7(2)
[56] EACJ First Instance Div., Ref. No. 6 of 2016 (2020)
[57] *Law Governing Land in Rwanda (2021)*, No. 027/2021. See also M. Duponchel, 'Land Tenure Regularization in Rwanda' (World Bank 2016)
[58] *Tanzania Investment Act (2023 Revision)*; see also *Land Act (Revised Edition 2023)*

c) Kenya's Constitutional Leasehold: The 2010 Constitution of Kenya restricts non-citizens to leasehold interests for terms not exceeding 99 years.[59]

These lease-based models are significant for the AfCFTA because they provide Legal Legibility. By standardizing the duration and conditions of leases, the EAC reduces the Invisible NTBs" that arise from opaque land laws. This pragmatic compromise ensures that property remains an active component of Trade in Services (Mode 3) rather than a static barrier to entry.

5. Evaluating the AfCFTA Legal Architecture as a Solution

The AfCFTA is not merely a tariff-reduction treaty; it is a regulatory convergence project. This section critically assesses whether the existing AfCFTA instruments possess the legal teeth to dismantle the regional property disparities identified in Section 4.

5.1 The Limits of National Treatment in Addressing Property Barriers

The principle of National Treatment (NT), enshrined in Article 19 of the Protocol on Trade in Services and Article 12 of the Protocol on Investment, serves as a primary safeguard against discriminatory property barriers. However, its utility is legally constrained by its post-establishment scope. Under Article 12 of the Protocol on Investment, NT mandates that a State Party accord to established investors treatment no less favourable than that accorded to its own investors in like circumstances.[60]

5.1.1 The Post-Establishment Constraint

A critical doctrinal distinction exists between Market Access (Pre-establishment) and National Treatment (Post-establishment). Because the AfCFTA Protocol on Investment primarily follows a post-establishment model, NT cannot be invoked to challenge discriminatory property laws that act as a barrier to Market Entry. For example, if an ECOWAS state's land law prohibits all foreign entities from acquiring title at the point of entry, a Kenyan firm cannot claim an NT violation because it has not yet achieved the status of an "established investor" within that specific sector. NT only becomes actionable once the investment is "admitted" in accordance with domestic law. Therefore, property-based protectionism at the entry stage

[59] See Art. 65(1) *Constitution of Kenya 2010*
[60] AfCFTA Protocol on Investment, Art 12(1)

remains a sovereign prerogative unless specifically liberalized under the Market Access schedules of the Protocol on Trade in Services.

5.1.2 NT as a Shield for Mode 3 Commercial Presence

For a service supplier already operating under Mode 3 (Commercial Presence), NT functions as a shield for the "inputs of business." Once established, if a domestic law allows a local firm to convert a leasehold to a freehold but denies this to an already-operating Kenyan firm, this constitutes a *prima facie* violation of NT. In this context, the AfCFTA shifts the burden to the State to justify why such "differential treatment" in the operation and expansion phase is necessary for a legitimate policy objective.

5.1.3 The Constitutional Shield and the Right to Regulate

The most formidable obstacle to property-neutrality is the Constitutional Shield. In many African states, land restrictions are entrenched in the Constitution.[61] While Article 27 of the Vienna Convention on the Law of Treaties (VCLT) prevents a state from pleading internal law as a justification for treaty breach, the AfCFTA Protocol on Investment provides a carve-out for measures taken to address historical injustices or disadvantaged groups.[62]

This introduces the risk of Regulatory Opportunism. Under the guise of the Right to Regulate, states may frame restrictive land-use permits as "social equity" measures.[63] Consequently, unless the AfCFTA Dispute Settlement Body (DSB) adopts a strict proportionality test, these domestic exceptions could effectively immunize property-based Non-Tariff Barriers (NTBs) from scrutiny, even for investors who have already cleared the market entry hurdle.

5.2 The Protocol on Investment as a Corrective Mechanism

The AfCFTA Protocol on Investment functions as the corrective engine of the continental trade architecture. While the Services Protocol facilitates the *entry* of a service provider, the Investment Protocol ensures the *survival* of the assets acquired during that entry. Thus, through

[61] See art 266 of the Constitution of the Republic of Ghana 1992; s 315(5) Constitution of the Federal Republic of Nigeria 1999,
[62] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 27
[63] AfCFTA Protocol on Investment, art 13

establishment of the supranational standards for the treatment of property, the Protocol serves to "discipline" domestic land and property regimes that would otherwise act as arbitrary barriers to trade.

5.2.1 Protection Against Unlawful and Indirect Expropriation

The most potent corrective tool in the Protocol is the protection against Expropriation.[64] For a cross-border service provider, the risk is rarely "direct" nationalization (the physical seizure of a warehouse or office). Instead, the risk is Indirect Expropriation, where a state enacts regulatory takings that substantially deprive the investor of the economic use or value of their property.[65]

In jurisdictions where property law is volatile, such as some states within ECOWAS, a sudden change in land-use zoning or a refusal to renew a long-term commercial lease can be catastrophic. The Protocol on Investment corrects this by mandating that any such taking must be:

1. For a public purpose;
2. On a non-discriminatory basis;
3. In accordance with due process of law; and
4. Accompanied by prompt, adequate, and effective compensation.[66]

If these property protections are elevated from the domestic to the treaty level, the AfCFTA creates a minimum standard of treatment that domestic property laws cannot legally fall below without triggering international liability.

5.2.2 Dispute Settlement Avenues

A primary Non-Tariff Barrier (NTB) in Africa is the perceived Home Court Advantage of domestic judiciaries in property disputes. The AfCFTA Protocol on Investment addresses this through its Dispute Settlement framework. While the Protocol emphasizes State-to-State

[64] Article 14
[65] *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, 6 Iran-U.S. C.T.R. 219 (1984)
[66] *AfCFTA Protocol on Investment*, Art. 14(1)

dispute resolution under the Protocol on Rules and Procedures on the Settlement of Disputes, it also opens the door for Investor-State mediation and consultation.[67]

The existence of a continental dispute settlement body serves as a deterrent against Proprietary Protectionism. If an EAC-based logistics firm believes its property rights in a West African state have been truncated by discriminatory land administration, the firm's home state can bring a claim before the AfCFTA Dispute Settlement Body (DSB). This supranational oversight forces domestic land registries and ministries to adhere to more transparent and objective standards, effectively smoothing out the regional disparities between ECOWAS and the EAC through the threat of legal sanction.

5.2.3 Does Investment Protection Indirectly Harmonize Property Standards?

A central question for this study is whether the Protocol on Investment acts as a "silent harmonizer" of property law. This paper argues that it does, through a process of "Regulatory Chill" and Convergence. When states realize that inconsistent or discriminatory property laws may lead to costly international litigation and the loss of Foreign Direct Investment (FDI), they are incentivized to align their domestic land administration with international best practices. This leads to a functional harmonization:

a) Standardization of Titles: States are encouraged to formalize and digitize titles to ensure they meet the definition of protected investment.
b) Clarity in Security Interests: To attract trade finance, states move toward the OHADA model or the EAC digital registry model to ensure that mortgages and liens are internationally legible.[68]

In this sense, property law harmonization in Africa is not occurring through a single Continental Land Code, but through the indirect pressure exerted by the Investment Protocol. Over time, this creates a Common Language of Property across the AfCFTA, reducing the transaction costs for cross-border service providers and slowly dismantling the property-based NTBs that currently fragment the market.

[67] *AfCFTA Protocol on Investment*, Art. 44 (Prevention and Settlement of Disputes). See also M. Mbengue, 'The AfCFTA Protocol on Investment: A New Model for the 21st Century' (2023) 117 *American Journal of International Law* 45
[68] J. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2015) 320

6. Conclusion

The terminal analysis of the nexus between property rights and the AfCFTA reveals a fundamental Property Paradox: while the Agreement provides a sophisticated supranational framework for the liberalization of services, its functional efficacy remains tethered to a fragmented and localized mosaic of domestic land regimes. As demonstrated through the comparative lens of the EAC and ECOWAS, property law functions as the ultimate behind-the-border Non-Tariff Barrier (NTB), where the persistence of lex situs sovereignty, discretionary Governor's Consent requirements, and constitutional prohibitions on freehold interests for non-citizens create a structural Compliance Tax on cross-border service suppliers. This study concludes that a hollow liberalization persists where the treaty-given Right of Establishment (Mode 3) is nullified by the administrative and legal opacity of national land registries, transforming mobile capital into dead capital upon crossing a regional frontier. Consequently, for the AfCFTA to transition from a public international law instrument to a functional economic union, it must move beyond tariff reduction toward a Functional Harmonization Model. This requires the Legal Interoperability of security interests and the standardization of leasehold protections, ensuring that the bundle of rights is not merely a domestic entitlement but a continental asset capable of underpinning the trade finance and commercial presence essential for a truly integrated African market. This paper has made the following recommendations:

1. To eliminate the Sovereignty Filters that currently impede Mode 3 service delivery, the AfCFTA Secretariat must spearhead the adoption of a Protocol Annex on Minimum Property Standards. This instrument should establish a non-discriminatory Baseline of Access, ensuring that AfCFTA nationals are granted leasehold interests under conditions no less favorable than those afforded to domestic commercial entities. Central to this recommendation is the codification of Security of Tenure Benchmarks, which would mandate that commercial leases for cross-border investors meet a minimum duration (e.g., 50 years) to align with long-term capital depreciation cycles. Furthermore, by embedding transparent expropriation rules, specifically defining indirect expropriation to exclude legitimate, non-discriminatory regulatory shifts, the AfCFTA can provide the Legal Legibility required to de-risk property-dependent investments across disparate Regional Economic Communities (RECs).

2. A primary friction in trade finance is the Invisibility of Collateral across borders; therefore, a framework for the Mutual Recognition of Commercial Leases is essential. This recommendation proposes a Passporting System for property interests, where a leasehold or a registered security charge (such as an EAC mortgage or an OHADA *hypothèque*) is accorded reciprocal legal standing for the purposes of securing cross-border credit. By ensuring the Cross-Border Enforceability of long-term leases, the AfCFTA can facilitate a more liquid market for trade-related assets. This would allow a service provider to leverage its immovable property in one State Party as high-quality collateral to fund an expansion into another, effectively transforming dead capital into a mobile, continental asset that supports the free movement of capital.
3. Given the political sensitivity of land tenure, the AfCFTA should adopt an Incremental Convergence Strategy through a Model Framework on Immovable Property. Rather than attempting a radical and likely rejected Continental Land Code, this soft-law approach provides Member States with best-practice guidelines for modernizing land administration. This framework would encourage the voluntary alignment of domestic laws with the Functional Harmonization Model, focusing on the standardization of trade-critical property definitions and registration procedures. Thus, by prioritizing incremental convergence over rigid codification, the AfCFTA allows for the preservation of local customary nuances while slowly building a Common Language of Property that reduces the compliance tax currently born by firms navigating the heterogeneous legal landscapes of the EAC and ECOWAS.

The administrative gap between national land registries remains a significant Non-Tariff Barrier (NTB), necessitating the establishment of a Pan-African Digital Registry Interoperability Mechanism. This coordination body should facilitate the technical Handshake between digitized registries (such as Kenya's *Ardhisasa* and Rwanda's land system) to create a searchable, blockchain-ready metadata layer for cross-border verification of titles. Accompanying this technological integration must be a robust Judicial Cooperation Framework, where the AfCFTA Dispute Settlement Body issues Interpretative Guidance to national judiciaries. This would ensure that domestic courts interpret property disputes involving AfCFTA investors through the lens of treaty obligations, thereby reducing Home Court Advantage and fostering a predictable, continent-wide jurisprudence for property protection