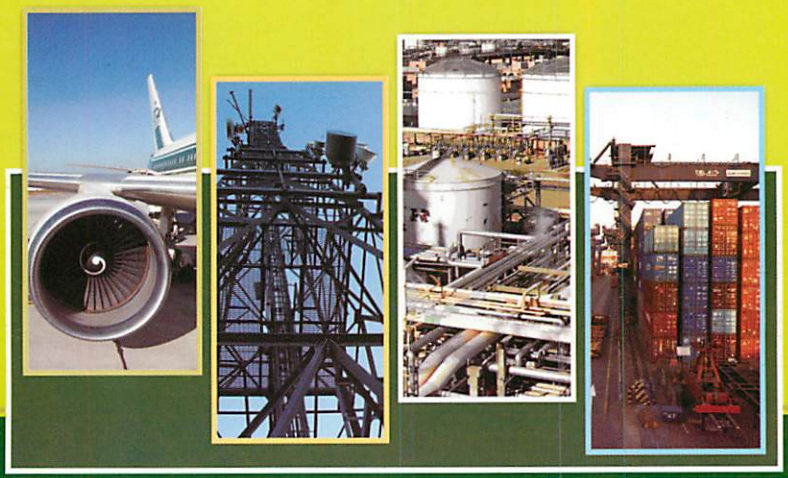
(ECIM)

ECOWAS COMMON INVESTMENT MARKET

OPERATIONAL GUIDELINES
FOR THE HARMONIZATION OF NATIONAL INVESTMENT LAWS



ECONOMIC COMMUNITY OF WEST AFRICAN STATES

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FOR THE HARMONIZATION OF NATIONAL INVESTMENT LAWS

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INFORMATION FOR NATIONAL CONSULTANTS IN THE HARMONIZATION INVESTMENT LAWS

Foreword

His Excellency, Ambassador James Victor GBEHO, President, ECOWAS Commission

The Treaty establishing the Economic Community of West African States (ECOWAS), it's revised version, and the ECOWAS Vision 2020 set out the principles and aspirations on which the provisions of these documents are based. They equally affirm the member states' commitment to promoting economic development in each country through the expansion of trade and investment opportunities by enhancing the competitiveness of community enterprises in global markets, in a manner that protects the environment. Their objectives are to eliminate barriers to trade, promote conditions of fair competition, increase investment opportunities, and establish effective procedures for the implementation and application of these aspirations and for the resolution of disputes as well as to further regional and multilateral cooperation.

Specifically, in the revised Treaty, the two principal provisions relating to investment include: the adoption of a regional agreement on cross-border investment (Article 3.2(f)); and the harmonization of national investment codes leading to the adoption of a single Community Investment Code (Article 3.2(I)). Consequently, ECOWAS Commission has decided to launch the process of adopting an Investment Policy Framework (IPF) and a Community Investment Code (CIC) under its ECOWAS Common Investment Market (ECIM) initiative. Significant progress has been made in creating the conditions for taking the ambition forward and basic IPF and CIC drafts are now available.

At its 37th Ordinary Session on the 16th of February 2010, the Authority of Heads of State and Government of ECOWAS urged Member States to take necessary measures not only to enhance their structural reforms and economic and financial recovery measures but also to pursue efforts towards liberalising their economies and promoting activities in the private sector. In addition, Member States were exhorted to make adequate provisions for the ratification of the various ECOWAS protocols and ensure their effective application. The Heads of State and Government also urged the ECOWAS Commission to intensify its efforts towards the realisation of the common market through notably the acceleration of priority integration projects such as the ECIM.

As the President of the Commission, it is my sincere ambition to see the implementation ECIM becoming a reality soonest in line with the renewed position of the Heads of State and Government of our Community. To me, the ECIM initiative means the deregulation of individual and business entities investment options and operations in a manner to correct for distortions in competition for investment with respect to: (a) the free movement of people and capital, (b) sub-regional access to commercial credit, (c) the purchasing of bonds and securities on the stock markets of ECOWAS member countries, (d) opening of accounts in ECOWAS member countries, and (e) transfers from trade in services, among others.

However, I equally believe that the implementation of ECIM initiative requires the creation, or strengthening, of high level national coordination and effective participation in the process. It is in this way that the outcome of the process will enjoy legitimacy of all our regional stakeholders. This is why the Commission is currently supporting of the use of national consultants to work with the Commission's staff in re-aligning/harmonizing the drafting of our common investment code (CIC) and the regional investment policy framework (IPF) with the existing national investment policies of member states of our community.

For effective implementation of ECIM under a single investment code this OPERATIONAL GUIDELINES FOR THE HARMONIZATION OF NATIONAL INVESTMENT LAWS is expected to assist the national consultants in their harmonization process, provide basic information for all the various stakeholders to understand their rights and obligations in the process of the implementation of the ECIM initiative, and thus make ECOWAS community a true common market where:

- There is a coordinated investment co-operation programme among member States that will lead to increased investment from both within ECOWAS region and from non-ECOWAS sources;
- National treatment is extended to ECOWAS investors at the take off of the initiative and to all investors at later date, subjected to the exceptions provided for under the Supplementary Act;
- All industries are opened for investment to ECOWAS individuals and corporate citizens, and to all investors by at later date, subject to be exceptions provided for under Supplementary Act;
- The business sector has a larger role in the co-operation efforts in relation to investment and related activities in ECOWAS; and
- There is freer flow of capital, skilled labour and professionals, and technology amongst Member States.

It is expected that the Regional and National Institutions implementing the ECIM process will find this document handy as a reference material to guide their work process.

His Excellency,
Ambassador James Victor Gbeho
President, ECOWAS Commission.

Prof. Lambert N. Bamba,
Commissioner, Macro-Economic Policy
ECOWAS Commission

INTRODUCTION

OPERATIONAL GUIDELINES FOR THE HARMONIZATION OF NATIONAL INVESTMENT LAWS

The late 20th century has been characterized by an increased interdependence between the nations of the world. Unprecedented trade liberalization at the multilateral, regional and bilateral level accompanied by the exponential development of new information technologies have changed the way sovereign states, businesses and citizens interact among themselves and with one another. Remarkable trade liberalization and a switch from protectionist to open market economies have been argued to provide the basis for the growth of transnational business activity while democratic values and institutions have been progressively strengthened. However, the Economic Community of West Africa States (ECOWAS) is still facing great challenges in achieving sustainable growth and development that can bring about poverty reduction and political stability. It is now well recognized that processes of globalization alone will not resolve such problems, and that there is a need for improved international as well as regional cooperation mechanisms to effectively address those issues.

As provided in the Vision 2020, ECOWAS is a community comprising like-minded sovereign member states proximately located and desirous of achieving inter alia: (a) sustained economic development based on international competitiveness; (b) co-ordinated economic and foreign policies;(c) functional co-operation and enhanced trade and economic relations with third States; (d)establishing conditions which would facilitate access by their nationals to the collective resources of the Region on a non-discriminatory basis; (e) a fully integrated and liberalized internal market that will create favourable conditions for sustained, market led production of goods and services on an internationally competitive basis; and (f) cooperation and joint action in

developing trade and investment relations with third States and in establishing appropriate regulatory and administrative procedures and services which are essential for the development of the international and intra-regional trade and investment aspirations of ECOWAS member states.

No doubt West African countries have become more accommodating toward foreign direct investment (FDI) over the last 10-15 years, as evidenced inter alia by changes in their regulatory regimes. The reorientation was set in the context of a more general shift in attitudes toward the private sector, and it reflects an increasing realisation that private international capital flows are likely to be a key source of development finance in the future of the community. The changing stance toward FDI has also given rise to a proliferation of investment promotion agencies, special economic zones and other targeted mechanisms by which member States aspire to attract foreign investors. However, considerable national differences persist and important hurdles still need to be overcome in most countries. Also, while it is fair to say that in terms of overall statutory FDI regulations on investment flows, member states are on average not more restrictive than other developing nations.

Going beyond the statutory rules, investors into West Africa region are acutely concerned with the transparency of regulation. First, it is difficult to find **reliable, detailed information about the regulatory regimes** of some countries. Second, a number of countries appear to apply **a high degree of administrative and/or political discretion to the regulatory process** (e.g. the granting of investment licences based on undisclosed or changing criteria) rather than rely on largely rules-based systems. Third, when sovereign governments exert their right to regulate by changing key pieces of legislation, they often do so without engaging in the **prior consultations with concerned parties** that are commonly considered as an integral part of political and regulatory transparency. Finally, concerns about the **consistency of implementation** are high on the list of investors' concerns about regulation. The issue of regulatory discretion raises important integrity

issues in addition to transparency, and there is anecdotal evidence from many countries of even "hard" regulation being applied selectively. Corruption is often cited as a major concern in this respect. So is excessive red tape and slow administrative procedures, which encourage investors to seek recourse to informal mechanisms

Fundamental to ECOWAS Vision 2020 therefore is a common understanding of what regional integration is, and its value for national development in the region. The intention of the Vision is to promote broad-based economic and social opportunities for the region within the context of ECOWAS regional integration agenda and current globalisation realities. Three kinds of regionalism can be deduced from this Vision:

First, there is **regional cooperation** involving the setting up of dialogues or processes among member states' governments in which there will still be national provision of services but often increased coordination of policies, usually through shared strategies or principles.

Second, there is **regional integration** involving the lowering of market barriers among member states, to allow for free movement of goods, services and people.

Third, there is **regional provision** of public services involving the pooling together national services at the regional level.

The realisation of the above levels of integration in the vision motivated the adoption of three Supplementary Acts on Investment Rules by the Authority of Heads of State and Government in December, 2008. The Act constitutes the legal basis for the development and operation of the ECOWAS Common Investment Market (ECIM) Vision. The aim of the ECIM is the convergence of the whole ECOWAS region into a single economic policy space in which all the pillars in vision elucidated above stand, facilitated by unfettered flow of persons, capital, goods and services. The goal of the ECIM is the promotion of the spirit of free enterprise for ECOWAS investors, anywhere in the region.

This guidelines aim to amplify the provisions of the Supplementary Acts on investment rules as the operational framework for the ECIM. It attempts to break down the contents of the act in terms that ECOWAS citizens and investors can comprehend as well as to apply them in their investment decisions in the region. Member states and other repertoires are guided to understand the fundamental provisions of the Act and their responsibilities under the act. The rights, privileges and obligations of the parties envisaged in the provisions are clarified in the guidelines.

PART I

THE SUPPLEMENTARY ACT ON INVESTMENT AND THE RESPONSIBILITIES OF MEMBER STATES

A. Adoption of Supplementary Acts on Investment by Heads of State and Government of ECOWAS

The Heads of State and Government of the community adopted three Supplementary Acts in December 2008 that define ECOWAS harmonized investment regime as a powerful marketing tool for the region for extra and intra- flows of investment. Over the years the crafting of limitations on the source of investment as well as other barriers at national levels of member countries had sent wrong signals to regional and extra-regional investors in the community. With these Acts, the harmonization exercise being undertaken by ECOWAS is based on the fact that a single market of about 250 million people could manifest sufficient size and scale agility, flexibility and creativity to attract and retain investment in ways that previous large, more cumbersome and various regional machineries could not. The harmonization is critical in order to open a single economic space for member states to benefit from, achieve full exploitation of human and mineral resources as well as achieve better competitive position through the full exploitation of the market size which is presently about 280 million people.

While ECOWAS Leaders have made clear commitments towards closer and deeper regionalism through the adoption of the Supplementary Acts on investment, this needs to be operationalised at the country level if the Leaders' Vision is to become a reality. For this to be successfully achieved, attention will need to be paid to building national level awareness, understanding, and acceptance of regionalism. From the provisions of the Supplementary Act on ECOWAS investment rules, the common investment code (CIC) is expected to reflect the guarantees and commitments to be undertaken by regional governments in the pursuit

of increased investment to the region. For this reason, the usual areas found in most bilateral and regional investment agreements were addressed by the document including scope and coverage, definitions of investment and investor, national and most favored nation (MFN) treatment, minimum standards of treatment, performance requirements and incentives, senior management and Board of Directors , transfers, expropriation, compensation , dispute settlement and environment, health and labor issues.

Implementation of ECIM initiatives requires the creation, or strengthening, of high level national coordination mechanisms to ensure effective participation in the process. A strong understanding of the ECIM therefore is that the value added of the consequent regional investment bloc to member states is itself dependent on the collective bargaining of the entire ECOWAS or through the efforts of all the member states. An ECIM means the deregulation of individual and business entities investment options and operations in all the member states so as to to correct the distortions in competition for investment with respect to: (a) the free movement of people's capital, (b) sub-regional access to commercial credit, (c) the purchasing of bonds and securities on the stock markets of ECOWAS member countries, (d) opening of accounts in ECOWAS member countries, and (e) transfers from trade in services. This justifies the use of **national consultants** to work with the **Commission's staff** in re-aligning/ harmonizing the draft CIC and the regional investment policy framework (IPF) with the national investment policies.

Like other economic integrations with antecedents in international business and financial services who have nonetheless embraced the ideal of a seamless regional economic space, ECOWAS' strategy for defining and exploiting its own regional comparative advantage rests with respect to ECIM rests on two planks. First, it continues to attract and support FDI to drive the regional industrialization objectives. Second, through its CIC, coupled with its incentivized legal vehicles designed to capture foreign investment flows, the region continues to position itself as an important international business centre for intra and extra-regional investment flows.

B. Elements of the ECOWAS Common Investment Market

Investment represents property or other possessions acquired for future financial return or benefit, e.g laying out money or capital in an enterprise with the expectation of profit Investment can be used as a tool to stimulate other trading activities within and outside the region by the fact that cross-border investors and local investors have a vested interest in the region. Investment therefore creates links between ECOWAS member States and the world market. The main elements of ECIM as specified in the Supplementary Act on investment rules include:

1. *Free movement of goods and services:*
Through measures such as eliminating all barriers to intra-regional movement and harmonizing standards and quality requirements, to ensure regional acceptability of goods and services traded;

2. *Right of Establishment:*
To permit the establishment of ECOWAS owned businesses in any Member State without restrictions;

3. *A Common External Tariff (CET):*
This is a rate of duty applied by all Members of the regional Market to any product imported from any country that is not a member of the ECOWAS market;

4. *Free Circulation of Goods*
This refers to the free movement of goods imported from extra regional sources which would require collection of taxes at first point of entry into the ECOWAS Region and the provision for sharing of collected customs revenue from such products by member states of the community;

5. *Free Movement of Capital:*
This will require the implementation of measures such as eliminating foreign exchange controls, convertibility of currencies (or a common currency) and integrated capital market, such as a regional stock exchange to allow for the free movement of capital across the region.

6. A Common Trade Policy:

This refers to an agreement among the members on matters related to internal and international trade and a coordinated external trade policy negotiated on a joint basis;

7. Free Movement of Labour:

This will involve the implementation of measures such as removing all obstacles to intra-regional movement of skills, labour and travel, harmonizing social services (education, health, etc.), providing for the transfer of social security benefits and establishing common standards and measures for accreditation and equivalency to allow for free movement of labour (professionals and non-professionals)

8. Other Measures:

Harmonization of Laws: This will involve the harmonization of company, intellectual property and other business laws. There are also a number of economic, fiscal and monetary measures and policies which are also important to support the proper functioning of the ECIM. These are being attended to by ECOWAS Commission should equally capture the attention of the consultants in their harmonization exercise.

Clearly the codification of investment policy for ECOWAS is expected to enhance the regional investment climate by: creating a regional network for policy dialogue among investment policy makers with other stakeholders in the Community; promoting a favourable environment for employment creation through joint regional private/financial sector development and an entrepreneurship culture; improving intra-governmental policy coordination and cooperation between the various governmental agencies in ECOWAS region; and reinforcing the impact of development initiatives supported by international, regional and bilateral funds.

Since effective implementation of ECIM would result in free movement of goods, services, labour, capital, and financial markets (five basic freedoms for investment flows), the initiative is expected to make ECOWAS an economic region where:

- There is a coordinated investment co-operation programme

among member States that will lead to increased investment from both ECOWAS and non-ECOWAS sources;

- National treatment is extended to ECOWAS investors at the take off of the initiative and to all investors by a specified date, subject to the exceptions provided for under the Supplementary Act on investment rules;
- All industries are opened for investment to ECOWAS individuals and corporate citizens, and to all investors by a specified date, subject to the exceptions provided for in the Supplementary Act;
- The business sector has a larger role in the co-operation efforts in relation to investment and related activities in ECOWAS; and
- There is freer flow of capital, skilled labour and professionals, and technology amongst Member States.

The implementation of ECIM will consolidate the economic activities in the community into an integrated regional unit that can provide a common platform to participation in the wider regional and global processes, including the negotiations with developed country partners such as the European Union, United States, Canada, as well as in multilateral negotiations at the World Trade Organization (WTO). The potential gains of ECIM for member countries would therefore be:

- Emergence of a regional market that could serve as a "training ground" for the region's industries in terms of quality control, marketing techniques and other ways to improve the competitiveness of the participating countries' products;
- Achievement of economies of scale along with improved competitiveness arising from the enlargement of the market size;
- Enhancement of industrialization by making the expansion of industries viable through the enlargement of the market size;
- Reduction of costs involving long-term and capital intensive goods that could be achieved by the joint production of public goods; and
- Protection against adverse developments in world markets.

C. Key Principles for Harmonization of Regional Investment Laws into a Common Code

It is important that member States recognise the following principles which, to the extent applied, contribute to effective implementation of ECIM:

- Transparency of national policies, laws and regulations and administrative practices affecting foreign and domestic investment;
- Coherence and stability of these laws, regulations and administrative practices; changes made in the light of evolving circumstances should respect the rights of investors as provided in the Supplementary Act on common investment rules;
- National treatment for foreign investors at both the pre and post establishment stage; exceptions should be clearly and precisely formulated and periodically reviewed with a view to phasing them out;
- Timely and unrestricted transfer of the proceeds of the investment and guarantee for the repatriation of the capital when the investment is terminated in line with the provisions of the Act;
- Fair and equitable treatment of domestic and foreign investments with full protection of property rights including intellectual property; high standards on expropriation and compensation;
- Unrestricted access of investors to effective dispute settlement mechanisms including international arbitration;
- Movement of key personnel for the investment and simplification of visa regulations;
- Transparency of incentive measures;
- Simplification of administrative procedures for the

establishment of new companies, the take-over of existing companies, the granting of permits, concessions and licenses as well as for other operations or transactions needed for the establishment or development of private investment;

- Transparent and equitable regulations and procedures for privatisation and de-monopolisation;
- Respect of internationally agreed principles of corporate social responsibility in line with international standards;
- Good corporate governance and integrity in public administration;
- Removal of barriers to trade, which have a negative effect on investment, through increased regional co-operation; and
- Promotion of investment policies and measures consistent with their commitments to sustainable development, protection of the environment and the observation of internationally recognised core labour standards.

D. General Obligations of Member States towards the Implementation of ECIM

In line with the above principles, ECOWAS member states will be expected to:

- review their policies and rules affecting investment and private sector development with a view to improving the investment climate in the region;
- consider adhering to relevant regional rules and instruments as provided by the Act;
- notify and publish lists of national measures providing exceptions to national treatment and the rationale for maintaining these measures;
- review their network of bilateral investment treaties and double

taxation treaties within and outside the region in line with the provisions of the Act;

- intensify action to remove obstacles to business development, in particular regulations and administrative practices that obstruct or delay investment;
- enhance partnership in building human capacities and skills necessary for acquiring and spreading the benefits of investment in the region;
- develop a framework for the competitive functioning of their markets which would include effective competition laws and the reform of economic regulations;
- strengthen the capacities of investment promotion agencies to disseminate information and to provide services to investors and encourage co-operation among these agencies at regional and international levels;
- support small and medium sized enterprises and encourage their co-operation in regional projects and programmes;
- consult business groups, private sector associations, social partners and civil society organisations to explore the development of investment opportunities and to provide input to the decision making process on investment policies, laws and regulations;
- Ensure that henceforth individual national measures and programmes are undertaken on a fair and mutually beneficial basis to other member States;
- Undertake appropriate measures to ensure transparency and consistency in the application and interpretation of their investment laws, regulations and administrative procedures in order to create and maintain a predictable investment regime in entire ECOWAS region;

- Begin the process of facilitation, promotion, liberalization and consequently harmonization of national investment laws towards a common code;

- Take appropriate measures to enhance the attractiveness of the investment environment of member States for direct investment flows; and

- Take such reasonable actions as may be available to ensure observance of the provisions of the Supplementary Act by the Regional and National institutions as well as authorities within ECOWAS member states territories.

E. Programmes and Action Plans

For the implementation of these obligations under the Supplementary Act on investment rules, ECOWAS Member States are expected to, undertake the joint development and implementation of the following three programmes:

1. Cooperation and Facilitation Programme

An effective cooperation and facilitation programme is required for the implementation of the Supplementary Act on ECIM. Under such a programme, ECOWAS member States would be expected to undertake the following both individual and collective initiatives:

(a) Individual Initiative to:

- Increase transparency of Member State's investment rules, regulations, policies and procedures through the publication of such information on a regular basis and making such information widely available to national consultants appointed by ECOWAS Commission;
- Simplify and expedite procedures for applications and approvals of investment projects at all levels as from the transition period until the regional code is adopted; and

- Examine the various bilateral Agreements which they have committed themselves and subject them to the provisions of the Supplementary Act

(b) Collective Initiative to:

- Members States are to establish a database for ECOWAS (ECOWAS Portal) as part of the Commissions ECOBIZ information to enhance the flow of ECOWAS investment data and information on investment opportunities in the region;
- Promote public-private sector engagements through regular dialogues with the ECOWAS business community and other international organizations to identify barriers to investment within and outside ECOWAS and propose ways to improve the ECOWAS investment climate indicators of the member states.;
- Identify target areas for technical co-operation, e.g., development of human resources, infrastructure, supporting industries, small and medium-sized enterprises, information technology, industrial technology, R&D and co-ordinate efforts within ECOWAS and other international organizations involved in technical co-operation;
- Resume the review of national investment policies and align to /with the standard ECOWAS IPF; and
- Cooperate with national consultants that are engaged by ECOWAS Commission to harmonize national investment laws with the regional standards

2. Promotion and Awareness Programme

In respect of the Promotion and Awareness Programme of the ECIM, member States would need to co-operate among themselves with the support of ECOWAS Commission to:

- Organize joint investment promotion activities: e.g. fora, seminars. Workshops, inbound familiarization tours for investors from capital exporting countries, joint promotion of specific projects with active business sector participation;

- Conduct regular consultation among investment promotion agencies (IPAs) on ECOWAS investment promotion matters;
- Organize investment-related training programmes for officials of investment promotion agencies (IPAs) in the region;
- Exchange lists of sectors/industries member States are promoting/encouraging could encourage investments from other member States ; and
- Examine possible ways by which the IPAs of member states can support the promotion efforts of other member States in the region.

3. Liberalization Programme

In respect of the Liberalization Programme toward the ECIM, member States would be required to:

- Reduce and eliminate restrictive investment measures and review their investment regimes regularly in line with the Supplementary Act and the regional IPF. In this context, member States would be expected to undertake actions to liberalize, among others:
  - rules, regulations and policies relating to investment;
  - rules on licensing conditions;
  - rules relating to access to domestic finance; and
  - rules to facilitate payment, receipts and repatriation by investors.

- Undertake individual action plans to:
  - Open up all sectors for investment to ECOWAS investors, say in line with the ECIM time table and to all investors in accordance with the provisions of the Supplementary Act; and
  - Extend national treatment to all ECOWAS investors, as from the take off of the ECIM process and to all investors in accordance with the provisions of the Agreement on the time lines for the implementation of the initiative; and
  - Promote free flow of capital, skilled labour, professionals and technology among ECOWAS Member State.

To execute these three programmes, ECOWAS Commission would require member States to submit national Action Plans to the **ECIM Council** for the implementation of these programmes. The Action plans would however be reviewed every 2 years to ensure that the objectives of this ECIM are achieved.

F. Opening up of ECOWAS Sectors and National Treatment

Subject to the provisions of the Supplementary Act, each member State is expected to:

- Immediately open its economic sectors for investments to other ECOWAS investors;

- Immediately accord to ECOWAS investors and their investments, in respect of all industries and measures affecting investment **treatment no less favourable than that it accords to its own like investors and investments ("National treatment");**

- At the onset it is advisable that each member States submits a **Temporary Exclusion List and a Sensitive List,** if any, within an agreed period as provided by ECOWAS Commission , of any industries/sectors or measures affecting investments with regard to which it is unable to open up or to accord national treatment to ECOWAS investors;

- In the event that a member State, for justifiable reasons, is unable to provide any list at this stipulated period, it may seek an extension from the **ECIM Council** in ECOWAS Commission;

- The Temporary Exclusion List should be reviewed every 2 years and shall be progressively phased out as agreed by all Member States; and

- The Sensitive List would also be reviewed by ECIM every year.

G. Most Favoured Nation Treatment

- Subject to Article 6 of the Supplementary Act, each member State shall accord immediately and unconditionally to investors and investments of another ECOWAS member State, treatment no less favourable than it accords to investors and investments of any other Member State with respect to all measures affecting investment including but not limited to the admission, establishment, acquisition, expansion, management, operation and disposition of investments.

- In relation to investments falling within the scope of the Supplementary Act, preferential treatment granted under any existing or future agreements or arrangements to which a Member State is a party shall be extended on the MFN basis to all other Member States.

The requirement in paragraph 2 above should not apply to existing agreements or arrangements notified by Member States to the ECIM Council within 12 months after the date of of the commencement of the ECIM

Waiver of Most Favoured Nation Treatment

- Where a member State is temporarily not ready to make concessions under Article 6 of the Supplementary Act, and another member State has made concessions under the said Article, then the first mentioned member State would be expected to waive its rights to such concessions.

- However, if a member state which grants such concessions is willing to forego the waiver, then the first mentioned member Sate can still enjoy these concessions.

H. Modification of Schedules and Action Plans

- Any modification to the provision of the Supplementary Act and Action Plans should be subject to the approval of the National Coordinating Committee on Common Investment Market (NCCIM) of individual member States of ECOWAS countries

- Such modification to or withdrawal of any commitments in the Supplement Act and the Action Plan would then be subject to the consideration of the ECIM Council.

I. Transparency

- Each Member State would be expected to make available to the ECIM Council through publication or any other means, all relevant measures, laws, regulations and administrative guidelines which pertain to or affect the operation of the Supplementary Act.

- Each Member State would be expected to promptly inform the ECIM Council through its NCCIM of the introduction of any new law or any changes to existing laws, regulation or administrative guidelines which significantly affect investment or its commitments under the Supplementary Act.

- From the provisions of the Supplementary Act, nothing in it require any member State to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.

J. Other Agreements

- It is clear from the Supplementary Act that the Authority of Heads of State and government of ECOWAS affirm their existing rights and obligations under the Revised ECOWAS Treaty; and in the event

that the Supplementary Act provides for better or enhanced provisions over the Revised Treaty provisions and its protocols, then the provisions of the Supplementary Act would prevail.

- The Supplementary Act or any action taken under it is not expected to affect the rights and obligations of the member State under existing agreements to which they are parties

- Nothing in the Supplementary Act is expected to affect the rights of the member States to enter into other agreements as long as such agreements are not contrary to the principles, objectives and provisions of the Supplementary Act.

K. General Exceptions

To guarantee national sovereignty of ECOWAS member States, the Supplementary Act permit member states to implement national measures and policies as long as such measures are not applied in a manner that would result in arbitrary or unjustifiable discrimination between ECOWAS states or a disguised restriction on investment flows. Such measures include those:

- Necessary to protect National Security and public morals;

- Necessary to protect human, animal or plant life or health;

- Necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the Supplementary Act including those relating to:
  - The prevention of deceptive and fraudulent practices or to deal with the effects of a default on investment agreement.
  - The protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts.
  - safety

- Aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of investment or investors of Member States which are consistent with the ECOWAS Trade Liberalization Scheme (ETLS) and the regional CET provisions

L. Emergency Safeguard Measures

- If, as a result of the implementation of the ECIM under the Supplementary Act, a Member State suffers or is threatened with any serious injury and threat, such a Member State may take emergency safeguard measures to the extent and for such a period as may be necessary to prevent or to remedy such injury. The measures taken shall be provisional and without discrimination against other countries, and shall be communicated to the ECIM Council for approval

- However, where such emergency safeguard measures are taken, approval of such measures would have to be secured be from the ECIM Council 30 days before the date when such measures shall become effective.

- The ECIM Council is expected to determine the definition of serious injury and threat of serious injury and the procedures of instituting emergency safeguards measures that will not constitute an infringement to the provisions of the Supplementary Act.

Measures to Safeguard the Balance of Payment

- In the event of serious balance of payments (BOP) and external financial difficulties or threat thereof, a member State should have the right to adopt or maintain restrictions on investments on which it has undertaken specific commitments, including payments or transfers for transactions related to such commitments (see Article 10 of the Supplementary Act)

- It is recognized that particular pressures on the BOP of member States in the process of economic development or economic transition may necessitate the use of restrictions to ensure, inter alia, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.

- Where measures to safeguard balance of payments are taken pursuant to Article 10 of the Supplementary Act, notice of such measures should be given to the ECIM Council and approval secured at least 30 days before the date when such measures shall become effective. However, such measures:
  - Should not discriminate against the rest of ECOWAS Member States;
  - Must be consistent with the relevant provisions of Articles of Agreement of the International Monetary Fund (IMF);
  - Must avoid unnecessary damage to the commercial, economic and financial interest of any other ECOWAS Member State.
  - Should not exceed those necessary to deal with the circumstances approved by the ECIM Council; and
  - Must be temporary and be phased out progressively as the situation that necessitated the safeguard measures subsides

- ECOWAS member States adopting the BOP measures must commence consultations with the ECIM Council early enough in form of notification and specifying the basis and the tenure for the measures through its NCCIM.

- The ECIM Council would however determine the rules applicable to the procedures under Article 10 of the Supplementary Act

M. Institutional Arrangements

- In line with Article 25 of the Supplementary Act, it is recommended that ECOWAS Ministerial Monitoring Committee (MMC) creates ECOWAS Common Investment Market Council (referred to as " the ECIM Council) comprising the National Ministers responsible for investment and the President of ECOWAS Commission. The Chief Executives of the 15 IPAs in the region could participate in the ECIM Council meetings (but not as members)

- The ECIM Council should be established to supervise, co-ordinate and review the implementation of the Common Investment Market and the Supplementary Act on an on-going basis

- In the performance of its functions, it is advisable that the ECIM Council establish National Coordinating Committee on Investment (NCCIM) comprising, senior officials responsible for investment from relevant Government agencies in each of the countries of ECOWAS.

- The NCCIM would report to the ECIM Council through the Private Sector Directorate of the ECOWAS Commission.

- The ECOWAS Commission shall be the Secretariat to the ECIM Council while its Chairman shall be the President of the Commission.

N. Settlement of Disputes

- The Dispute Settlement Mechanism in Articles 33and 34 of the Supplementary Act would apply in relation to any dispute arising from, or any differences between Member States or investors concerning the interpretation or application of the Act and the implementation of the ECIM

- If necessary, a specific dispute settlement mechanism, as provided for in the Act may be established, it shall form an integral part of the Supplementary Act.

PART II

INFORMATION FOR NATIONAL CONSULTANTS IN THE HARMONIZATION INVESTMENT LAWS

A. Issues in Investment Law Harmonization in ECOWAS

It is important that national consultants know that essentially investment laws they are to harmonise has two main functions in the process of any regional economic integration arrangement **One** is to establish the machinery for integration and the other is to establish the legal framework that will allow the regional market to function properly. The second function of the investment law, which is more relevant to this discussion, may consist of negative and positive integration measures. **Negative integration** measures refer to the removal of barriers to the cross-border movement of factors of production in the CIM. **Positive integration** measures, on the other hand, involve the institution of other measures to enhance the efficiency of the market.

The distinction between negative and positive integration measures only shows that the removal of the identified impediments may be necessary but not sufficient to effective functioning of the ECIM. This could be primarily as a result of the presence of other physical and commercial barriers that have an equally restrictive effect on regional investment flows, among which are legal variances that could still exist among member states.

The need for harmonization of investment laws in ECOWAS region depends on whether such positive integration measure can address the different problems caused by legal divergence among member States, namely, the cost of externalities, unnecessary transaction costs, and barriers to interdependence:

1. Externalities

This basically means that the rules (or insufficiency or lack thereof) in one jurisdiction can lead to costs being imposed on other jurisdictions. For instance, the anti-trust laws of an ECOWAS member state which is meant to encourage free competition may be rendered ineffective by the failure of another member to enact similar laws in the region. Large businesses in the country where there are no anti-trust laws, unwilling to face intra-regional competition and choosing to hide behind their country's lenient laws, may collude and apportion market shares among themselves to the disadvantage not only of the consumers in that country but also of the manufacturers and exporters in country with antitrust laws. However, by adopting a common legislative and regulatory policy against combinations in in this area, ECOWAS member states can effectively plug this legal loophole

2. Transaction Costs

One unavoidable expense in conducting business in different national jurisdiction is the cost of familiarization and compliance with the laws of that jurisdiction. Further, parties who are subject to the rules of different jurisdictions may encounter, during their negotiations, the problem of deciding which jurisdiction's law should apply to their transaction. This problem can prolong, even undermine, the negotiations and thereby increase the cost of doing business. The frequency at which these costs are incurred increases with the number of cross-border transactions, although it is possible that the cost of familiarization will diminish in the succeeding similar transactions. Different products standards, too, can lead to similar results. Forcing firms intending to market their products in the entire region to incur additional costs in ensuring their products comply with all the different standards, would be depriving them of the benefit of economies of scale. Harmonization of such standards and rules will diminish if not eliminate the need for this additional expense.

3. Interdependence

Interdependence among market actors in ECOWAS region has a direct correlation with the frequency of their transactions. Unless such

interdependence becomes a reality, it cannot be said that a region has an integrated economy. To achieve interdependence, it may be necessary to remove some, not all, forms of divergence on legal issues. This may be a continuing process considering that once a certain degree of integration is achieved, contradictions may arise between the regional market and the multiple divergent rules.

B. ECIM and the World Trade Organization

Multilateral economic integration is regulated through the WTO framework that constitutes the basic set of rules regulating the global trading order, its core principles being non-discrimination, reciprocity and transparency. However, numerous states are also members of regional trading agreements, i.e. geographically discriminatory arrangements among a subset of countries, which in fact discriminate trade of non-members. A special provision is created in GATT Article XXIV to allow for the existence of these integration agreements to be consistent with the non-discrimination principle of the WTO.

Article XXIV of the GATT plus the Understanding on Interpretation of the Article (Understanding Regional Trading Agreements) of WTO sets forth the basic principles for regional economic integrations. WTO provides for regional economic integration among member States, hence in terms of geographic scope, harmonization of investment laws may be regional (i e under economic integration arrangements) or multilateral (i e negotiation of the four Singapore Issues in the WTO). Since some efforts at harmonization are directed at areas of law that are already the subject of similar global efforts at WTO level, this raises another theoretical hurdle in justifying legal basis for regional harmonization of investment laws in ECOWAS. The question thus posed is: would there be any difference in the rationale, scope, and degree between these regional and global harmonization to render regional harmonization necessary or preferable? A related question is: would not present efforts at global harmonization, assuming they are successful, satisfy the needs of the region?

The differences in rationale, scope, and degree between global and regional harmonization measures or efforts are reflected in the ECOWAS's adoption of various schemes for economic integration out of which the region, compared with the world in general, can expect a higher degree of economic interdependence and greater commercial interaction across borders among member States. In other words, the expectation of a higher degree of investment flows as well as other factors and products movement, both in value and volume, means that the ECOWAS region, as opposed to the world in general, has more to gain from harmonization. Conversely, without harmonization, the costs of non-harmonization (i.e., cost of externalities, unnecessary transaction costs, and barriers to interdependence) of investment laws in ECOWAS integration would be greater for the region than it is for the world.

Even though multilateral harmonization is already in progress (not yet concluded), there is still room for regional harmonization under certain conditions. These conditions, in turn, are determined by the impact and causative correlation between harmonization and the potential and actual flows of products and factors of production within the ECOWAS region. More specifically, since member states in the region are already having successful trade relations with each other, especially with the implementation of ETLS and the CET (with the adoption of five band tariff structure) under the regional Customs Union, the region is expected to gain more by moving ahead to concluding harmonization of national investment laws into a single code.

The inconclusive multilateral efforts at global harmonization of investment laws under the Singapore Issues may not be sufficient to address all the needs of ECOWAS region for the implementation of ECIM. For one thing, the degrees of expected economic interdependence among ECOWAS members and the rest of the world vary substantially. This difference determines the scope and degree of harmonization of member states investment laws required in the ECIM. The need for harmonization at the lower level of global economic integration will definitely be less than that of the regional level, in terms of the number of legal issues and the depth of harmonization. Accordingly, although it can draw upon the processes and results of

existing global efforts at harmonization, ECOWAS cannot expect these efforts to result in the settlement of all the issues and the depth to which these issues need to be harmonized in order to promote ECIM in our regional economic integration process.

C. Determining the Scope and Depth of Harmonization of National Investment Laws of Member States

The above justification for regional harmonization of national investment laws of member States of ECOWAS merely solves only one aspect of the issues in establishing a case for the harmonization process. There still remains the problem of determining its scope and depth, which requires the identification of a criterion for evaluation. This is necessary to determine a standard or criteria by which an ideal balance is struck between competing considerations. Such a standard will prevent the harmonization scope and depth of investment laws among member States to become too broad or too narrow. The competing considerations, on one hand, involve the need to "localize" the harmonized law (the CIC) and respect the legislative prerogative of domestic national institutions and, on the other, the need for the harmonized laws to achieve optimal policy level desired for effective implementation of ECIM.

The first consideration exerts a narrowing pressure on the scope and depth of harmonization of investment laws while the other exerts pressure in the opposite direction. ECOWAS Commission is aware that the inclusion of unnecessary areas of law and legal issues into the CIC risks reluctance of national governments to cede legislative prerogative, leading to difficulty in obtaining their consent to the harmonized rules in the CIC. The reluctance might proceeds primarily from the belief that domestic laws reflect more faithfully local policy considerations, hence, are better suited to address local regulatory needs than regional legal frameworks. In this sense, locally drafted rules, as opposed to regional legal frameworks, are said to enjoy the advantage of localization of the law because of the assumption that the nation's cultural, economic, and political perspective were given ample attention in the law's preparation by the national legislature hitherto. For this purpose,

ECOWAS Commission is engaging national consultants to re- align the national investment laws in the harmonization process.

Therefore, in delineating the scope and depth of harmonization of national investment laws into the CIC, ECOWAS Commission is allowing ample consideration, through the engagement of national consultants so as to ensure appropriate integration of national psyche and national legitimacy of member states into harmonized investment law (i e CIC) for the region. The Commission is of the belief that the more the harmonized investment law originates from national roots the better it becomes to implement the ECIM.

Notwithstanding this position, the Commission is also mindful of the fact that insufficient scope and depth could equally lead to a failure to address the optimal policy area that requires harmonization, thereby resulting in inefficacious harmonization. The optimal policy consideration requires that all related issues in the harmonization process must be dealt with. Indeed, if harmonization were pursued in only a few rather than a substantial number of related areas and issues of law, several problems may arise. First, there is a risk that harmonization might not only fail to attain maximum gains but might not even be effective in the first place. Contradictions and inconsistencies might arise between related areas and issues of law due to the arbitrary delineation of the scope and depth of harmonization. Second, there would also be the risk of policy incoherence which would undermine the validity of the call for the harmonization as expressed in the adoption of the Supplementary Act on regional investment rules by the Heads of State and Government of the region.

Bearing in mind the need to strike a balance between the competing considerations of localization of the law and optimum policy area, this guideline suggests the following guiding principles as criteria:

- that the scope and depth of harmonization of national investment laws of member states be confined to those areas of law that relate to cross-border economic transactions as provided for in the Supplementary Act; and

- that the underlying goal of the harmonization of national investment laws be premised on the need to facilitate commercial and industrial interactions between and among the participants in the ECOWAS regional market, with the end in view of promoting the economic integration of the member-states.

Since these two criteria confines the scope and depth of the harmonization to cross-border transactions, whatever objections that may be raised during the assignment of national consultants based on the localization argument is effectively addressed. Further, by identifying the facilitation of commercial and industrial interactions and the promotion of regional economic integration as the purposes of harmonization, ECOWAS Commission have ensured that the optimum policy area is effectively defined, thereby reducing the risk of an ineffectual harmonization due to insufficiency of scope and depth.

Using the above two criteria, the scope and depth of the ECOWAS harmonization of national investment laws into CIC may be delineated basically by answering the following questions:

- In what areas and concerning which legal issues would variance in the investment laws of the member states render cross-border commercial transactions (in the ECOWAS region) legally, technically, and economically unviable?

- In what areas of investment law and regarding which legal issues will the harmonization promote the goals of regional economic integration in the ECOWAS (i.e encouragement of investments and industrialization, facilitation of efficient regional reallocation of resources and regional division of labour, assured market of considerable size, and mutuality of gains)?

- When different areas and issues of national investment laws are being considered for harmonization, what would be their relative propensity in comparison to each other to promote the goals of integration?

These fundamental questions are necessary for the consultants to use in knowing which national ministries departments and agencies should be contacted in aggregating the national investment laws to harmonise in their respective countries The major areas of investment laws that may be found in functioning integrated common market economies had been worked upon by BizClim to produce a typical framework of regional CIC and IPF for ECOWAS .National consultants engaged by ECOWAS Commission are expected to use these frameworks to adjust their respective national investment laws bringing out areas of convergences and divergences.

D. Structure of the Existing Investment Polices of ECOWAS Member States

A look at the existing investment policies in the region shows areas of convergence and divergence among member states *(see Booklet on ECOWAS Regional Investment Policy Framework).* The observed similarities among the countries on investment rules provided a good platform for further enhancement of such similarities towards the common code. In particular, these similarities would be strengthened in the harmonization process through the following:

- Clear and transparent regional policies in the CIC that will no longer impose unnecessary burdens on investors;

- Coherence and stability of these investment laws, regulations and administrative practices under the common code;

- Putting in place National and Most Favoured Nations (MFN) treatments provisions within the provisions of the Supplementary Act on investment rules for investors in the community in line with their commitments at the multilateral level (under World Trade Organization-WTO) and in compliance with their commitments under the economic partnership agreements (EPAs) with the European Union (EU);

- Transparent and non discriminatory incentives in the CIC ; and

- Access of investors to effective dispute settlement mechanisms, including timely and efficient means of ownership, registrations as well as full protection of properties and contractual rights, as well as acceptable standards on expropriations and on adequate compensations.

However, existing situation on investment policies in the region equally revealed the following divergences:

- Many countries still impose differential, general and specific restrictions on investment, 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;

- Many countries tend to discriminate against foreign investors in activities judged to be particularly suited to nationals and or local entrepreneurs, particularly in sectors like the small-scale manufacturing and mining, trading and proximity services;

- Foreign participations in financial services are restricted in some countries while in others they are subjected to more burdensome entry and operational requirements than those applied to domestic investors.

Harmonization of ECOWAS investment policies into a code basically consists of modifying national investment provisions from the various countries within the community, which are not similar initially, but to be made coherent, or update them with a regional reform process. It equally refers to ways of reducing duplication and overlap between member state governments and their agencies at formulating and implementing investment policies. While respecting the peculiarities of all ECOWAS member states investment policies, the harmonization exercise would permit these countries to promote increased legal cooperation on corporate rules among themselves.

E. Expectations from the Harmonization on National Investment Policies into a Code

The harmonization of the investment policies in the region into a single code is to simplify the investment regulatory regime towards a common framework. It must be pointed out here that the **simplification should not be interpreted to mean compromising standards;** but it is an act of reducing or eliminating elements of the harmonization process in order to reduce complexity and inefficiency, as well as to limiting the potential of any re-introduction of previous cumbersome or unnecessary investment regulatory requirements or steps.

A well constructed investment policy harmonization for the region provides a powerful promotion and marketing tool for ECOWAS region that has not been a natural recipient of global investment flows. Consequently, the objectives of the harmonized investment policy framework for the region would include, inter alia:

- The aligning of private investment to a single ECOWAS space, that is, the making of the treatment of private investments uniform/similar throughout the region
- Achieving an increased flow of intra-area and extra-area investments; and
- Improving the competitiveness of existing companies benefits through economies of scale offered by a larger West African Market.

In other words, the primary purpose of the ECIM is the integration of national economies to create large internal markets that can sustain production efficiency at levels comparable to those in industrial countries. The harmonization of national investment laws towards a regional best practice of investment code is therefore expected to strike a better community balance between private interests (investor rights) and public goods (investor obligations towards the region) that will be attractive to investors within and outside the region.

Enlarged ECOWAS regional markets provide incentives for private cross-border investments among member countries as well as FDI into

Group photograph of all the participants (comprising national consultants and ECOWAS Commission officials at the signing of the agreements between the national consultants of member states and ECOWAS Commission during the workshop in Lagos on 21st September 2010.

the region from the rest of the world. The establishment of optimum-sized industrial and service projects, constrained by the limited size of individual country markets, could be facilitated by common appropriate trade and macroeconomic policy regimes. For example, the economies of most individual ECOWAS member states are too small to support a viable steel industry, a sector pivotal to industrialization. The combination of a stable common regional investment climate, transport and communication infrastructure, and sound regional economic policy could provide adequate incentives for large-scale investment in manufacturing and service projects subject to economies of scale.

Regional economic integration theory suggests that the abolition of tariffs and other trade barriers produces an intra-regional trade creation effect that will be most prominent in sectors characterized by plant economies of scale and low transportation cost due to the enlargement of effective markets. The harmonized regional investment policy (i. e CIC) will nullify the import substitution motive of intra-ECOWAS FDI, and substitute it by free trade in the emerging single market, and will raise the scope of a regionally integrated network of affiliated firms that facilitates production rationalization and increases intra-firm trade. An intermediate outcome may be the substitution of intra-ECOWAS FDI induced by national barriers by intra-ECOWAS trade.

The location of each affiliated firm that undertakes a specific stage of production (vertical integration) or a specific variety of a product (horizontal integration) is made upon differences of local production conditions instead of local market needs. Economic convergence is the result and, in particular, the monetary integration smoother as differences between member states in factors affecting production conditions in areas of wages, interest rates, external economies, economic policies, are narrowed down substantially. It will also influence the flows of and the location choice between different member states of non-ECOWAS FDI that aim to servicing the unified regional market of West Africa.

An emerging single investment market within ECOWAS raises the scope for community production rationalization and the building of a

regionally integrated network of affiliated firms in the region under common ownership, taking advantage of local supply conditions differentiation, free intra-firm trade.

It would also lower the cross border coordination costs through the inter-country convergence of institutions, policies, attitudes, codes behaviour and the deregulation of market transactions. Firms within ECOWAS would then locate each value added activity in the most cost efficient site according to productivity-adjusted cost of inputs. If each production phase (vertical integration) or variety of a product (horizontal integration) is located where it takes advantage of increasing returns to scale, then, this may produce an intra-regional division of labour characterized by the geographical clustering of similar activities and products.

Besides, firms will continue to exploit intangible firm specific income and market power generating resources, such as brand names, managerial expertise and other non-codified information intensive assets, for which market failure is high via common ownership, through FDI rather than licensing or other lengthy transactions.

In general, harmonization of ECOWAS investment policies will accelerate liberalization, deregulation and privatization policies across national markets and sectors in the entire ECOWAS countries. It will also ensure the implementation of common competition policies, standards of treatment; harmonize asymmetries in business practices and regulations, administrative procedures and business support measures. Thus, it would facilitate the flow of FDI by decreasing information, adaptation and transaction costs of doing business and coordinating value added activities in different countries.

F. Approaches to Harmonization

Several member governments and their agencies regulate similar investment policies for the same or similar reasons in the region. Having more than one government or agency regulate an activity does not add anything to the effectiveness of any of the regulatory programs in

enhancing the public interest. Sometimes, multiple regulatory programs actually reduce each other's effectiveness. And, in almost every case, duplication and overlap result in additional costs that could be eliminated through harmonization without reducing the benefits of regulation.

Duplication and overlap in regulatory programs increase all of the types of regulatory costs identified above. In many cases, administrative costs are higher than they would be if duplication were reduced, especially if the result of harmonization is fewer governments or agencies regulating the activity.

National consultants are expected to indentify agencies in the national economy that are in charge of the various investment laws and collate them accordingly for harmonization into the sample framework giving to them by the Commission. These agencies include:

- National Investment Promotion Agencies
- Ministry of Commerce and Industry
- Ministry of Finance
- Chambers of Commerce and Industry
- Corporate Affairs Commissions
- National Stock Exchanges
- National Securities and Exchange Commission
- Inland Revenue Authorities
- Organised Private Sector Institutions
- National Standard Organizations
- National Central Banks
- National Customs Services
- National/Regional Business Laws Registries etc

Among the several approaches ECOWAS Commission expects consultants to take in conducting the harmonization include the following:

1. Streamlining of Processes:

In member States are agencies and governments working together to provide one integrated process and set of information and regulatory requirements for activities that require approvals from several different

The workshop for national consultants engaged in the harmonization of member states investment laws into the standard frame provided by ECOWAS Commission took place at Protea Hotel, GRA, Ikeja, Lagos from 21st -23rd September 2010.
In addition to allowing the consultants to know what the assignment entails, the workshop equally provided an opportunity for 14 of the 15 national consultants to sign their contracts of engagement.

From right to left: Mrs Onuoha, representing the Director of Legal Department; Mr Jonas Adunkpe, representing the Director of General Administration of ECOWAS Commission; and the national consultant from Benin at the workshop

From right to left: Mr Alfred Braimah, Director, Private Sector, making a presentation while Dr. Jonathan Aremu, Consultant, (ECIM) looks on

agencies. National consultants are required to identify these agencies to gather relevant information for the harmonization.

2. *Standardizing Requirements:*
Quite often the standards set by different regulatory programs in the same country differ slightly even when the objective of the regulatory programs are the same. It is the responsibility of national consultants to use the appropriate standards that fit into the frame given to the by ECOWAS Commission.

3. *Standardizing Regulatory Approach:*
Sometimes, different agencies or governments use different regulatory instruments to accomplish the same goal – one government might use licensing while another takes a more results-based approach. Also, the consultants will be expected to identify the instruments that are relevant to the one from ECOWAS Commission.

4. *Rationalizing Regulatory Jurisdiction:*
Sometimes the simplest and most effective way of reducing duplication and overlap is to reduce the number of governments and agencies that are regulating an activity. At this juncture it is not the responsibility of the consultant to discriminate between national institutions. His assignment is to gather relevant information from as many of them as are available in the national economy of their assignments.

G. Barriers to Harmonization

Given that harmonization has the potential to reduce costs without reducing the public interest benefits of regulation, what are the barriers that keep it from being successfully implemented in more areas? There are at least three:

- **Capacity** – harmonization can take an enormous amount of effort from staff and elected officials alike. It takes time, resources and long-term commitment. This is why ECOWAS Commission engaged you through a competitive approach.

- **Motivation** – there is often little reason for governments to put a high priority on regulatory harmonization. From their perspective, their regulatory programs may be achieving their objectives and there is little reason to change. Those who pay the costs of regulatory duplication and overlap may not be willing, or able, to make a case for reducing costs (note that it is not always those who are regulated that bear most of the costs, it may the general taxpayer, competitors of those who are regulated or the economy overall). Even if there are complaints, there may be special interests that strongly support the status quo, sometimes including those who are regulated. The national consultants will be expected to justify the assignment using the various arguments provided in this guideline.

- **Jurisdiction** – harmonization usually requires some or all of the governments and agencies involved to cede some of their authority. We provided a list above, but such list may be more in many member states. It has to be done any way.

To make a final argument in support of regional harmonization of investment laws, in spite of these barriers, perhaps one needs to draw an analogy from sports to show its necessity in attaining the goals of ECIM in the regional economic integration of the community. Let us call this sport the Regional Market Game. To play this sport, three things are required: (i) Players, (ii) A playing field, and (iii) Rules of the game.

Thus, one may say that in the sport of Regional Market Game, the players are the industries and consumers, while the economies of the member states of ECOWAS make up the playing field, and lastly, the community investment code (i.e. the CIC) provides the rules of the game. The viability of the game requires that the rules must be consistent throughout the playing field. This, in its simplest form, states the case for regional harmonization of investment laws in the ECOWAS which is being harmonised.

From left to right: Mr Peter Oluonye (Principal Programme Officer, Private Sector Department) addressing the participants while consultants from Burkina Faso, Cape Verde and Cote d'Ivoire listen attentively.

From left to right: Cross section of national consultants from Cote d'Ivoire, The Gambia, Ghana and Benin

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