

ISSUES IN THE IMPLEMENTATION OF ECOWAS SUPPLEMENTARY ACT ON COMMON INVESTMENT MARKET

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A. Objectives of Common Investment Market

The objectives of ECOWAS Common Investment Market (ECIM) are:

- a) To establish a competitive ECOWAS investment market with a more liberal and transparent investment environment amongst member states so as to:
 - Substantially increase the flow of investments into the region from both ECOWAS and non-ECOWAS sources;
 - jointly promote ECOWAS as the most attractive investment region;
 - strengthens and increase the competitiveness of ECOWAS economic sectors;
 - progressively reduce or eliminate investment regulations and conditions which may impede investment flows and the operation of investment project in ECOWAS; and
- b) To ensure that the realization of the above objectives would contribute towards free flow of investment by 2020

B. Features of the ECIM

The ECIM is expected to be an economic region where:

- a) There is a coordinated investment co-operation programme among Member States that will lead to increased investment from both ECOWAS and non-ECOWAS sources;
- b) National treatment is extended to ECOWAS investors by 2012 and to all investors by 2020, subjected to the exceptions provided for under the Supplementary Act;
- c) All industries are opened for investment to ECOWAS individuals and corporate citizens, and to all investors by 2020, subject to be exceptions provided for under Supplementary Act;
- d) The business sector has a larger role in the co-operation efforts in relation to investment and related activities in ECOWAS; and
- e) There is freer flow of capital, skilled labor and professionals, and technology amongst Member States.

C. General Obligations

To realise the objectives, ECOWAS Member States are expected to:

- a) Ensure that measures and programmes are undertaken on a fair and mutually beneficial basis;
- b) 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;
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- c) Begin the process of facilitation, promotion, liberalization and consequently harmonization of national investment laws towards a common code;
- d) Take appropriate measures to enhance the attractiveness of the investment environment of Member States for direct investment flows; and
- e) 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.

D. Programmes and Action Plans

ECOWAS Member States are expected to, for the implementation of the obligations under the Supplementary Act , undertake the joint development and implementation of the following programmes:

1. Cooperation and Facilitation Programme

Implementation of the Supplementary Act on ECIM demands putting in place effective Co-operation and Facilitation Programme Under such a programme, ECOWAS Member States would be expected to undertake the following both individual and collective initiatives-

(a) Individual Initiative to-

- i. 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;
- ii. Simplify and expedite procedures for applications and approvals of investment projects at all levels; and
- iii. Examine the various bilateral Agreements which they have committed themselves and subject them to the provisions of the Supplementary Act

Cooperation and Facilitation Programme(cont.)

b) Collective Initiative to-

- i. establish a database for ECOWAS (ECOWAS Portal) to enhance the flow of ECOWAS investment data and information on investment opportunities in the region;
- ii. promote public-private sector linkages through regular dialogues with the ECOWAS business community and other international organizations to identify investment impediments within and outside ECOWAS and propose ways to improve the ECOWAS investment environment;
- iii. 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;
- iv. review national investment policies towards a standard ECOWAS Investment Policy Framework (IPF); and
- v. Cooperate among themselves to emerge with an acceptable Common investment Code (CIC)

2. Promotion and Awareness Programme

In respect of the Promotion and Awareness Programme of the ECIM, Member States would need to cooperate among themselves with the support of ECOWAS Commission to:

- a) Organize joint investment promotion activities e.g., seminars, Workshops, inbound familiarization tours for investors from capital exporting countries, joint promotion of specific projects with active business sector participation;
- b) Conduct regular consultation among investment agencies of ECOWAS investment **promotion** matters;
- c) Organize investment-related training programmes for officials of investment promotion agencies (IPAs) in the region;
- d) Exchange lists of promoted sectors/industries where Member States could encourage investments from other Member States and initiate promotional activities; and
- e) Examine possible ways by which the investment agencies 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-

- a) Unilaterally reduce and eliminate restrictive investment measures and review their investment regimes regularly in line with Supplementary Act on towards regional IPF. In this context, member States would be expected to undertake actions to liberalize, among others:
 - (i) rules, regulations and policies relating to investment;
 - (ii) rules on licensing conditions;
 - (iii) rules relating to access to domestic finance; and
 - (iv) rules to facilitate payment, receipts and repatriation by investors.
- b). Undertake individual action plans to:
 - (i) Open up all sectors for investment to ECOWAS investors by 2015 and to all investors by 2020 in accordance with the provisions of the Supplementary Act; and
 - (ii) Extend national treatment to all ECOWAS investors by 2011 and to all investors by 2020 in accordance with the provisions of this Agreement; and
- c) Promote freer flow of capital, skilled labour, professionals and technology among ECOWAS Member State

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

E. Opening up of ECOWAS Sectors and National Treatment

Subject to the provisions of the Supplementary Act, each Member States is expected to:

- a) Open immediately its economic sectors for investments to other ECOWAS investors;
- b) Accord immediately to ECOWAS investors and their investments, in respect of all industries and measures affecting investment including but not limited to the admission, establishment, acquisition, expansion, management, operation and disposition of investments **treatment no less favorable than that it accords to its own like investors and investments (“National treatment”)**;
- c) At onset it is advisable that each Member States submits a **Temporary Exclusion List and a Sensitive List**, if any, within the first 12 months after the date of signing of the Supplementary Act, 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;
- d) In the event that 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;
- e) The Temporary Exclusion List should be reviewed every 2 years and shall be progressively phased out by 2020 by all Member States; and
- f)The Sensitive List would also be reviewed by ECIM every year.

F. Most Favored Nation Treatment

- a) 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 favorable that the 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.
- b) 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 **Most Favored Nation (MFN)** basis a to all other Member States.
- c) 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 signing of the Supplementary Act.

Waiver of Most Favored Nation Treatment

- a) 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.
- b) 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.

G. Modification of Schedules And Action Plans

- a) 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

- b) 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.

H. Transparency

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

I. Other Agreements

- a) It is clear from the Supplementary Act that the Authorities of Head of States 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.
- b) The Supplementary Act or any action taken under is not expected to affect the rights and obligations of the Member State under existing agreements to which they are parties
- c) 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.

J. General Exceptions

To guaranty national sovereignty of ECOWAS Member States, the Supplementary Act permit Member countries to engage in the measures and policies as long as such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between ECOWAS countries or a disguised restriction on investment flows. Such measures include those :

- a) Necessary to protect National Security and public morals;
- b) Necessary to protect human, animal or plant life or health;
- c) Necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the Supplementary Act including those relating to:
 - i. The prevention of deceptive and fraudulent practices or to deal with the effects of a default on investment agreement.
 - ii. 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.
 - iii. safety
- d) Aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of investment or investors of Member States.

K. Emergency Safeguard Measures

- a) 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 treat, 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.
- b) However, where such emergency safeguard measures are taken, approval of such measures would have to be secured be from the ECIM Council 14 days before the date such measures are taken.
- c) The ECIM Council is expected to determine the definition of serious injury and treat of serious injury and the procedures of instituting emergency safeguards measures that will not constitute an infringement to the provisions of the Supplementary Act.

K. Emergency Safeguard Measures (cont.)

Measures to Safeguard the Balance of Payment

- a) 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 on payments or transfers for transactions related to such commitments (see Article 10 of the Supplementary Act)
- b) It is recognized that particular pressures on the BOP of Member State 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.
- c) 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 14 days before the date such measures are taken.

However ,such measures :

- (i)Should not discriminate among ECOWAS Member States;

K. Emergency Safeguard Measures (cont.)

- (ii) Must be consistent with the relevant provisions of Articles of Agreement of the International Monetary Fund (IMF);
 - (iii) Must avoid unnecessary damage to the commercial, economic and financial interest of any other ECOWAS Member State.
 - (iv) Should not exceed those necessary to deal with the circumstances approved by the ECIM Council; and
 - (v) Must be temporary and be phased out progressively as the situation that necessitated the safeguard measures subsides.
- d) ECOWAS Member State 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.
- e) The ECIM Council would however determine the rules applicable to the procedures under Article 10 of the Supplementary Act

L. Institutional Arrangements

- a) 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 Investment Promotion Agencies (IPAs) in the region should participate in the ECIM Council meetings.

- b) The ECIM Council should be established now that the Supplementary Act is adopted to supervise, co-ordinate and review the implementation of the Common Investment Market and the Supplementary Act

- a) 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.

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

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

M. Settlement of Disputes

1. The Dispute Settlement Mechanism in Articles 33 and 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
2. 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.