

Unlocking and Protecting Investment Flow in Africa:

The AfCFTA Investment Protocol

Introduction to CDH

AN OVERVIEW OF OUR LAW FIRM

We are a top, independent, African business law firm based in South Africa and in Kenya through Kieti Law LLP. We are actively cultivating relationships with other top independent firms around the world. At Cliffe Dekker Hofmeyr (CDH) we believe the right partnership can lead to great things.



Brent Williams
Chief Executive Officer



Tim Fletcher
Chairperson

Clients attest to this firm's proficient approach: *"Professional, terrific turnaround times, quality advice and out-of-the-box solutions."*

CHAMBERS GLOBAL 2020

CDH is *"extremely commercial, client-centric and efficient, while also providing sound advice which is always in our best interest."*



Full service law firm.
One of the largest business law firms in South Africa.



more than
300 lawyers



track record spanning
168 years

Chambers Global 2021 ranked Cliffe Dekker Hofmeyr among the leading South African law firms with 38 partners recognised as leaders in their fields of expertise, and 20 areas highly ranked.

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.



DealMakers



Introduction to the Presenters



Njeri Wagacha

Partner
Nairobi

- 12 years PQE: Mergers & Acquisitions, Competition Law, Private Equity, and Employment Law



Jackwell Feris

Director | Sector Head
Johannesburg

- 16 years PQE: Energy and Resources, Infrastructure & Transport, Projects, Intra-Africa Investments, Dispute Settlement

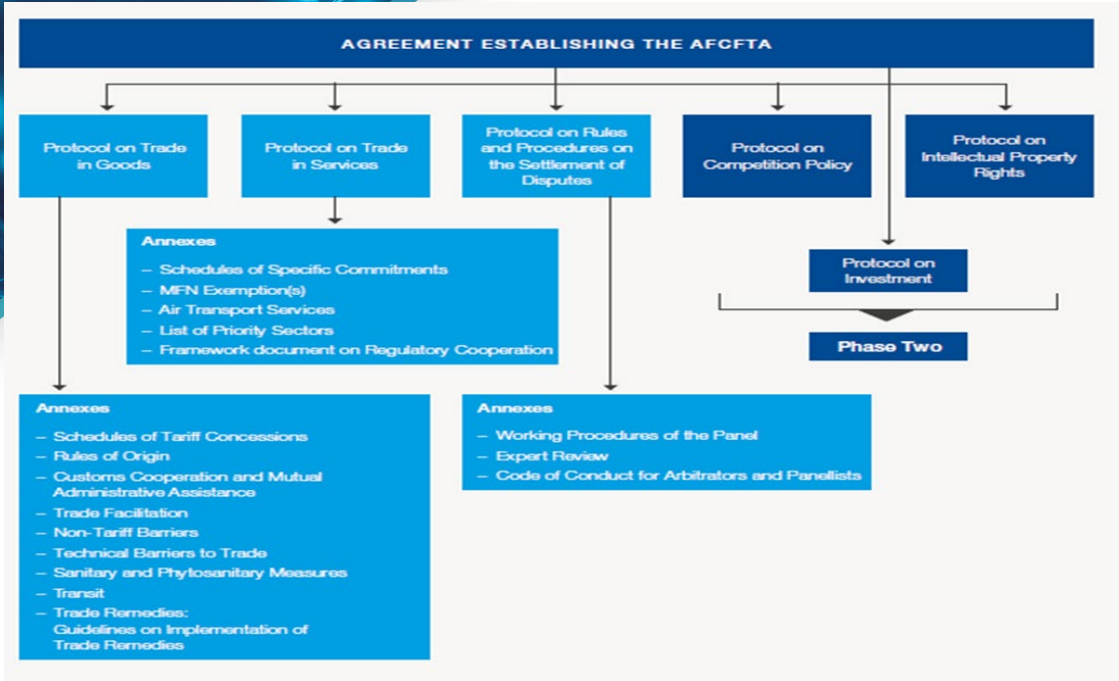


Vincent Manko

Director | Dispute Resolution
Johannesburg

- 9 years PQE: Business Rescue & Restructuring, Investments, Dispute Settlement

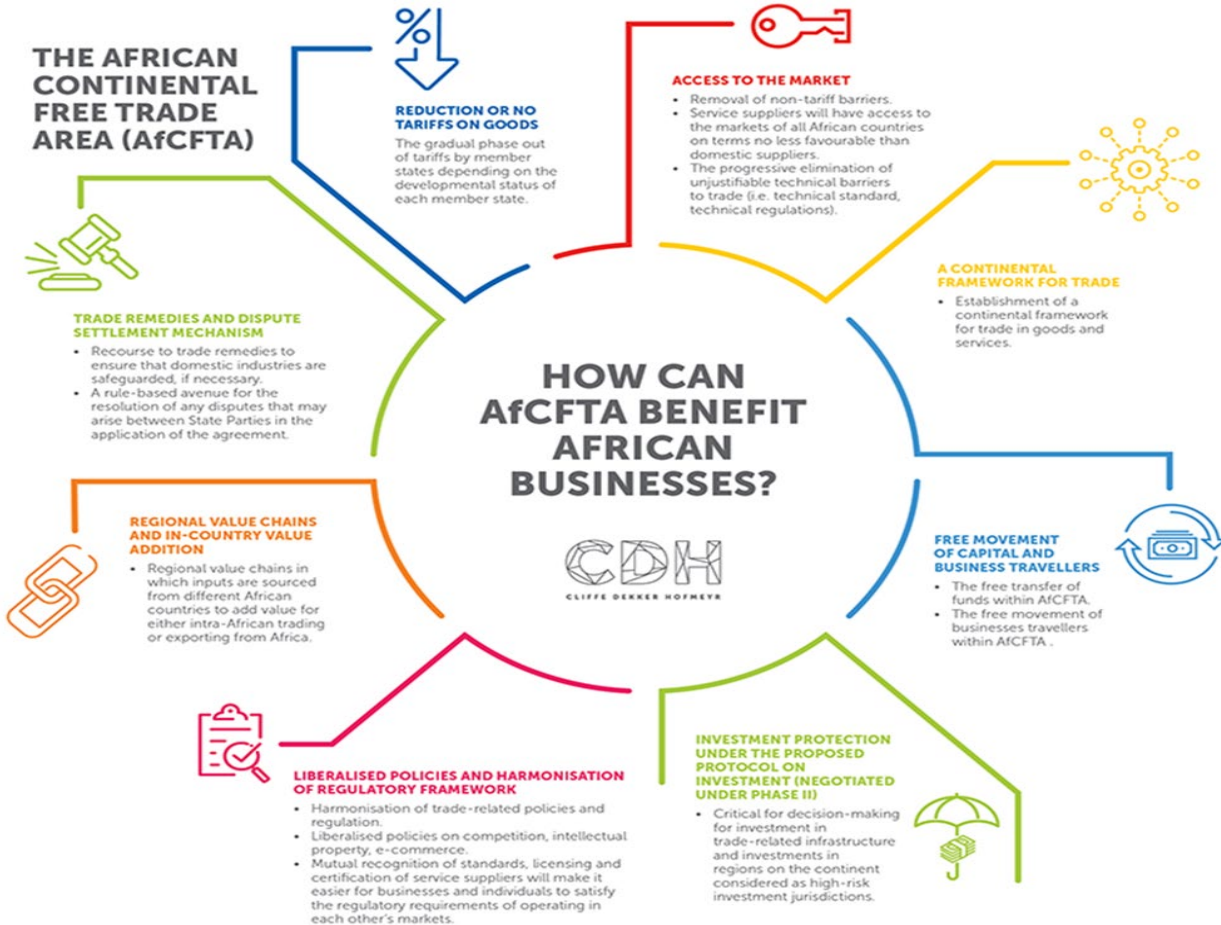
THE AFRICAN CONTINENTAL FREE TRADE AREA (“AfCFTA”) AGREEMENT



Which countries have ratified the AfCFTA Agreement?



The successful Implementation of the AfCFTA has the following benefits for African businesses



KEY HIGHLIGHTS OF THE AfCFTA

Contextualizing

AfCFTA Investment Protocol



PROTOCOL TO THE AGREEMENT ESTABLISHING THE
AFRICAN CONTINENTAL FREE TRADE AREA
ON INVESTMENT



Unlocking Investment Flow and Protecting Investments in Africa

Investing in trade-related infrastructure is a catalyst to achieve the objectives of the **AfCFTA**

The **African Development Bank** estimates that the continent faces an annual infrastructure investment deficit of **\$100 billion** and by **2025** the infrastructure financing needs are projected to reach as much as **\$170 billion**

This infrastructure investment deficit can largely only be filled with **private sector funding** – typically **foreign investors** but also **Intra-Africa investors**

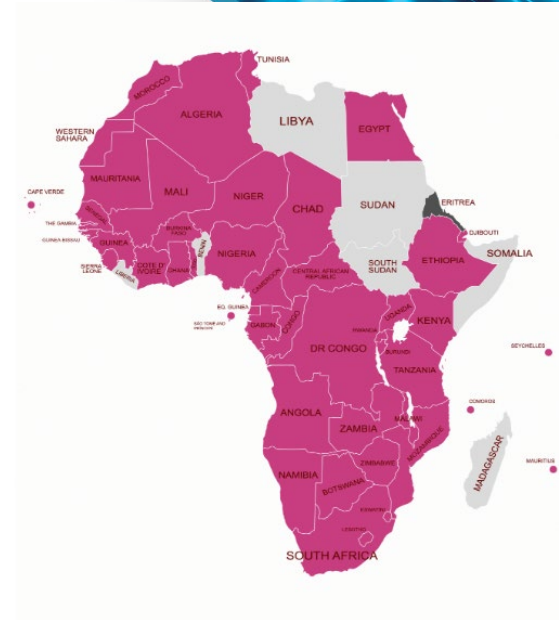


Unlocking Investment Flow and Protecting Investments in Africa

Investment Protection is paramount to **unlock investment** into major infrastructure projects required to unlock investments in various sectors in Africa, especially high value sectors such value addition through manufacturing in various potential Regional Value Chains.

AfCFTA Investment Protocol under the **AfCFTA Agreement** as adopted by the African Union Heads of State on **19 February 2023**.

Once it comes into effect intends to provide for a uniform investment framework for intra-Africa investment.



Unlocking Investment Flow and Protecting Investments in Africa

- ❑ **Investment:** ENTERPRISED BASED as opposed to ASSET BASED elements of the *Salini* test (significant contribution to host government, risk/reward, certain duration etc) requirements such as: *“Investor which maintains substantial business in the territory of that Host State.”*

“For greater certainty, the investment must have the following characteristics: commitment of capital or other resources, the expectation of gain or profit, a certain duration, assumption of risk, and a significant contribution to the Host State’s sustainable development;”

“Substantial Business Activity” expressly defined

- ❑ **Investors:** a natural person from African jurisdiction or legal or juristic person [Enterprise] incorporated in a member state in Africa. [Intra-Africa investor]

FOREIGN INVESTOR

FOREIGN INVESTOR (EUROPEAN / ASIAN / AMERICAN)



MAURITIUS (AfCFTA MEMBER STATE)
(WHOLE OWNED SUBSIDIARY)



ANOTHER AfCFTA JURISDICTION (i.e. DRC | KENYA | SA | NAMIBIA etc.)

Domestication of investor

Investment Flow and Protection

INTRA-AFRICA INVESTOR

MAURITIAN INVESTOR (MAURITIUS IS AfCFTA MEMBER STATE)



ANOTHER AfCFTA JURISDICTION
(i.e. DRC | KENYA | SA | NAMIBIA etc.)

Unlocking Investment Flow and Protecting Investments in Africa

- ❑ **Host State Guarantees:** Expropriation | Most Favoured Nation | National Treatment | Transfer of Capital/Funds | FET (watered-down) **BUT** also as effective Dispute Settlement
- ❑ **Investor Obligations:** Sustainable Development | ESG | Human Rights | Corruption
- ❑ **Host States Rights:** Regulate in the Public interest | impose local content obligations | Incentives | ESG standards | Climate Change (Green Hydrogen | e-mobility etc)

Effect of the AfCFTA Investment Protocol on Existing Intra-Africa BITs: will terminate within 5 (five) years from entry into force of the Protocol. BUT different to foreign investment directly into a particular African host state

Spotlight on Namibia



Namibia is a member of the AfCFTA

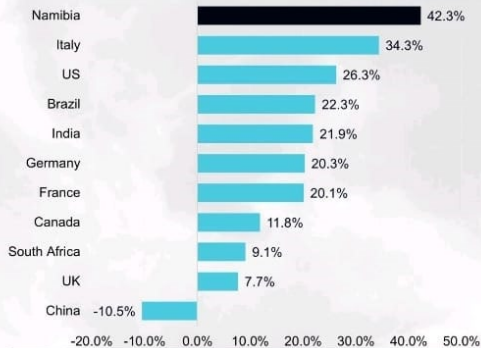
Namibia has embarked upon major investment drive for investment in the Energy & Industrials Sector of Namibia (Green Hydrogen, Renewable Energy, Oil & Gas etc) it is important to be cognisant of both the opportunities it presents but also to **fully appreciate the investment risk to Namibia as host government.**

Part thereof:

- Clearly understanding what the rights and obligations are of investor in respect of their investments for a host state is imperative = appreciation future risk if things go wrong.
- The proliferation of investment increases the risk of disputes with investors, linked to the climate and related policies of states like Namibia.

Gross Index Return 2023

Gross Index Return 2023 (in local currencies)
The NSX Local had a stellar performance in 2023, outperforming both developed and developing markets alike.



Source: Bloomberg

Spotlight on Namibia



- 15 signed Bilateral Investment Treaties (“**BITs**”)
- 8 BITs are in enforce, and of the 8 BITs – 7 are with **EU member** states such as:
 - Germany
 - Netherland
- All BITs are classified “**old generation**” investment treaties
- The nature of “**old generation**” treaties are generally considered to expose states to **significant future risk to the fiscus** in the event of a dispute related to an investment by a qualifying investor from such states.

No.	Short title	Parties	Status	Date of signature	Date of entry into force	Date of termination
1	Namibia - Russian Federation BIT (2009)	Namibia; Russian Federation;	Signed	25/06/2009		
2	Congo - Namibia BIT (2007)	Congo; Namibia;	Signed	17/07/2007		
3	China - Namibia BIT (2005)	China; Namibia;	Signed	17/11/2005		
4	Italy - Namibia BIT (2004)	Italy; Namibia;	Terminated	09/07/2004	30/05/2006	30/05/2021
5	Angola - Namibia BIT (2004)	Angola; Namibia;	Signed	21/03/2004		
6	Namibia - Viet Nam BIT (2003)	Namibia; Viet Nam;	Signed	30/05/2003		
7	Austria - Namibia BIT (2003)	Austria; Namibia;	In force	27/05/2003	01/09/2008	
8	Namibia - Spain BIT (2003)	Namibia; Spain;	In force	21/02/2003	28/06/2004	
9	Namibia - Netherlands BIT (2002)	Namibia; Netherlands;	In force	26/11/2002	01/10/2004	
10	Finland - Namibia BIT (2002)	Finland; Namibia;	In force	31/10/2002	21/05/2005	
11	France - Namibia BIT (1998)	France; Namibia;	In force	25/06/1998	26/02/2006	
12	Cuba - Namibia BIT (1997)	Cuba; Namibia;	Signed	27/06/1997		
13	Malaysia - Namibia BIT (1994)	Malaysia; Namibia;	In force	12/08/1994	02/11/1996	
14	Namibia - Switzerland BIT (1994)	Namibia; Switzerland;	In force	01/08/1994	26/04/2000	
15	Germany - Namibia BIT (1994)	Germany; Namibia;	In force	21/01/1994	21/12/1997	

Spotlight on Namibia



“**OLD GENERATION**” BITs risk for Namibia (based on lessons learnt):

- No regulatory flexibility for Namibia:
 - sustainability development
 - environmental
 - Climate change
 - Just energy transition
- No balance of rights and obligations between investor and state
- Unlimited potential exposure under the Fair and Equitable Treatment Standard:
 - Potentially creating unqualified legitimate expectations to investors:
“**The sun can be yours**” – lessons from Spain for Namibia’s “**Export the Sun**” for the green hydrogen economy.
- Harmonisation with AfCFTA Investment Protocol BUT still ensuring maximum protection is provided to investors with substantial investment – that brings real economic change.

Are there any real value in investment treaties such as the AfCFTA Investment Protocol for investors?

AfCFTA Investment Protocol



18 July 2023

US\$109.5m Award Against Tanzania

Highlights

- The International Centre for Settlement of Investment Disputes, part of the World Bank, has declared arbitration proceedings against the United Republic of Tanzania ("Tanzania") closed
- The Tribunal has delivered its Award with Tanzania ordered to pay compensation for the unlawful expropriation of Ntaka Hill of more than US\$109.5 million (including interest already accrued) to the Claimants
- Indiana is a 62.4% shareholder of the combined holdings of the Claimants
- This holding percentage may increase as a result of the current ACICA arbitration proceedings between shareholders of one of the Claimants
- Indiana to commence enforcement process for the Award

Japanese investor wins damages over Spanish solar reforms

Jack Ballantyne
28 November 2021

Print article



JCC invested in concentrated solar plants in Andalusia, Spain

An ICSID tribunal has ordered Spain to pay a Japanese investor over €23.5 million plus interest and costs after finding that changes to the state's renewable energy regime frustrated its legitimate expectations.

Spain fails to annul largest renewables award

Jack Ballantyne
28 March 2022

Print article



NextEra Energy won the €290 million Energy Charter Treaty award in 2019 (Credit: Shutterstock/only_kim)

An ICSID committee has upheld the largest award yet issued against Spain over its renewable energy reforms, rejecting arguments that the investor had "unclean hands" or that the tribunal should not have agreed to hear an intra-EU dispute.



A wind farm in central Spain (Shutterstock/Brian Maudsley)

A Japanese wind farm investor has won €106.2 million in the latest Energy Charter Treaty award against Spain over reforms to its renewables sector, as the state is threatened with an ECT claim by the developer of a uranium project.

AfCFTA INVESTMENT PROTOCOL

Challenges and Concerns *re* Investor–State Dispute Settlement

- ❑ Excessive duration of proceedings
- ❑ Lack of consistency and coherence in the interpretation of legal issues
- ❑ Incorrect decisions
- ❑ Lack of independence, impartiality, and neutrality of adjudicators
- ❑ Lack of diversity among adjudicators
- ❑ Excessive costs of proceedings (including insufficient recoverability of cost awards)



AfCFTA Protocol on Investment: Management and Settlement of Disputes

- ❑ State Dispute Settlement - article 44
- ❑ Dispute Prevention and Grievance Management - article 45
 - consultations, negotiations, conciliation, mediation
 - other amicable dispute resolution mechanisms available
- ❑ Investor–state dispute settlement – article 46
 - dispute resolution mechanisms to be provided in the Annex?

AfCFTA

INVESTMENT

PROTOCOL



Lessons from SADC and South Africa

- ❖ Annex 1 - SADC Protocol on Finance and Investment: signed on 18 August 2006 and came into effect on 16 April 2010
 - Article 28: SADC Tribunal; ICSID and UNCITRAL
- Annex 1 – Amendment: 2016 and SADC Model BIT (2012)
 - No ISDS
- South Africa: Protection of Investment Act, 2015?

Annex to the AfCFTA Protocol on Investment: Possible Routes?

- Retain and improve investor-State arbitration system (e.g. modify the appointment rules or enacting rules of conduct and/or ethics for arbitrators etc.)
- Addition of an appellate mechanism to investor-State arbitration system
- Introduce a multilateral investment court (with or without a built-in appeal)
- No ISDS at all, with two sub-scenarios:
 - recourse to domestic courts only
 - State-to-State arbitration only.

QUESTIONS



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The logo for CDH Incorporated, featuring the letters 'CDH' in a stylized, geometric font where the letters are interconnected. Below the letters, the word 'INCORPORATED' is written in a smaller, sans-serif font. The logo is set against a dark blue background with a network of glowing blue lines and dots, suggesting a digital or technological theme.

CDH
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