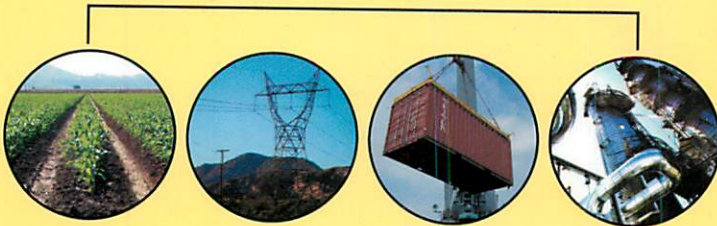




ECONOMIC COMMUNITY OF WEST AFRICAN STATES

ECOWAS

REGIONAL INVESTMENT POLICY FRAMEWORK



ECOWAS COMMISSION, ABUJA, NIGERIA



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Abuja, 2007

ECOWAS COMMISSION, ABUJA, NIGERIA

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CHAPTER I

1. INTRODUCTION

1.1 Context

The globalisation of the world economy, which entails interdependence among countries, has made the role of investment to become increasingly important in recent years. However ECOWAS countries have remained, in relative terms, at the margin of the process of the expanding global investment flow. Given the fact that investment inflows are to a large extent function of location specific advantages such as: size of domestic market, growth of the domestic economy, openness to international trade, and an appropriate investment climate and image, ECOWAS Member States became more determined to address the problem of low investment inflow into the region. Consequently, at their meeting held in Abuja in April 2006, the Ministerial Monitoring Committee (MMC) mandated the old Secretariat to prepare a regional investment policy framework" which they will consider at the October 2006 meeting. This framework has been prepared in response to this request. While taking the peculiarities of ECOWAS countries into account, this regional framework was drawn in line with international principles, consolidates the progress achieved by members states on policy areas related to investment. It puts forward suggestions for implementation and institutional follow-up.

After thorough discussions on the issues relating to the draft policy framework, some of the main conclusions arrived at were as follows:

- A number of similarities exist in the different investment codes of Member States, which could be used in the preparation of a regional investment policy.

- A few significant differences however exist, particularly with regard to tax incentives and some aspects of national policies for attracting investment.
- There is a need for harmonization and implementation of the different sectoral policies designed to attract investments to the region.
- There is a need for the formulation of a draft supplementary act on the regional investment policy.
- There is a need for the establishment of a Regional Investment Promotion Agency (RIPA). The duties of this agency and its interactions with the ECOWAS Commission and Member States should be clearly defined.

After the deliberations, a regional framework document was adopted with the following essential aspects:

1. A description of the framework indicating:
 - the rationale for the regional investment framework;
 - the present situation of investment policy and code in member states;
 - the areas in which policy harmonization should be pursued with a view to improving the investment environment in the region;
 - the establishment of a mechanism for monitoring the implementation of the relevant harmonised policy;
 - the establishment of a regional structure for investment promotion, facilitation and monitoring.
2. A draft Supplementary Act adopting community Rules on investment and modalities for its implementation within ECOWAS.
3. A draft "Supplementary Act adopting establishing a Regional Investment Promotion Agency within ECOWAS.

1.2 Aims

The framework aims at providing a reference for the elaboration, implementation and evaluation of national policies relating to investment in the ECOWAS region.

This involves harmonising investment promotion policies and the regulatory environment:

- ***Essential conditions for attracting investment*** : Political stability; good governance; macroeconomic reform and stability; trade liberalization; market integration; foreign exchange market liberalization; investment deregulation; consistency in policy and application; improvement of procedures for creating enterprise.
- ***Principal actions needed to increase investment over the medium-Term***: Tax reform; legal and judicial reforms; institutional reforms; capital market development; human capital development; credible privatization; new/upgraded infrastructure; investment promotion and facilitation.
- ***Program of Immediate Actions***: Accelerate implementation of the ECOWAS trade reform agenda; Investor servicing and policy advocacy at the national and regional level.

2. THE CASE FOR ECOWAS REGIONAL INVESTMENT POLICY

2.1 Regional investment policy is requested by ECOWAS treaties

The Revised ECOWAS Treaty calls for the establishment of a common market through:

- The liberalisation of trade by the abolition, among Member States, of customs duties levied on imports and exports, and the abolition among Member States, of non-tariff barriers in order to establish a free trade area at the Community level;
- The adoption of a common external tariff and a common trade policy vis-a-vis third countries;
- The removal, between Member States, of obstacles to the free movement of persons, goods, service and capital, and to the right of residence and establishment.

In addition to the customs union and the common market, the ECOWAS region is to also establish an “economic union” with common policies for economic, financial social and cultural sectors, including a monetary union.

Specifically, there are also two provisions relating to investment - the first one providing for the adoption of a regional agreement on cross-border investment (Article 3.2(f)), and the second for the “the harmonisation of national investment codes leading to the adoption of a single Community investment code.” (Article 3.2(I))

2.2 Regional investment policy strengthens the development of private sector and lead to sustainable economic growth

A regional investment code would strengthen the common market as it would eliminate the distortions on competition provided by individual member countries' code which offer different fiscal incentives to investors.

Furthermore, development of a strong and dynamic private sector is crucial to long-term economic growth, which in turn, is a necessary

condition for sustained poverty reduction. Experience over the past two decades has shown that when properly regulated and operating under competitive market conditions, the private sector can generally use resources more efficiently than the public sector. Private enterprises can deliver goods and services to meet growing consumer demands, and create new job opportunities at the same time. As economic growth proceeds, formal and informal employment becomes a source of income for the poor, and improves the sustainability of their livelihoods. Private sector growth can also affect poverty in other ways. Public-private partnerships in infrastructure projects can reduce pressure on public budgets and enable governments to redirect more resources to social spending. Private sector participation in infrastructure and utilities can also improve and extend the delivery efficiency of essential services. Private sector involvement in the delivery of education and health services to higher income groups can free-up government resources for the needs of lower income groups.

The challenge to government of ECOWAS region is to create and maintain the legal and market institutional infrastructure needed to enable private sector activities to act as the engine of economic growth, in other words, to support and strengthen an 'enabling business environment'. A regional investment policy contributes to that aim by re-enforcing the 'enabling business environment'.

2.3 Regional investment policy reinforces ECOWAS aims to secure transparent, stable and predictable conditions for investment and enhance the common market

The ostensible goal of ECOWAS is "to secure transparent, stable and predictable conditions for long-term cross border investment." To ECOWAS a common investment policy will help unlock the benefits of investment for member countries, generating more dynamic growth, technology transfer, employment and a wide range of additional benefits. It is widely recognized that, under the right conditions, investment can be an important source of private capital for developing countries that can complement national and international development

efforts; and it can create jobs, generate positive 'spill over' effects, facilitate technology transfer, and expand access to global markets. However, realizing this potential requires more than liberalization of capital account and investor protection. Successful regional investment strategy requires effective regulatory and institutional provisions in member countries. In addition, successful regional investment strategy is often required in the context of active industrialization policies designed to build regional capacity, create dynamic linkages between foreign and domestic investors, transfer technology, and safeguard the balance-of-payments.

The presumed benefits of a regional investment policy for ECOWAS countries can therefore be broadly divided into three clusters:

- **Predictability and Stability.** One important claim is that an investment policy for the region would help to create legal and institutional conditions needed to attract investment. It would, so the argument runs, offer investors security. In effect, the argument here is that the agreement would encourage governments to behave in a way that reflected their own self-interest.
- **Dispersing FDI.** At present, FDI is highly concentrated in a small group of countries in the region. With a common investment policy an enlarged space is now created for foreign investors as well as local and regional investors.
- **Harmonising ECOWAS incentives towards Investment.** There are many bilateral investment treaties in place in ECOWAS countries. At the same time, foreign investment rules are enshrined in many national trade agreements. A common investment regime would minimise this fragmentation and also help to set a base line.

Thus, an investment policy for all countries in ECOWAS will unlock these benefits through two key channels. First, it would improve market access for investors, lowering barriers to entry just as tariff cuts lower barriers for goods. Second, such a common policy would increase investor rights, and reduce the risks associated with government intervention in ECOWAS Countries.

3. OVERVIEW OF THE PRESENT STATE OF INVESTMENT POLICY IN ECOWAS MEMBER STATES

3.1 Present Situation

Economic Community of West African States (ECOWAS) have become more accommodating toward foreign direct investment (FDI) over the last two decades as evidenced inter alia by changes in the regulatory regimes of most of the countries towards overseas investors and their investments. The reorientation was set in the context of a more general shift in attitudes toward the private sector, and it reflects an increasing realization that private international capital flows are likely to be a key source of development finance in the future. The changing stance toward FDI has also given rise to a proliferation of investment promotion agencies, special economic zones and other targeted mechanisms through which countries aspire to attract foreign investors and their investments. However, it is observed that considerable national differences still persist among the countries and important hurdles still need to be overcome to harmonize the regional investment code. Also, while it is fair to say that in terms of overall statutory FDI regulation, West African countries are on average not more restrictive than other developing nations, some of the remaining obstacles are yet both severe and peculiar to the region. An example of remaining obstacle is the prevalence of sectoral restrictions with the purpose of protecting small businesses and artisan production, which likewise hold back the creation of a market economy and foreign-local corporate linkages in large segments of ECOWAS societies.

3.2 Overview of regulatory practices toward investment in ECOWAS Region

Tables 1 and 2 (in Annex) summarize information collected on West African countries' regulatory institutions and other practices towards investors. They provide an inventory of available public information which evaluates the various national investment climates. The two tables that make up the matrix address different aspects of

discriminatory and non-discriminatory treatments to investors. Table 1 focuses on actual restrictions to investment, whether in the form of general or specific limits to access, or post-entry limitations on foreign-invested companies' commercial operations. Table 2 however, describes other measures, including those that aim at attracting investors by means of subsidization, and measures to enhance regulatory transparency. The inventory is intrinsically a work in progress that will be further completed and/or improved based further feedbacks and information from stakeholders. Once completed with accurate and up to date information, the inventory should contribute to measure progress on investment policy transparency and openness in the region; and then ECOWAS Secretariat can initiate a political dialogue among governments of West African countries on best practices to attract investment and maximize its economic benefits through a harmonized investment policy for the entire.

3.2.1 Restrictions on Foreign Investment

i. General restrictions on entry

According to available information ECOWAS countries have generally simplified their procedures for entry of FDI (participation in existing firms and greenfield investment) since the early 1990s. Since then, FDI is no longer routinely screened in most countries, and some now apply policies of guaranteeing a transparent registration of projects meeting proper criteria. However, many countries still impose general restrictions on entry, either by prohibiting foreign investment below a certain size, through minimum capital investment or by requesting prior approval or licensing from which domestic investors are exempted (Table 1).

Previous restrictions on foreign purchase of domestic shares (in capital markets) have been relaxed in several ECOWAS countries. Without prejudice to restrictions on FDI laws, non-residents are now in principle, allowed to own up to 100 per cent of domestic enterprises in nearly all ECOWAS countries except in Ghana, where foreign ownership cannot exceed a fixed threshold. From this development it is

understood that many ECOWAS countries have accepted the obligations of the Article VIII of the IMF's Article of Agreement which compels member nations of IMF to remove restrictions on payments and transfers for international current transactions, and to adopt multilateral payment system free of restrictions and discriminations. Most ECOWAS countries have put rules in place guaranteeing investors an unrestricted remittance of dividends, profits and liquidation proceeds, on condition that payment of taxes and other liabilities has been made according to local regulations.

ii Specific Restrictions on Entry

All ECOWAS countries retained some levels of restrictive practices toward some specific categories of investment. They discourage regional and foreign investment in certain sectors either to stimulate local entrepreneurship, to protect sectors deemed to be of strategic interest, or to maintain the monopoly position of state enterprises. As a general rule, the majority of countries tend to discriminate against regional and foreign investors in activities judged to be particularly suited to national or local entrepreneurs. Such practices are found in sectors like small-scale manufacturing and mining, some trading activities and proximity services. Regional and foreign participation in financial services is restricted and/or subjected to more burdensome licensing requirements than applied to domestic investors in some countries. For some other countries they do not report discriminatory regulation against regional and foreign entrepreneurs wishing to invest in financial activities. More generally, progress has been made in transferring financial services from the public to the private domain.

To boost local entrepreneurship and self employment, most ECOWAS governments ban or restrict foreign participations in certain kinds of other services, especially the ones that do not call for specialized expertise. Examples include barber shops and beauty salons, retail and wholesale trading, radio-television and telecommunication, transportation, bars and restaurants. Essentially in the primary sector foreign entrepreneurs are in most cases not allowed to invest in small scale mining, in construction companies and in some agricultural

activities. Furthermore, regulations also deny national treatment to non-domestic entrepreneurs wishing to invest in the manufacturing sector in many countries. One prime example, mirrored in many ECOWAS countries' legislation, is military equipment, but some of the more Africa-specific exceptions include the production of commodities goods such as bread, school furniture and bricks.

iii Post Entry-Restrictions

Most ECOWAS countries have relatively few statutory practices favouring domestic companies over existing foreign owned enterprises. On the contrary, it appears that foreign businesses may enjoy in practice easier access to local financing because of their better collateral capabilities, and may obtain official support for projects deemed to be critical for the national development strategy. On the issue of subsidies, ECOWAS countries mostly provide investment incentives in the form of tax reductions and do not release information on regulations and practices discriminating against regional and foreign investors. Incentives are granted to encourage investment in particular sectors (e.g. export activities are generally exempted from paying duty) or geographic locations. With the exception of where domestic-owned companies pay a lower corporate income tax than foreign-owned enterprises, national tax legislation does apparently not discriminate against foreign investors in ECOWAS countries with substantial foreign enterprise.

Immigration and other regulation make the entry of key personnel in regional and foreign enterprises relatively difficult throughout the entire West African countries. The process of getting work permits for regional and foreign employees is both expensive and time-consuming. On top of the immigration regulation, most countries also apply strict rules to the employment of expatriates, and generally allow foreign employees only in proportion to the capital invested. Conversely, some countries encourage immigration of persons with special skills to compensate for a lack of workforce in certain sectors.

3.2.2 Regulatory Practices Other than Restrictions

i. Practices Encouraging Investment

The degree and distinction to which ECOWAS countries offer incentives to attract investment in addition to what is available to domestic enterprises is mostly hard to establish on the basis of publicly available information.

To boost the confidence of foreign entrepreneurs and assure them of protection of their investments, all ECOWAS countries were discovered to have signed Bilateral Investment Treaties (BITs) with a number of other countries. In addition to the BITs, investors place great emphasis on the presence of Bilateral Tax Treaties (BTTs), which provide them with greater certainty about the fiscal implications of cross-border transactions.

ii. Measures to Enhance Investment Policy Transparency

It appears that the ECOWAS countries with a few exceptions could do more to diffuse relevant information to investors. On issues as vital to investors as national practices for notification prior to regulatory changes as well as “silent and consent” authorization, no information has been found for the large majority of countries.

Practices for the publication of investment regulations vary widely among countries within ECOWAS region. While a majority of these countries publish some material, but few official web sites provide full texts of laws and regulations making the needed documents to be generally difficult to access because they tend to be spread among several web sites and lost between unrelated information. Most of the websites contacted merely seem to give preference to showcasing success stories and advertising future projects rather than to providing concrete documentation and data for incoming investors.

iii. Other Measures

At the sub-national level, some countries provide various kinds of incentives, mainly through tax rebates, to investors establishing in rural areas or in less developed part of the country. However, the degree to which these reflect regional policy-making as opposed to the priorities of national priorities is not always clear.

3.2.3 Restrictions in the Service Sectors: Evidence from GATS Schedules

Another way of identifying practices and regulations that discourage investment inflows to the service sectors is to examine the World Trade Organization (WTO) General Agreement on Trade in Services (GATS) schedule of horizontal commitments related to mode 3 provisions of services. Most of the countries in ECOWAS are signatories to GATS via their accession into WTO. Moreover, in GATS, countries have an incentive to announce commitments that are less permissive than their actual regulatory practices in order to “keep their options open”.

3.3 Overview of incentives

The incentives which are being granted within the sub region lack uniformity. It should also be noted that most member states operated a system allowing for a degree of automaticity in the grant of some incentives with a view to minimizing the extent of technocratic intervention. There is however significant differences in terms of fiscal incentives offered by the Member States.

4. ELEMENTS OF AN EFFECTIVE ECOWAS REGIONAL INVESTMENT POLICY

As identified above, investment policy, law and practices, in ECOWAS member states show areas of convergence in substantive parts. The similarities among the code may serve as an initial platform for the creation of a regional investment code for the ECOWAS Community as a whole. However divergences are noticed in key issues like incentive-based strategies. More importantly divergences occur in policy required to create a climate for a conducive investment environment in ECOWAS region.

4.1 Building blocks of the regional investment policy harmonisation (areas of convergence)

The main objective being to harmonise policies creating an environment that is attractive to all investors and enhancing the development benefits of investment to the region.

The regional policy framework will recognise that a broad based integrated approach is needed to strengthen the investment environment in ECOWAS and that the following policy areas are of crucial importance.

A preliminary list of policy building blocks for policy harmonisation for investment inducing framework has been set; it includes:

- 1) *Investment policy transparency, investment protection and non-discrimination treatment.*
- 2) *Investment promotion and facilitation including review of investment incentives.*
- 3) *Tax policy:* Design tax policy favourable to investment; ensure transparency, integrity and efficiency of tax administration, undertake a systematic review of tax incentives.

- 4) ***Public Administration and Regulatory Governance:*** Strengthen functioning of public and regulatory institutions, streamline administrative procedures and eliminate administrative obstacles to investment, ensure integrity in public administration, build institution and human capacity at central, regional and local government levels, strengthening consultation procedures between public and private sectors and civil society.
- 5) ***Competition policy:*** Create and effectively enforce regional competition legislation which is in line with best international practice; have independent enforcement agencies endowed with adequate human and financial resources, provide competition authorities the possibility to express their views in the process of developing and implementing legislation having an impact on competition, ensure that privatization operations are compatible with competition principles.
- 6) ***Corporate Governance and corporate responsibility:*** Strengthen regulatory authorities to improve implementation and enforcement, encourage private sector involvement and facilitate the development of a corporate governance culture, provide training and capacity building for all parties and professions involved in corporate governance, protect minority shareholders, reinforce boards, promote compliance with international standards and practices for accounting, audit and non financial disclosure. Respect internationally agreed principles of corporate social responsibility.
- 7) ***Anti-corruption and business integrity:*** Implement effective policies to prevent and to punish bribery and corruption; introduce the necessary regulatory and institutional reforms develop education and public awareness campaigns, engage in a dialogue with the private sector on measure to prevent corruption in commercial transactions; systematically evaluate the implementation of anti-corruption measures.

- 8) *Human resources and employment strategies*: Strengthen human resources development through government policies, education programs and vocational training, review employment strategies throughout the region and encourage a systematic dialogue between policy makers and private sector institutions.
- 9) *Enterprise development and SME promotion*: Encourage enterprise creation through proper government policies and development of financial institutions, Implement good practices for SME promotion.
- 10) *Trade*: Creation of a common market
- 11) *Industrial Policy*

4.2 Best Policy practices (convergence criteria)

A set of best policy practices is necessary to guide the reform process. *Boxes 1 - 3 below provide best practices for the first three building blocks above:*

Box 1: Investment policy principle and best practices

- Clear and transparent national policies, laws, regulations and administrative practices that do not impose unnecessary burdens;
- Coherence and stability of laws, regulations and administrative practices;
- National treatment for foreign investors at both the pre-and post-establishment stage; exceptions to be clearly formulated and brought to the attention of the Investors and periodically reviewed with a view of phasing them out;
- Promotion of an effective services sector, in particular through the removal of remaining obstacles to foreign investment in the areas of financial and professional services;
- Timely and unrestricted transfer of the proceeds of the investment;
- Guaranteed repatriation of the capital when the investment is terminated;

- Timely and efficient means of ownership registration and full protection of property and contractual rights including intellectual property and the right to own land; high standards on expropriation and compensation;
- Access for investors to effective dispute settlement mechanisms including government ratified and binding instruments such as arbitration;
- Movement of key personnel for the investment and simplification of visa regulations;
- Transparency and non-discrimination of investment incentives; systematic review of cost/benefits of existing and planned incentives;
- Ratification of international treaties on the promotion and protection of investment.
- Support for responsible corporate conduct through: (i) Investment policies that are consistent with development, protection of the environment and internationally recognised core labour standards; (ii) Promotion of internationally agreed principles of good corporate conduct.

Box 2: Investment Promotion and Facilitation

Definition and implementation of an effective strategy of investment promotion that is specific and takes into account best practices, such as:

- Elaboration of regional and governments vision and policy on local, regional and foreign investment and advocacy among social partners, civil society and investors;
- Establishment of a regional Investment Promotion Agency with adequate human and financial resources, whose performance is regularly reviewed;
- Definition of strategic policy options and setting out the corporate strategy and marketing plan for the Investment Promotion Agency to build competitive strength and achieve selected policy options;
- Involvement of Investment Promotion Agencies in identifying administrative barriers to FDI and establishing a programme with

clearly assigned responsibilities and target dates to remove such obstacles to investment;

- Mechanisms for regular dialogue between IPAs and investors;
- Regional consultation with IPAs on all policy areas related to investment;
- IPA involvement in international and regional networks and capacity-building initiatives;
- Facilitation of investment and servicing of new and existing investors at all stages of the investment cycle, from start-up to post-investment and new expansion stages;
- Encouragement of greater integration of foreign business into the regional economy and the establishment of foreign investment in the member countries through linkage programmes with SMEs;
- Evaluation of costs and benefits of investment incentives;

Box 3: Tax Policy

- Tax policy design and administration to play a central role in facilitating investment from international, regional and domestic sources; this implies a balance between budgetary considerations and private sector development priorities;
- Development of a comprehensive tax strategy, which is consistent with economic development and investment strategies, based on measurement of the overall tax burden and effective tax rates for business activities;
- Transparency, clarity and predictability of tax laws, regulations and administrative practices; explicit legal basis for all taxes, duties and similar charges; consolidation of all income and profit tax laws into a single Code, supplemented by explanatory materials and supporting information;
- Tax system which is neutral in its treatment of foreign, regional and domestic investors;
- Tax treaty network to address international double taxation; availability of dispute settlement mechanisms (e.g. mutual agreement procedures among tax authorities);

- Use of cost/benefit analysis of tax incentives accounting for revenue losses and tax administration costs; evaluations to be made available to the public;
- Reporting of tax expenditure reports and use of sunset clauses for the budget process;
- Establishment of a comprehensive tax treaty network, which minimises the opportunities for abusive cross-border tax avoidance activities;
- Regular consultations involving tax and investment policy makers and investment promotion agencies and business to improve tax policy design and coherence of tax and investment policies.

4.3 Implementation

4.3.1 Implementation outline

The political commitment to implement this framework through suitable national and regional policies and regional co-operation is of outmost importance. In addition, the support from the business sector will be necessary which implies the mobilization of business associations. In addition contributions by civil society organizations will be encouraged.

The implementation part of the Framework will also call for the improvement of legislative process and the strengthening of parliamentary institutions.

Finally the framework will call for the strengthening of institutional capacities to assess and monitor progress.

4.3.2 Investment policy harmonisation monitoring

4.3.2.1 Objectives and principles

A tool is proposed for the monitoring of the policy harmonisation. The Investment Policy Harmonisation Management Tool (IMT) is conceived

as a management tool to help measure progress on the reform agenda, provide a benchmark for country assessments on performance and support the implementation of the ECOWAS Investment Policy Framework.

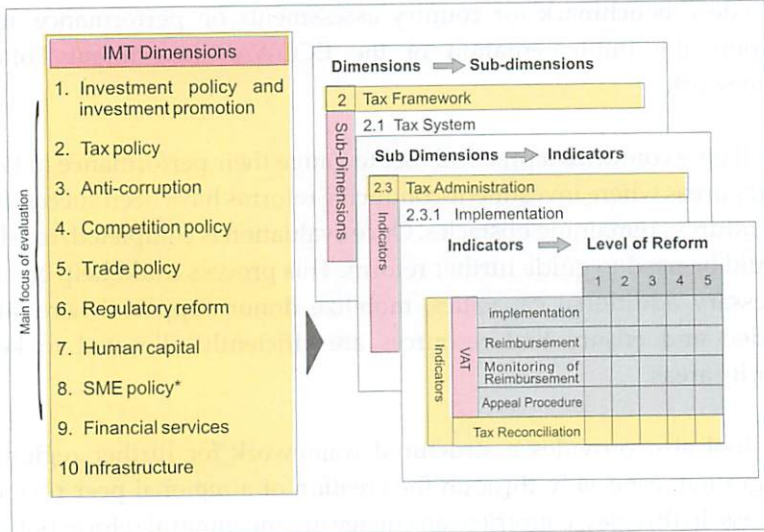
It will give countries a practical tool to gauge their performance in key policy areas where investment-conducive reforms have been successful and address remaining obstacles. Once evaluation is completed, results should be used to guide further reform. This process could help create necessary additional capacities, mobilize donor support where still needed and ensure that resources are efficiently allocated to key priority areas.

The tool also provides a structured framework for further regional integration, especially through the creation of a regional peer review process. In this way, countries can engage in a meaningful reform policy dialogue among each.

Finally the tool serves to reinforce public/private dialogue, ensuring that input from the private sector is included in policy formulation and reform.

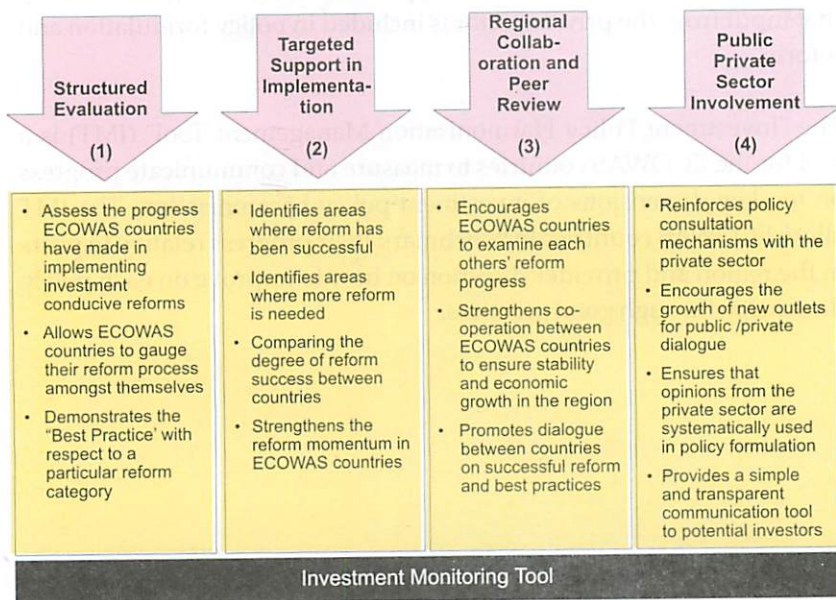
The "Investment Policy Harmonisation Management Tool" (IMT) is a tool for the ECOWAS countries to measure and communicate progress on ten key dimensions of investment policy harmonisation. The IMT allow ECOWAS countries to benchmark their progress relative to peers in the region and provides direction on how to improve on each policy dimension through good practices.

The IMT measures implementation of reform in 10 key dimensions Approach



Objectives

The IMT is guided by four key objectives:



4.3.2.2 Process

1. *Structured evaluation:*

- measures progress in investment reform for ECOWAS countries on a comparative basis.
- indicates countries' position on a scale of 1 to 5 along various dimensions of reform.

2. *Targeted support in implementation:*

- prioritises regional and country level support needs based on evaluation.
- provides a basis for coaching initiatives and peer reviews through "Good Practice" examples.

3. *Regional collaboration and peer review:*

- promotes ECOWAS regional investment dialogue through "Good Practice" case studies.
- encourages more effective peer reviews through a common evaluation framework.

4. *Public and private sector involvement:*

- provides a simple and transparent communication tool to potential investors.
- supplies a common framework for private sector policy dialogue with governments.
- encourages public/private consultations.

4.3.2.3 Key steps in the IMT process

- **Step 1.** First round presentation by the Secretariat at the Stakeholders meeting in Niamey, to present and explain the IMT and identify key policy priorities (28-30 September 2006).
- **Step 2.** Finalisation of the IMT toolkit and first evaluation of ECOWAS countries by the Secretariat based on available secondary sources (Completed: November 2006).

- **Step 3.** ECOWAS countries conduct self-evaluation along IMT dimensions (December 2006).
- **Step 4.** ECOWAS Secretariat conduct second level measurement with support of local consultants to further incorporate: (i) primary data from each ECOWAS country (ii) input from specialized government bodies (ex.: Competition national structures, Investment promotion Agencies); (iii) Input from the private sector (Chambers of Commerce, etc) (January 2007).
- **Step 5.** Second round Stake holders meeting to review and discuss IMT results for each country (February 2007).
- **Step 6.** Finalisation and publication of IMT (March 2007).

4.4 Regional institutional framework for investment

4.4.1 Private Sector Department at the ECOWAS Commission

The department responsible for investment issues at the ECOWAS Commission is to be strengthened in order to ensure better monitoring of the regional investment policy and to undertake peer reviews, discuss key issues of regional integration and develop recommendations to improve policies for investment. Roundtables and task forces composed of senior government officials and private sector representatives under the auspices of the department can be created to deal with specific issues such as Investment Policy, Investment Promotion, Enterprise Development, Corporate Governance, Social Responsibility and Business Integrity, Tax Policy, etc.

The Private sector department of the ECOWAS Commission could be supported by a number of advisory groups such as the organised Private Sector, Civil Society, Parliamentarians, Local and Regional policy groups.

4.4.2 ECOWAS Regional Investment Promotion Agency (RIPA)

A Regional Investment Promotion Agency is to be established, to increase awareness of member States' investment incentives, opportunities, legislation, practices, major events affecting investments and other relevant information through regular dissemination and other awareness-promoting activities.

The structure, function and operational mode of the agency will be later defined. The functions could include the responsibilities to:

- implement the regional policy relating to investments as is contained in this Agreement;
- collect, collate analyse and disseminate information about investment opportunities in the region as received from the national investment promotion agencies investment promotion agencies of the information on investment requesting or transmitting information from or to another member state;
- provide a contact for assistance in investment promotion and facilitation;
- provide special expertise in the promotion of development and sustainable investments;
- promote the transfer of technology through appropriate investments;
- maintain statistics about inward and outward investment of Member States;
- handle enquires in relation to the conduct of investments of investors of Member States;
- report on any matters dealt with under the various provisions of this Agreement;
- perform other matters as the members of the Conference of Member States may determine;
- provide consulting services and disseminate report of studies to member states;
- harmonize government-enterprise relations and provide guidance to national investment promotion agencies; and
- liaise with existing investment insurance guaranty agencies.

4.5 Outline of a regional investment agreement

Justification of code:

- Legal justification (ECOWAS Treaties, supplementary Acts, Decisions etc)
- Economic justification (Need for integration into globalization process);
- The development of a common market calls for the elimination of distortions in competition created by national investment codes.)

Objective:

- Reassure investors and encourage them to invest in the ECOWAS region.

General conditions:

- Provisions already stipulated in international investment treaties
- Freedom to effect transfers including free movement of capital within the region
- Freedom to invest
- Right of access to foreign exchange
- Recognition of private property
- Recognition of intellectual property
- Guarantee ownership of private property and compensation in cases of expropriation for public use.

Benefit to be granted

- Establishment phase (time limit)
- Operational phase
- Conditions for granting licenses
- Licensing application documents

Settlement of disputes

- General provisions
- Freedom of contracting parties to have recourse to jurisdictions of their choice

Transitional provisions

- Reference to ECOWAS treaties
- Supplementary Acts
- Decisions.

Annex 1: (Table 1) - Regulatory Treatment of FDI in West African Countries: Restriction on Investment

ECOWAS Countries Restrictions Practices	Benin	Burkina Faso	Cape Verde	Cote D'Ivoire	Gambia	Ghana	Guinea	Guinea Bissau	Liberia	Mali	Mauritania	Niger	Nigeria	Senegal	Sierra Leone	Togo
1. General restrictions on entry																
a) Entry of FDI	YES	YES	YES	YES	NO	YES	YES	YES	N/A	YES	N/A	N/A	NO	NO	N/A	YES
b) Foreign purchase of shares	N/A	N/A	NO	YES	NO	YES	NO	N/A	N/A	YES	N/A	N/A	NO	NO	N/A	YES
c) IMF Article VIII status	YES	YES	NO	YES	N/A	NO	N/A	YES	N/A	YES	YES	N/A	YES	NO	N/A	YES
d) Liquidation proceeds transfer abroad	N/A	N/A	N/A	YES	YES	NO	NO	N/A	N/A	NO	N/A	N/A	NO	NO	N/A	YES
2. Specific restrictions on entry																
a) Sectoral limitations to FDI	NO	YES	YES	YES	YES	YES	YES	YES	N/A	NO	N/A	N/A	YES	NO	N/A	YES
- financial services	N/A	N/A	N/A	N/A	YES	YES	N/A	N/A	N/A	YES	YES	N/A	N/A	N/A	N/A	N/A
- other services	N/A	N/A	N/A	N/A	YES	YES	YES	N/A	N/A	YES	YES	N/A	N/A	YES	N/A	N/A
- primary sectors	NO	N/A	N/A	N/A	YES	YES	YES	YES	N/A	YES	N/A	N/A	YES	YES	N/A	N/A
- manufacturing	NO	N/A	YES	N/A	YES	N/A	YES	NO	N/A	N/A	N/A	N/A	YES	YES	N/A	N/A
b) Acquisition of real estate for FDI purposes	N/A	N/A	N/A	N/A	N/A	YES	N/A	N/A	N/A	N/A	N/A	N/A	YES	N/A	N/A	N/A
3. Post-entry restrictions																
a) Exceptions to national treatment of established foreign controlled enterprises	N/A	YES	YES	YES	YES	YES	YES	NO	N/A	N/A	N/A	N/A	N/A	YES	N/A	N/A
- access to local finance	N/A	N/A	N/A	N/A	YES	N/A	YES	NO	N/A	N/A	YES	N/A	N/A	N/A	N/A	N/A
- access to privatization	N/A	N/A	N/A	YES	N/A	YES	NO	N/A	N/A	N/A	N/A	N/A	N/A	YES	N/A	N/A
- access to subsidies	N/A	N/A	N/A	YES	N/A	N/A	YES	NO	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
- access to public procurement	N/A	N/A	N/A	N/A	N/A	N/A	YES	N/A	N/A	YES	N/A	N/A	YES	YES	N/A	N/A
- taxation	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	NO	N/A	N/A	YES	YES	N/A	YES
- discriminatory licensing in public utilities	N/A	N/A	N/A	YES	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	YES	YES	N/A	YES
b) Other discriminatory practices	N/A	N/A	N/A	YES	N/A	YES	N/A	N/A	N/A	N/A	YES	N/A	YES	YES	N/A	YES
- nationality-based restrictions on boards	N/A	N/A	N/A	YES	YES	YES	N/A	N/A	N/A	NO	YES	N/A	N/A	YES	N/A	YES
- discriminatory private practices	N/A	N/A	N/A	N/A	N/A	YES	N/A	N/A	N/A	YES	YES	N/A	N/A	N/A	N/A	N/A
- entry of key personnel	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	YES	YES	N/A	N/A	N/A	N/A	N/A
c) Performance requirements	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

Annex 2: (Table 2) - Regulatory Practices Towards FDI: Other than Restrictions

ECOWAS Countries Non-Restrictions Regulatory Practices	Benin	Burkina Faso	Cape Verde	Cote D'Ivoire	Gambia	Ghana	Guinea	Guinea Bissau	Liberia	Mali	Mauritania	Niger	Nigeria	Senegal	Sierra Leone	Togo
1. Practices encouraging FDI																
a) FDI-targeted tax and other incentives	N/A	YES	YES	YES	N/A	YES	N/A	YES	N/A	YES	N/A	N/A	N/A	N/A	N/A	YES
b) Number of bilateral investment treaties (of which with OECD members)	N/A	12	YES	N/A	N/A	07	N/A	01	N/A	N/A	N/A	N/A	08	14	N/A	07
d) Number of bilateral tax treaties (of which with OECD members)	N/A		YES	N/A	N/A	03	N/A	N/A	N/A	N/A	N/A	N/A	09	04	N/A	07
2. Enhancing Policy Transparency																
a) National authorities	N/A		N/A	YES	N/A	YES	YES	N/A	N/A	N/A	N/A	N/A	YES	YES	N/A	YES
- publication of regulations	N/A		YES	YES	N/A	NO	YES	N/A	N/A	N/A	YES	N/A	YES	YES	N/A	N/A
- notification prior to regulatory changes	N/A		N/A	YES	N/A	NO	YES	N/A	N/A	N/A	N/A	N/A	NO	YES	N/A	N/A
- negative lists of restricted sectors	N/A		N/A	YES	N/A	YES	YES	N/A	N/A	N/A	N/A	N/A	YES	YES	N/A	N/A
- "silent and consent" authorization	N/A		YES	N/A	N/A	YES	YES	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
3. Other measures																
a) Measures at sub-national level	N/A				N/A	N/A	YES	N/A	N/A	N/A	YES		YES	N/A		

CHAPTER II

SUPPLEMENTARY ACT A/SA.3/12/08 ADOPTING COMMUNITY RULES ON INVESTMENT AND THE MODALITIES FOR THEIR IMPLEMENTATION WITH ECOWAS

THE HIGH CONTRACTING PARTIES

MINDFUL of Articles 7, 8 and 9 of the ECOWAS Treaty as amended establishing the Authority of Heads of State and Government and defining its composition and functions;

MINDFUL of Article 3 of the ECOWAS Treaty stipulating the areas in which the Community should focus its activities in order to achieve its aims and objectives;

RECOGNIZING that the development of a more vibrant and dynamic private sector helps to create job opportunities, promote technology transfer, support long term economic growth and contributes effectively to the fight against poverty;

ANXIOUS to promote and consolidate within ECOWAS, an environment conducive to the development of the activities of the private sector and to make the latter a genuine engine of economic growth;

NOTING that national investment codes in force in Member States offer investors different incentives and protection measures;

CONVINCED of the need to establish within the ECOWAS region, reliable, transparent, stable and predictable conditions for investments;

DESIROUS of adopting common regional rules on investments and defining the modalities for their implementation, in order to achieve the afore-mentioned objectives;

HAVING CONSIDERED the opinion of the ECOWAS Parliament;
ON THE RECOMMENDATION of the sixty first ordinary session of the Council of Ministers, held in Ouagadougou from 27 29 November 2008.

AGREE AS FOLLOWS:

**CHAPTER I:
GENERAL PROVISIONS**

ARTICLE 1: DEFINITIONS

- (a) **“company”** means any corporate entity constituted or organized under the applicable law of any ECOWAS Member State, whether or not for profit, and whether privately or governmentally owned or controlled;
- (b) **“national”** means a person who is a citizen of any Member State of ECOWAS;
- (c) **“investment”** means
- i) a company;
 - ii) shares, stock and other forms of equity participation in a company, and bonds, debentures and other forms of debt interests in a company;
 - iii) contractual rights, such as under turnkey, construction or management contracts, production or revenue-sharing contracts, concessions or other similar contracts;
 - iv) tangible property, including real property; and intangible property, including rights, such as leases, mortgages; liens and pledges on real property;
 - v) rights conferred pursuant to law, such as licences and permits provided that:
 - such investments are not in the nature of portfolio investments which shall not be covered by this Supplementary Act;
 - there is a significant physical presence of the investment in the host State;
 - the investment in the host State is made in accordance with the laws of that host State;

- the investment is part or all of a business or commercial operation; and
 - the investment is made by an investor as defined herein.
- (d) **“investor”** is any individual or company of any Member State of ECOWAS or a company that has invested or is making an investment in the territory of a Member State;
- (e) **“measures”** includes any legal, administrative, legislative, judicial or policy decision that is taken by the host State, directly relating to and affecting an investment in the territory of the host State, but does not include measures in draft form;
- (f) **Member State**, means a State of ECOWAS
- (g) **“home State”** means a Member State of ECOWAS from where the investment or the investor comes;
- (h) **“host State”** is the ECOWAS Member state where the investment is located;
- (i) **“ECOWAS”** means the Economic Community of West African States whose creation was reiterated by Article 2 of the Revised Treaty.
- (j) **“Third Country”** is any other State which is not a member of ECOWAS
- (k) **“ILO”** means the International Labor Organisation

**ARTICLE2:
ADOPTION OF THE REGIONAL INSTRUMENT**

The Community Rules on investment as defined in this Supplementary Act are hereby adopted.

ARTICLE3: OBJECTIVE

The objective of the Community Rules on investment is to promote investment that supports sustainable development of the region.

ARTICLE 4: SCOPE OF COVERAGE

- (1) This Supplementary Act applies to all investments by an investor,

whether the investment is made before or after the entry into force of this Supplementary Act.

- (2) This Supplementary Act applies to any measure adopted or maintained by a Member State, after the entry into force of this Supplementary Act by a governmental authority of the host State.
- (3) This Supplementary Act does not create retroactive obligations or responsibilities for investors. However investors who are not in compliance with on going obligations and responsibilities shall seek to comply with them within twenty four (24) months of the entry into force of this Supplementary Act.

CHAPTER II: STANDARDS OF TREATMENT TO MEMBER STATES' INVESTORS

ARTICLE 5: NATIONAL TREATMENT

- (1) Each Member State shall accord to investors of another Member State treatment no less favourable than that, which it accords, in like circumstances to any other investor operating in its territory, with respect to the management, conduct, operation, expansion and sale or other disposition of investments.
- (2) Each Member State shall accord to investments of investors from another Member State treatment no less favourable than that which it accords, in like circumstances, to investments of its own investors with respect to the, managements, conduct, operation, expansion and sale or other disposition of investments.
- (3) The treatment accorded by a Member State under Paragraphs (1) and (2) means, with respect to a local authority, treatment no less favourable than that which it accords, in like circumstances, to investors within the Community.
- (4) The concept of “in like circumstances” requires an overall examination, on a case by-case basis, of all the circumstances of an investment, including notably:
 - a) its effects on third persons and the local community;

- b) its effects on the local, regional or national environment, the health of the populations, or on the global commons;
- c) the sector in which the investor is active;
- d) the aim of the measure in question;
- e) the regulatory process generally applied in relation to a measure in question; and
- f) other factors directly relating to the investment or investor in relation to the measure in question.

ARTICLE 6: MOST-FAVORED-NATION TREATMENT

- (1) This Article applies to:
 - a) all measures of a Member State covered by this Supplementary Act, and
 - b) all the substantive provisions of other international agreements on investment that enters into force after this Supplementary Act has entered into force.
- (2) Each Member State shall accord to investors of another Member State treatment no less favourable than that it accords in like circumstances, to investors of any other state within the Community with respect to the management, conduct, operation, expansion, sale or other disposition of investments.
- (3) Each Member State shall accord to investments made by investors of another Member State treatment no less favourable than that it accords in like circumstances, to investments made by investors of any other Member State of the Community or of a third party with respect to the management, conduct, operation, expansion, sale or other disposition of investments.
- (4) Each Member State shall accord to investors of another Member State and to investments made by investors from other Member States, the better of the treatment required by this Article, and the national treatment obligation.
- (5) Paragraphs (2) to (4) above do not oblige a State within the Community to extend to the investors of another Member State the benefit of any treatment, preference or privilege contained in:
 - i) any existing or future customs union, free trade area, common market agreement or any international arrangement relating to

- the current or future environment to which the investor's home State is not a Party, or
- ii) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

ARTICLE 7: MINIMUM REGIONAL STANDARDS

- (1) Each Member State shall accord to investors from a Member State or their investments, treatment in accordance with customary international law, including fair and equitable treatment and reasonable protection and security under the domestic law. This obligation shall be understood to be consistent with the obligation of ECOWAS Member States.
- (2) Paragraph (1) prescribes the customary usage of international law minimum standard of treatment of aliens as the minimum standard of treatment to be accorded to investments. The concepts of “fair and equitable treatment” and “full protection and security” are included within this standard, and do not create additional substantive rights.
- (3) Each Member State shall accord to investors and their investments non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.
- (4) Notwithstanding Paragraph (3), if an investor of a State, in the situations referred to in that Paragraph, suffers a loss in the territory of another Member State resulting from:
- i) requisitioning of its investment or part thereof by the latter's forces or authorities; or
 - ii) destruction of its investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation, the host State within the Community shall provide the investor restitution or compensation, which in either case shall be prompt, adequate and effective; and with respect to compensation, shall be in readily convertible form.

ARTICLE 8: EXPROPRIATION

- (1) No Member State may directly or indirectly nationalize or expropriate an investment in its territory (“expropriation”), except:
 - a) for a public purpose;
 - b) on a non discriminatory basis;
 - c) in accordance with due process of law; and
 - d) on payment of compensation in accordance with Paragraphs (2) to (6).
- (2) Appropriate compensation shall normally be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“date of expropriation”), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value;
- (3) Compensation shall be paid without delay and be fully realizable;
- (4) Payment should be made in a convertible currency and compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.
- (5) On payment, compensation shall be freely transferable. Awards that are significantly burdensome on a host State may be paid yearly over a period of three (3) years or such other period as may be agreed by the Member States, subject to interest at the rate established by mutual consent.
- (6) This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with applicable international agreements on intellectual property.

- (7) A non-discriminatory measure of general application shall not be considered an expropriation of a debt security or loan covered by this Supplementary Act solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.

**ARTICLE 9:
SENIOR MANAGEMENT AND BOARDS OF DIRECTORS**

- (1) No Member State may require that an investor appoint to senior management positions individuals of any particular nationality.
- (2) No Member State may require that some members of the board of directors or any committee thereof, of an investment, be of a particular nationality, or resident in the territory of that State, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.
- (3) Subject to generally applicable rules of entry, no Member State may unduly restrict or prevent the cross-border movement of staff engaged in respect of investments from another Member State.

ARTICLE 10: TRANSFERS OF ASSETS

- (1) Each Member State shall permit all transfers relating to an investment to be made freely and without delay. Such transfers include:
- a) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns, physical assets and other amounts derived from the investment;
 - b) proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;
 - c) payments made under a contract entered into by the investor or its investment, including payments made pursuant to a loan agreement;
 - d) payments made pursuant to Article 8 of this Supplementary Act; and
 - e) payments arising under any dispute settlement process.

- (2) Each Member State shall permit transfers to be made in a freely convertible currency at the market rate of exchange prevailing on the date of transfer with respect to spot transactions in the currency to be transferred.
- (3) Notwithstanding Paragraphs (1) and (2), a host State within the Community may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:
 - a) bankruptcy, insolvency or the protection of the rights of creditors;
 - b) issuing, trading or dealing in securities;
 - c) criminal or penal offences;
 - d) transfers of currency or other monetary instruments; or
 - e) ensuring the satisfaction of judgments in adjudicatory proceedings
- (4) Notwithstanding Paragraph (2), a host State may restrict transfers or returns in circumstances where it could otherwise restrict such transfers under this Supplementary Act.

CHAPTER III OBLIGATIONS AND DUTIES OF INVESTORS AND INVESTMENTS

ARTICLE 11: GENERAL OBLIGATIONS

- (1) Investors and Investments are subject to the laws and regulations of the host State
- (2) Investors and investments must comply with the host State measures prescribing the formalities of establishing an investment, and accept host State jurisdiction with respect to the investment.
- (3) Investors shall strive through their management policies and practices, to contribute to the development objectives of the host States and the local levels of government where the investment is located.
- (4) An investor shall provide such information to a potential host State Party to this Supplementary Act, as that Party may require,

concerning the investment in question for purposes of decision-making in relation to that investment or solely for statistical purposes. The host State shall protect any confidential business information from any disclosure that would prejudice the competitive position of the investor or the investment. Nothing in this Paragraph, shall be construed to prevent any Member State of the Community from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its domestic law.

ARTICLE 12: PRE-ESTABLISHMENT IMPACT ASSESSMENT

- (1) Investors and Investments shall conduct an environmental and social impact assessment of the potential investment. Investors or the investments shall comply with environmental assessment screening criteria and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the host Member State for such an investment or the laws of the home State for such an investment. The investor shall comply with the minimum standards on environmental and socio-cultural impact assessment and screening that the Member States shall adopt at the first meeting of the Parties, to the extent that these are applicable to the investment in question.
- (2) Investors or the investments shall make the environmental and social impact assessments accessible in the local community and to affected interests in the host State where the investment is intended to be made prior to the completion of the host State measures prescribing the formalities for establishing such investment.
- (3) Investors, their investments and host State authorities shall apply the precautionary principle to their environmental and social impact assessment. The application of the precautionary principle by investors and investments shall be described in the environmental and social impact assessment they undertake.

ARTICLE 13: ANTI-CORRUPTION

- (1) Investors and their investments shall prior to the establishment of an investment or afterwards, refrain from involving themselves in corrupt practices as defined in Article 30 of this supplementary Act.
- (2) Investors and their investments shall not be complicit in any act described in Paragraph (1) of this article, including incitement, aiding and abetting, and conspiracy to commit or authorization of such acts.
- (3) The acts referred to Paragraph 1 and 2 shall be punishable in conformity with the provisions of Article 30 of this Supplementary Act.

ARTICLE 14: POST-ESTABLISHMENT OBLIGATIONS

- (1) Investors or investments shall, in keeping with best practice requirements relating to their activities the size of their investments, strive to comply with on hygiene, security, health and social welfare rules in force in the host country.
- (2) Investors shall uphold human rights in the workplace and the community in which they are located. Investors shall not undertake or cause to be undertaken, acts that breach such human rights. Investors shall not manage or operate the investments in a manner that circumvents human rights obligations, labour standards as well as regional environmental and social obligations, to which the host State and/or home State are Parties
- (3) Investors shall not by complicity with, or in assistance with others, including public authorities, violate human rights in times of peace or during socio-political upheavals.
- (4) Investors and investments shall act in accordance with fundamental labour standards as stipulated in the ILO Declaration on Fundamental Principles and Rights of Work, 1998.

ARTICLE 15: CORPORATE GOVERNANCE AND PRACTICES

In accordance with the size and nature of an investment,

- (1) Investments shall comply with and maintain national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices.
- (2) Investors and relevant public authorities of the host State(s) shall make available to the public, any investment contract or agreement with the host State government(s), subject to the law governing the release of confidential business information.
- (3) Investors shall, where appropriate, establish and maintain with the local community, liaison processes in accordance with regionally accepted standards.
- (4) Where relevant regionally accepted standards of the type described in this Article are not available or have been developed without the participation of member countries, the Community shall establish such standards.

ARTICLE 16: CORPORATE SOCIAL RESPONSIBILITY

- (1) In addition to the obligation to comply with:
 - all applicable laws and regulations of the host Member State;
 - and the obligations in this Supplementary Act and in accordance with;
 - # the size, capacities and nature of an investment, and taking into account;
 - # the development plans and priorities of the host State;
 - # the Millennium Development Goals and ;
 - # the indicative list of corporate social responsibilities agreed by the Member States.
- (2) Where standards of corporate social responsibility increase, investors should endeavour to apply and achieve the higher level standards.

ARTICLE 17: INVESTOR LIABILITY

Investors shall be subject to civil actions for liability in the judicial process of their host State for acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host State.

ARTICLE 18: RELATION OF INVESTOR'S LIABILITY TO DISPUTE SETTLEMENT

- (1) Where it is established by a court of competent jurisdiction of the host State that an investor has breached Article 13 of this Supplementary Act, the investor shall not be entitled to initiate any dispute settlement process established under this Supplementary Act. A host or home State may raise this as an objection to jurisdiction in any dispute under this Supplementary Act.
- (2) Where an investor is alleged by a host Member State or an intervener in a dispute settlement proceeding under this Supplementary Act to have failed to comply with its obligation relating to pre-establishment impact assessment, the tribunal hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages awarded in the event of such award.
- (3) Where a host Member State or home Member State believes that an investor or its investment has breached Article 13 or has persistently failed to comply with its obligations under Article 14 or 15, and such investor or investment has been notified by the host Member State or home Member State, as appropriate, either the host Member State or the home Member State may initiate proceedings before a tribunal established by this Supplementary Act.
- (4) Where a persistent failure to comply with Article 14 or 15 is raised by a host Member State defendant or an intervener in a dispute settlement proceeding under this Supplementary Act, the tribunal hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what

mitigating or off-setting effects this may have on the merits of a claim or on any damages award in the event of such award.

- (5) A host Member State may initiate a counterclaim before any tribunal established pursuant to this Supplementary Act for damages resulting from an alleged breach of the Supplementary Act.
- (6) In accordance with the applicable domestic law, a host State or private person or organization, may initiate actions for damages under the domestic law of the host Member State, or the domestic law of the home Member State where such an action relates to the specific conduct of the investor, for damages arising from an alleged breach of the obligations set out in this Supplementary Act. The proceedings in the domestic law Court shall conform to the procedures applicable in the Community Court of Justice.

CHAPTER IV: HOST STATE OBLIGATIONS

ARTICLE 19: PROCEDURAL FAIRNESS

In accordance with the requirements of Article 7.

- (1) Host Member States shall ensure that their administrative, legislative and judicial processes do not operate in a manner that is arbitrary or that does not deny administrative and procedural fairness to investors and their investments. Investors or investments shall be notified in a timely fashion of administrative or judicial proceedings and changes thereof directly relating to them, unless such notice is contrary to domestic law on an exceptional basis.
- (2) Hosts Member States shall act in a manner that does not create a denial of justice in judicial and administrative proceedings.
- (3) Administrative decision-making processes shall include the right of administrative appeal of decisions, commensurate with the level of development of the host Member State. Judicial review of administrative decisions should also be available through domestic or regional judicial review processes.

- (4) Notwithstanding the differences in administrative, legislative and judicial systems, Member States shall strive to improve the transparency, efficiency, independence and accountability of their legislative, regulatory, administrative and judicial processes, and shall provide review or appeal procedures to ensure that they operate in accordance with applicable domestic laws.
- (5) Judicial and administrative review processes shall be open to the public and documents shall be accessible by the public unless prohibited in accordance with domestic and regional laws. Decisions of such bodies shall however be available to the public.

**ARTICLE 20:
MAINTENANCE OF ENVIRONMENTAL AND OTHER
STANDARDS**

Member States recognize that it is inappropriate to encourage investment by relaxing domestic labour, public health, safety or environmental measures and thus shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in their territories, of an investment.

**ARTICLE 21:
MINIMUM STANDARDS FOR ENVIRONMENTAL, LABOUR
AND HUMAN RIGHTS PROTECTION**

- (1) Each Member State shall ensure that its laws and regulations provide for appropriate levels of environmental protection and shall strive to continue to improve those laws and regulations.
- (2) Each Member State shall ensure that its laws and regulations provide for high levels of labour and human rights protection appropriate to existing regional and international treaties that it enters into, and shall strive to continue to improve these laws and regulations.
- (3) All Member States shall have a domestic social, health and environmental impact assessment laws that meet the minimum standards adopted by the Community on these matters.

- (4) All Member States shall ensure that their domestic laws and policies are consistent with the ILO Declaration on Fundamental Principles and Rights of Work, 1998.
- (5) All Member States shall ensure that their laws, policies and actions are consistent with the international human rights agreements to which they are a Party and at a minimum, with the list of human rights obligations and agreements already adopted.

ARTICLE 22: PUBLICATION OF INFORMATION

Host Member States shall make available to the public any investment contracts or agreements with an investor involved in the investment authorization process, subject to the release of confidential business information.

ARTICLE 23: INCENTIVES

Potential host Member States should avoid competition for the attraction of investment or investments through incentives or other means that distort regional competition for investments. To this effect, Member States shall initiate negotiations to harmonise the adequate incentive schemes aimed at implementing sensitization and mobilization activities.

CHAPTER V: HOST STATE RIGHTS

ARTICLE 24: PERFORMANCE REQUIREMENTS

- (1) Member States recognize their obligations regarding trade-related investment measures established in other international agreements to which they are a Party.
- (2) Subject to Paragraph (1), host States may impose performance requirements to promote domestic development benefits from investments. Measures adopted prior to the completion of the host State measures prescribing the formalities for establishing an investment shall be deemed to be in compliance with this Supplementary Act. If such measures are taken after the completion of the host State measures prescribing the formalities for

establishing an investment, they shall be subject to the provisions of this Supplementary Act.

- (3) Measures covered by this Article may include requirements:
- a) to export a given level or percentage of goods or services;
 - b) to achieve a given level or percentage of domestic content;
 - c) to purchase, use or accord a preference to goods produced or services provided in its territory;
 - d) to purchase goods or services from persons in its territory;
 - e) to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange flows associated with such investment;
 - f) to restrict sales of goods or services in its territory that such investment produces by relating such sales to the volume or value of its exports or foreign exchange earnings; and
 - g) similar measures intended to promote domestic development.

**ARTICLE 25:
IMPLEMENTATION OF COMMUNITY RULES ON
INVESTMENT PROMOTION AND FACILITATION OF
INVESTMENT**

- (1) The Community shall create regional structures for the implementation of the Community Investment Rules Member States in the area of the promotion and the facilitation of investments.
- (2) Member States shall establish or maintain appropriate National structures for the same purpose.
- (3) The Member States shall take appropriate steps to facilitate Diaspora investment into the region.
- (4) Member States shall adopt relevant regional initiatives to promote investments in the region including investment guarantee mechanisms, integration of capital and other measures.

ARTICLE 26: ACCESS TO INVESTOR INFORMATION

- (1) Host States have the right to seek information from a potential investor or its home State about its corporate governance history and its practices as an investor, including in its home State.
- (2) Host States shall protect confidential business information they receive in this regard.
- (3) Host States may make the information provided available to the public in the community where the investment may be located, subject to the protection of confidential business information and to other applicable domestic laws.

CHAPTER VI: HOME STATE RIGHTS AND OBLIGATIONS

ARTICLE 27: ASSISTANCE AND FACILITATION FOR CROSS-BORDER INVESTMENT

- (1) Home States may facilitate cross border investment to other States in the Community in line with ECOWAS Treaty. However such assistance shall be consistent with the development goals and priorities of the receiving States of such investment and must not violate the commitments of Members States to the Community. Such assistance may include:
 - a) capacity building with respect to host State agencies and programmes on investment promotion and facilitation;
 - b) insurance programmes based on commercial principles;
 - c) technology transfer; and
 - d) periodic trade missions, support for joint business councils and other cooperative activities to promote sustainable investments.
- (2) Home States shall inform host States of the form and extent of available assistance as appropriate for the type and size of different investments.

ARTICLE 28 : INFORMATION

- (1) Home States shall, on request and in a timely manner, provide to a potential host State such information as is requested and available for the purposes of the host State to meet its obligations and perform its duties in relation to an investor or investment under this Supplementary Act and the host State's domestic law. Home States shall protect confidential business information in this regard.
- (2) Home States shall, on request, and in a timely manner, provide information relevant to the home State standards that might apply under like circumstances to the investment proposed by its investor, including but not limited to the home State's environmental and social public health impact assessment process.

ARTICLE 29: INVESTOR LIABILITY IN HOME STATE

Home States shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of investors for damages resulting from alleged acts or decisions made by investors in relation to their investments in the territory of other Member States. The host State laws on liability shall apply to such proceedings.

ARTICLE 30: OFFENCES AND SANCTIONS

- (1) Member States shall consider as criminal the following offences and investigate, prosecute and punish the said offences with appropriate sanctions
 - (a) the offering, solicitation or acceptance of an offer, promise or gift of any pecuniary or other nature, whether directly or through intermediaries, to any public official of the host State, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties to achieve any favour in relation to a proposed investment or any licenses, permits, contracts or other rights in relation to an investment; and

- (b) any acts constituting any of the acts described in Paragraph (A) including incitement, aiding and abetting, conspiracy to commit or authorization of such acts;

shall be made criminal offences in the host Member State and subject to appropriate criminal enforcement and sanctions.

- (2) All home States shall ensure that any money or other forms of benefits encompassed in Paragraph (1) shall not be recoverable or deductible in any fiscal or tax policies.
- (3) Home States shall, when possible, provide all available information that might assist a dispute settlement tribunal under this Supplementary Act in determining whether there has been a breach of an anti-corruption obligation.

CHAPTER VII : RELATION TO OTHER AGREEMENTS

ARTICLE 31: RELATION TO OTHER INVESTMENT AGREEMENTS AND OBLIGATIONS

- (1) All investment agreements entered into by Member States prior to entry into force of this Supplementary Act, shall to the extent that the provisions of such Agreements are inconsistent with the provisions of this Supplementary Act, renegotiate those agreements within a transition period of twenty four (24) months to make them consistent with the present Community Investment Supplementary Act.
- (2) Member States shall ensure that all future investment agreements to which they may become Party are fully consistent with this Supplementary Act on Investment; particularly with the balance of rights and obligations it establishes, and the principal features of the dispute settlement system. Member States may be called upon to assess compliance with these obligations.

**ARTICLE 32:
RELATION TO OTHER INTERNATIONAL AGREEMENTS**

- (1) Member States shall ensure that the provisions of other international trade agreements to which they are a party are consistent with the provisions of this Supplementary Act. Member States shall collaborate to ensure the effective application of the provisions of this Act within the international trade agreements.
- (2) In the event of any dispute arising on this issue, the Member States shall seek to resolve such dispute within the framework of this Supplementary Act as a first step.

**CHAPTER VIII:
DISPUTE SETTLEMENT**

ARTICLE 33: DISPUTE SETTLEMENT PROCEDURES

- (1) In the event of a dispute between Member States, or between a Member State and an investor, or between an investor and a host State, the party wishing to raise the dispute shall issue a notice of intention to initiate arbitration to the other potential disputing Party or Parties using a dispute settlement procedure prescribed below.
- (2) There shall be a minimum period of six months between the date of a notice of intention to initiate a dispute settlement process under this Supplementary Act, and the date a Party or investor as the case may be, may formally initiate a dispute. During this period, Member States make efforts to reach an amicable settlement of possible disputes. The use of good offices, conciliation, mediation or any other agreed dispute resolution process may also be applied.
- (3) Where mediation is adopted as the dispute resolution process, the disputants shall use an approved mediator for this purpose.
- (4) If no mediator is chosen by the disputing parties prior to three months before the expiration of the amicable settlement period, a mediator who is not a national of one of the State parties to the dispute shall be appointed. The conditions for the appointment of the said mediator shall be set out in the relevant regulation.

- (5) Member States may also establish national mediation centres to facilitate the resolution of disputes between Parties and investors or investments, taking into account regional rules, customs and traditions on investment. Mediators officially appointed to such centres shall be incorporated into the Agency's list through the national mediation centres.
- (6) Any dispute between a host Member State and an Investor, as envisaged under this Article that is not amicably settled through mutual discussions may be submitted to arbitration as follows:
 - (a) a national court;
 - (b) any national machinery for the settlement of investment disputes;
 - (c) the relevant national court of the Member States.
- (7) Where in respect of any dispute envisaged under this Article, there is disagreement as to the method of dispute settlement to be adopted; the dispute shall be referred to the ECOWAS Court of Justice.

**ARTICLE 34:
TRANSPARENCY OF THE DISPUTE SETTLEMENT
PROCEDURES**

- (1) All documents relating to a notice of intention to arbitrate, the settlement of any dispute, the initiation of a panel or appeal, or the pleadings, evidence and decisions in them shall be available only to the parties to the disputes.
- (2) Procedural and substantive oral hearings shall be open to the public also.

**ARTICLE 35:
ENFORCEABILITY OF FINAL AWARDS/DECISIONS**

- (1) The Final Awards/Decisions on Investment disputes made by mediations, arbitrations and judicial bodies shall be enforceable
- (2) Member States parties to the Supplementary Act shall abide by the decisions of mediation, arbitration and judicial bodies on investment disputes. Notwithstanding this provision, disputant parties may seek redress from competent jurisdictions.

ARTICLE 36: GOVERNING LAW IN DISPUTES

When a claim is submitted to a panel or an appeal tribunal, it shall be decided in accordance with this Supplementary Act, and subsidiarily, any other national, Community, and international law/rules agreed upon by the parties.

CHAPTER IX : GENERAL EXCEPTIONS

ARTICLE 37: NATIONAL SECURITY

Nothing in this Supplementary Act shall be construed:

- a. to require a Member State to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interest; or
- b. to preclude a Member State from applying measures that it considers necessary for the fulfillment of its obligations under the United Nations Charter with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

ARTICLE 38: GENERAL RESERVATIONS AND EXCEPTIONS

- (1) The provisions of this Supplementary Act, except Article 8, do not apply to any law or other measure of a host State the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by long-term historic discrimination in its territory, provided that such law or other measure is compatible with the requirements of Article 19.
- (2) State Parties may take such measures as are necessary to avoid or abate a balance of payments emergency. Such measures shall be kept in force for as short a time as possible to address the emergency situation. Such measures shall not be subject to this Supplementary Act.

CHAPTER X : FINAL PROVISIONS

ARTICLE 39: REGIONAL CO-OPERATION

Member States may conclude co-operation agreements on matters covered by this Supplementary Act, as well as on the development of regional capacities in this field.

ARTICLE 40: AMENDMENT AND REVISION

- (1) Any Member State, the Council of Ministers, the ECOWAS Parliament and the ECOWAS Commission may submit proposals for the amendment or revision of this Supplementary Act.
- (2) Proposals not emanating from the ECOWAS Commission shall be submitted to it. The Commission shall forward all proposals for amendment and revision to the Member States not later than thirty (30) days after their receipt. Upon expiration of the thirty (30) days notice given to Member States, the Authority of Heads of State and Government shall examine the proposals for amendment or revision of the Supplementary Act.
- (3) The amendments or revisions shall be adopted by the Authority of Heads of State and Government in accordance with the provisions of Article 9 of the ECOWAS Treaty. The adopted amendments and revisions shall enter into force upon their publication in the Official Journal of the Community.

ARTICLE 41: PUBLICATION

This Supplementary Act shall be published by the ECOWAS Commission in the Official Journal of the Community within Thirty (30) days of its signature by the Chairperson of the Council of Ministers. It shall also be published by each Member State in its National Gazette within thirty (30) days after notification by the Commission.

ARTICLE 42: ENTRY INTO FORCE

1. This Supplementary Act shall enter into force upon its publication. Consequently, signatory Member States and the Institutions of ECOWAS undertake to commence the implementation of its provisions on its entry into force,
2. This Supplementary Act is annexed to the ECOWAS Treaty of which it is an integral part.

ARTICLE 43: DEPOSITORY AUTHORITY

This Supplementary Act shall be deposited with the Commission which shall transmit certified true copies thereof to all Member States and shall register it with the African Union, the United Nations and such other organizations as Council may determine.

IN WITNESS WHEREOF, WE, THE HEADS OF STATE AND GOVERNMENT OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES, HAVE SIGNED THIS SUPPLEMENTARY ACT

DONE AT ABUJA THIS 19 DAY OF DECEMBER 2008

IN SINGLE ORIGINAL IN THE ENGLISH, FRENCH AND PORTUGUESE LANGUAGES, ALL THREE (3) TEXTS BEING EQUALLY AUTHENTIC

Colortip
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