

THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS) COMMON INVESTMENT MARKET VISION AND THE LEGAL CHALLENGES OF INVESTORS IN THE SUB REGION

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ABSTRACT

The legal regimes of protection of investments in ECOWAS region have over the years suffered not only from a lack of policy drive, but also a sustainable and development driven legal framework. Policy inconsistencies and consequent uncertainty on investment issues and the integration/ common market vision has become a mirage with the attendant legal challenges.

These challenges have impacted negatively on the psyche of both local and foreign investors who are genuinely desirous of investing in ECOWAS region. The need for an elaborate legal framework as they relate to the promotion and protection of foreign investments and the integration of the ECOWAS economy has been become pertinent, this paper has suggested the way forward.

Key Words: *Foreign Investment; Integration of ECOWAS Economy; Protection and Promotion of Investors; Single Market Vision.*

INTRODUCTION

In the last two decades of the 20th century, great changes have taken place in policies and legal structures relating to foreign investment. The rapid changes in foreign investment have found their expression in numerous bilateral and multilateral investment treaties. The proliferation of

such instruments have direct impacts on national sovereignty, federalism, and states' ability to regulate in areas such as, trade, investment environmental protection and human healthⁱ.

In the past, foreign investment was largely regulated domestically. In general, the only international rules that applied to some aspects of foreign investment were rules of customary international law, and their application was purely exceptional. With the adoption of bilateral investment treaties beginning in the 1980s, an international legal framework started to emerge. Both developed and developing countries were eager to negotiate investment rules in order to further transnational investment. Because domestic laws and policies can be changed unilaterally, while bilateral and multilateral rights and obligations cannot, industrialized countries have preferred to rely on treaties as a more stable basis for their companies wishing to invest abroad. Developing countries in transition on the other hand hope to attract foreign investment through the granting of extensive investor protection in treaties. They believe that the existence of an investment treaty will influence an investor in its choice whether or not to invest and that an increase in foreign investment will contribute to rapid economic development. Whether investment treaties actually benefit potential host states is debatable. A recent World Bank report refers to research which seriously questions the efficacy of existing bilateral investment treaties in assisting developing countries in attracting new investment flows. The report advises that 'unilateral reforms to liberalize foreign direct investment (FDI) are likely to have the greatest and most direct benefit for the reforming country; which is why ECOWAS as a body can be used to achieve a uniform idea in protecting a foreign investment within the region.

ECOWAS regional integration was established in 1975. It is a conglomerate of sixteen West African countries; that is, a mix of Anglophone, Francophone and Lusophone erstwhile colonial states.ⁱⁱ

At the 35th Summit of the Heads of States of ECOWAS on 19th of December 2008, the Supplementary Act on Common Investment Rules for the Community was adopted, and thus paved the way for the commencement of the regional common Investment Market.

This paper shall succinctly unravel and appraise the vision for the development of the ECOWAS Common Investment Market to which all stakeholders can give their respective

support. Investors have many other considerations for deciding whether or not to invest into a country or region, including political instability, infrastructure, security, labour costs or the presence of skilled labour. All countries and regions in the world today promote foreign investment as a vehicle for achieving economic growth and development. In ECOWAS, foreign investment has been a pivoted policy. However, how effective these frameworks have been in the promotion of foreign investment has continued to be a subject of varying economic and academic opinions in different circles. The fact remains that, notwithstanding the various agreements, conventions, policies and regulations, the general in built legal mechanism and regulations, have not given the desired goal or effect in terms of the promotion of foreign investment in the region.

THE PROPOSED STAGES OF ECONOMIC INTEGRATION AND THE LEGAL IMPLICATIONS

There are several stages identified by Economist on integration, they are five, a free trade area, common market, custom union, economic union and complete economic integrationⁱⁱⁱ Hence most regional syndicates tend to adopt this model in their pursuit for regional economic integration however it should be noted here that in most cases not all these stages are usually successful despite the proposed stages of economic integration as stated above other economist have nonetheless suggested that the first level of economic integration is a preferential trade agreement described as the weakest form of economic integration which is very restrictive" According to Hodgson and Herander^{iv}, A preferential trade agreement is where member nations offer a tariff reduction to participating countries but still maintain a higher tariff on products from a non participating member nation and again individual members operate with different common external tariff. All of these theories are yet to yield any result whatsoever, then the single market strategy.

Single market is one of the ambitions of ECOWAS founding fathers since 1975^v. To individuals, the intention of the fathers was that a single market for the community will offer an ECOWAS citizen the right to live, work, study or retire in another West African Country. For consumers, it means higher quality and safety standards, and a wider choice of products

and services at lower prices. For business, it means operating on a common set of rules and access to a regional and domestic market, and thus enjoying economies of scale, to service about 300 million consumers and improved competitiveness. For ECOWAS as a whole, it means a more open society and competitive economy in which new opportunities are created, social rights are respected and high standards of health, and safety for life, businesses and the environment prevail.

From the above expectations, the single market initiative is much more than just an economic policy decision of ECOWAS mission as it would be accompanied by a social and regional policy agenda, and appropriate structural initiatives that will allow citizens of the community to be linked up to and benefit single market economy is expected to become a symbol of the willingness of the ECOWAS Members States to work together, in full respect of the rule of law and with mutual respect and trust in the various social and economic interactions. This expectation till date has been defeated, in Benin Republic, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo and Burina Faso.

For example, Ghana has made several attempts to be ahead of other countries within the region, doing business in Ghana, the Citizens and government have upper hands, Investors are given options and they are quite stringent conditions. In Ghana business can be conducted under either a limited liability company (local company) incorporated under the laws of the Republic of Ghana or an external company (branch). The regulator responsible for this is the Registrar General Department (RGD).

There two major ways of setting up of business in Ghana, and they are thus: There is a company limited by shares incorporated under the Ghana Companies Act^{vi}. A subsidiary can either be wholly or partly owned by a Ghanaian or a non-Ghanaian, but there conditions attached. While An external company (also known as a branch) is a body corporate formed outside the Republic of Ghana that has an established place of business in Ghana.

Aside the Registrar General Department, Ghana has other statutory bodies that dedicate the pace of the nature of business, for instance, Ghana Free Zone Board, Ghana Investment Promotion Centre^{vii}, Mineral Commission, Petroleum Commission, National Communication

Authority, Foreign Currency Account, Foreign Exchange Account, Ghana Revenue Authority and other related bodies.

The investment regulation of Ghana has processes to establish investors-foreign and local before final license is approved by the regulatory authorities. Investors intending to do business in Ghana first have to register as business entities (i.e. Limited Liability Company, partnership or sole proprietorship) with the Registrar-General's Department under the relevant laws as indicated earlier indicated. Enterprises with any foreign participation (i.e. wholly foreign-owned enterprises or joint ventures) must then register with Ghana Investment Promotion Centre (GIPC) indicating the amount of foreign capital invested. Under the GIPC Act, minimum capital required for foreign investors who participate in enterprises is USD 200,000 while Wholly Foreign-Owned Enterprises (WFOE) must have a paid-up capital equivalent to USD 500,000 (Ghana Investment Promotion Centre [GIPC], Ghana Investment Promotion Centre. Starting a business—Ghana investment promotion centre. All of these have constituted challenges to investors in Ghana

A foreign investor is required to satisfy the minimum equity capital requirements; either in cash or its equivalent in goods, plant and machinery, vehicles or other tangible assets imported to establish the enterprise^{viii} Registration with Ghana Revenue Authority for purposes of determining the statutory tax (e.g. taxes, rebates, and exemptions thereof) and Environmental Impact Assessment Certificate from the Environmental Protection Agency (EPA) are required as part of the registration and licensing approval, and all stages of the registration has applicable fees at the cost of the investor^{ix}. Depending on the sector under which the business is registered, the investor(s) may have to register with the association of the sector and also gain certificate to commerce or operate business from the municipal district assembly. All of these are quite frustrating in practice.

Flowing from the aforesaid, ECOWAS single market initiative is going to be a dynamic one, constantly evolving and adapting to new realities. As such it will never be “finalized” or “complete”. For this purpose, a solid regulatory framework is being put in place to guide rules of harmonization and the simplification process towards the implementation of the single market economy, with this position, investors will not be frustrated.

Since the benefits^x of the single market to consumers and small businesses must be preserved, with gains being fully passed on to all ECOWAS citizens, new forms of rules governing free movement of various factors of production would be put in place. While the initial focus of, say a national investment market exercise would be on removing the main cross-border obstacles facing businesses, a single investment market is being envisaged by ECOWAS to make the economic integration of the community to work better and deliver even more tangible benefits to the regional citizens, entrepreneurs, workers and consumers alike. Consequently, ECOWAS Heads of States on 19th December, 2008 adopted the supplementary Act and Investment Policy Framework to facilitate the simplification and harmonization of the various investment laws in the region towards a Community Investment Code (CIC) for the takeoff of the Common Investment market.

No doubt, the single investment market economy for ECOWAS in the 21st century needs to recognize the dynamics of globalization which offers many opportunities alongside intensified competitive pressure to be faced by ECOWAS businesses. Of course, the globalization process has increasingly blurred the distinction between the internal and external markets. This is why ECOWAS single investment market is being designed to give the community a solid foundation upon which to adapt these un-modifiable changing realities brought about by globalization metro-line to the peculiarities our region. It also needs to evolve and adapt itself to these emerging realities in order to retain its relevance and its contribution to Economics growth and social cohesion of our Community. ECOWAS Commission wants our single investment market economy to equally position itself ready to foster the development of quality rules and standards that are capable of shaping global norms towards benefiting ECOWAS citizens and businesses without violating our commitments to various multilateral institutions to which we are signatory.

VISION FOR ECOWAS COMMON INVESTMENT MARKET IN THE 21ST CENTURY

It is now understood that the 21st century ECOWAS is indivisible from the current world economy. Its prosperity has and will continue to flow from dismantling barriers and creating

open markets. This openness will be made possible and facilitated by a strong regulatory framework at national, regional and global levels. A major challenge of the 21st century facing the emergence of ECOWAS single investment market will therefore be to adopt the 1975 ECOWAS Treaty provisions and its revised version to secure the right regulatory framework, to ensure that regional markets function properly, to promote competitiveness, and to respond to the dynamism and change that flows directly from ECOWAS's engagement with the rest of the world economy.

Believing that the region needed to come together to resolve its own problems by itself, ECOWAS Treaty, among other provisions relating to Common Investment market stated in Article 1(d)-(g) the following:

- 1(d) Eliminate obstacles restricting the free movement of persons, services and capital between member countries;
- 1(e) Harmonize agricultural policies and promote common projects in the member states notably in the field of marketing, research and agro-industrial enterprises;
- 1(f) Implement schemes for the joint development of transport, communication, energy and other infrastructural facilities as well as the evolution of a common policy in these fields; and
- 1(g) Harmonize economic and industrial policies of member states and eliminate disparities in the level of development of member states.

The above four provisions of ECOWAS Treaty are basic attributes of Common Market in any economic integration model. These provisions therefore provide the basis for the Common Investment Market which is being embarked upon. The goal of the 21st century common or single investment market for the community however, is to make it work for the benefit of the regional citizens, consumers and businesses alike in spite of the current globalization process. It is also to promote a more competitive and sustainable ECOWAS Community in preparation for her to effectively compete in the multilateral environment.

However, the region has to ensure that the opening of the investment market and the consequent increasing competition that will result will offer fair commercial practices, so as to maximize consumers' welfare as well as to contribute to economic growth of the Community. The

functioning of ECOWAS single investment market, supported by a sound but flexible regulatory framework and a stable currency, will thus become a means to many ends. It will be a key to improving the quality of life, fostering innovation, facilitating economic growth, providing jobs and generating benefits for ECOWAS businesses and consumers. It is means to respond to and shape the forces of globalization, as it will foster internal competition which is essential in the preparation for external competitiveness of the community. It will stimulate a common approach to standards for safety, health in the workplace and the environment required for a single investment market without distortions.

EXPECTATION OF 21ST CENTURY ECOWAS SINGLE INVESTMENT MARKET

In a nutshell, the following are what we expect of a 21st century ECOWAS single investment market.

1. Single Investment Market for Consumers and Citizens.

ECOWAS Common Investment Market would be expected to generate benefits for consumers by enlarging choice and lowering prices as well as protect them through food and product safety standards, substantial privacy rights and guarantees against unfair competition and trading. The single investment market would particularly be effective in bringing down prices and increasing choice in areas such as goods and services as well as cross-border payments among others. It would genera job opportunities, allow greater movement of resources, persons and thus facilitate factor (human and material) mobility. In addition; its benefits would be more tangible across a range of economic activities as it will improve confidence in the quality of products and services available in the region. This applies not only to domestic products and services but also to imports into the ECOWAS Community.

In addition, the consequent rise in transactions among the Community economic actors would make it particularly important to empower consumers effectively and to reduce the fragmentation of consumer protection rules across the entire region.

2. Single Investment Market for an Integrated Economy

A well-functioning, more integrated single investment market and a fair and effective competition framework are essential to ensure a level-playing field among enterprises across ECOWAS countries. The market will equally encourage them, in particular SMEs, to engage more in cross-border activities (including mergers) so as to enjoy economies of scale, which will allow them to compete in the multilateral environment. With the momentum towards an ECOWAS labour market, new forms of mobility will definitely emerge and rules governing the free movement of workers across ECOWAS countries, modernized to facilitate expansion possibilities. With the use of a common currency, which is already in the regional action program the benefits of the single investment market will become more beneficial, by allowing it to reach its full potential. The single currency (i.e. Eco) will bring transparency to the regional single investment market, allowing consumers to compare the prices of goods and services directly, and firms to compare inputs costs more easily.

By creating deeper, more flexible and diversified pan –ECOWAS financial markets, the single investment market and the single currency together will improve financing conditions for both private citizens and businesses and enhance the resilience of the ECOWAS region to external financial shocks. The pursuit of investment activities in trans-ECOWAS-networks and markets would permit vertical and horizontal integration of business activities and thus contribute to the further integration of the ECOWAS economy.

3. Single Investment Market for a Knowledge Society

The single investment market would increasingly focus on making markets for knowledge and technology intensive goods and services work better, encouraging dynamic fast-growing sectors and creating market conditions that will stimulate innovation through the emergence of lead markets. In its present state, ECOWAS investment markets are still too fragmented along national lines in areas of crucial importance to the knowledge economy, such as telecoms. Improving the cost-effectiveness, quality and legal certainty of the system of intellectual property rights and spreading the use of new information and communication technologies on a pan-

ECOWAS basis through Common Investment Market will generate economies of scale to tap the regional research and innovation potentials.

4. Single Investment Market for a Well Regulated ECOWAS Region.

The success of the single investment market will definitely depend in part, on the establishment of a consistent and effective set of regional rules through the simplification and harmonization of the existing national code into a regional Common Investment Code (CIC). The single investment market will therefore involve simplification, and harmonization of existing rules and procedures, replacing national rules and regulations in many areas with a common set of Community wide rules. The dismantling of national investment laws into a single regional code will go hand in hand with the establishment of new rules through harmonization or mutual recognition of national legislation, including the respect of labour rights and the adoption of laws on health, safety and environmental protection.

With the passage of time and experience gained in the simplification and harmonization process, the common investment laws being implemented will be examined regularly to discover if they are generating the impact originally foreseen. It is important to say that the benefits of the ECOWAS single investment market will not materialize if the harmonized rules are not correctly applied, if laws are not implemented, if the rights created are not satisfactorily upheld and redressed, if regulation prove too costly to apply by ECOWAS member states, or if rules are abused (or instance by anti-competitive behavior or illegal trafficking).

Consequently, the simplification and harmonization of investment market rules will constantly be evaluated and reviewed to improve their implementation as well as to attend to emerging issues arising from them. This will however require close coordination between the national regulatory authorities of investments in member states and the Private Sector Directorate of the ECOWAS Commission. Such coordination will equally be reinforced by administrative cooperation among the Member States themselves, through the use of information technology, in fields such as financial services, competition and consumer law, justice, tax, customs and policing.

The foundation of the harmonization and simplification will require a critical assessment of how existing investment laws of member states can be improved to see what works and what does not, to explore how administrative burdens can be reduced and to make the changes needed including through simplification and/or repeal of some national legislation.

5. Single Investment Market for a Sustainable ECOWAS Community

The single investment market for the community with basic market freedom for various economic actors to operate is going to be a catalyst for change, driving innovation, productivity and growth. It will in turn create better economic prosperity on which the wellbeing and a better quality of life of the entire ECOWAS individual and corporate citizens depend. It is envisaged that people are likely to raise concerns about the perceived disruptive impact of such a regional globalization. Since such anticipation is based on the belief that the Common Investment Market should be social justice sensitive, measures will be put in place to resolve positive/negative impact in the implementation of the Common Investment Market on individuals, corporate organizations and member states. Ensuring that the single investment market sustains and promotes high levels of environmental protection is also necessary. ECOWAS Commission recognizes that both the social and environment aspects of the single investment market are key conditions for gaining public confidence in the common investment process. To this end, the market will be operated as a means to improve the quality of life, and would therefore be accompanied by regional development, lifelong learning, social and environment policies that will equip people, businesses and territories to adapt to and benefit from the change.

6. Single Investment Market opened to the World

It is understood that ECOWAS cannot secure prosperity by looking inwards alone under the current globalization process. It needs to exploit and build on its internal strengths to appropriately compete in the world economy. The common Investment Market will make ECOWAS attractive for investors and companies from across the world. It will spur the development of rules and standards in areas such as product safety, the environment, securities and corporate governance as well as compliance

global standards and settings on investment flows. It will equally give the ECOWAS region the potential to shape global norms and to ensure that fair rules are applied to worldwide trade and investment issues. ECOWAS single market should be seen as the launching pad of an ambitious global agenda for the Community to effectively act in a multilateral environment.

DELIVERING ECOWAS COMMON INVESTMENT MARKET VISION

It is important to warn here that collapsing the existing investment barriers into a Common Investment Code without developing an ECOWAS wide regulatory framework to preserve public interest will not lead to lasting integration. A range of structures in various policy domains (internal market, competition, tax and customs etc) are being contemplated in the Private Sector Directorate of the ECOWAS Commission to be used to create, implement and sustain the single investment market initiative. These tools need to be used more effectively and coherently. Recent efforts in applying “Better Regulation” principles, namely in conducting impact assessments, carrying out stakeholder consultations, and seeking practical solutions to implementation of the various ECOWAS programmes would be continued in the pursuit of the simplification/harmonization of national investment laws into a regional code. The integrated investment market based policies that will be established, will be well formulated while the existing national laws and regulations in all sectors will be systematically reviewed, revised and harmonized to ensure that they are having the desired impacts and to ensure that their application does not entail unnecessary administrative costs or burdens to individuals, corporate organizations and member state government in ECOWAS. For the establishment and the maturing of the single investment market therefore, the following new approaches will be pursued:

1. More impact-driven and result-oriented Approached

Whereas national investment policy is aimed at removing cross border barriers to investment, mainly through regulatory means, the emphasis of ECOWAS Common Investment Market will be at ensuring a better functioning of the entire regional market for the benefit of citizens, consumers and entrepreneurs of the community, with a view to promoting a competitive

business environment, respect for consumer's choice that is socially and environmentally responsible. The Common Investment Market desired for ECOWAS should be able to anticipate structural adjustments needed in the course of its implementation and assess their consequences so as to install appropriate measures needed to achieve better results. This requires:

- * Improved assessment of citizens', consumers' and business' needs, not just from an economic perspective, but in terms of choice and satisfaction;
- * Closer monitoring of market functioning and performance, both at a sectoral and economy-wide level, including through sector-specific enquiries; and
- * Improved assessment of the social impact of further integration and of the opening up of sectors to competition, and of the ways in which national and ECOWAS cohesion programmes can help assist the anticipation and adaptation to changes linked to economic integration.

2. More effective Approach

It is understood that formulating and implementing the strategy to achieve the Common Investment Market economy for ECOWAS is not going to be an easy task. Despite this, ECOWAS Commission will continue to play its key role as guardian of the Treaty, using all the instruments and strategies at its disposal, and acting as the guarantor of the bargain of trust between the Member States in the Implementation of the Common Investment Market initiative. In playing this role it will need to take account of the increased diversity in a Union of the 15 Members States and to find ways to build on best practice and foster trust on which the system of mutual recognition is built under the regional economic integration. At the same time, the regulatory environment under the single investment market economy initiative will be flexible enough to respond to the ever increasing pace of change that is desirable to the community objectives. Therefore, a diverse and flexible mix of instruments will include:

- * Finding the right balance between simplification/harmonization and mutual recognition of rules and between the use of directives and regulations, tailoring the instrument to the desired result;
- * Developing tools that complement legislation, such as the work of national agencies, guidance, exchange of best practices, self-and co-regulation;

- * Stepping up efforts to simplify and modernize existing rules, including through the screening of national legislation and cooperation mechanisms.
- * Pro-active enforcement of competition rules, and
- * Improved application of an enforcement of ECOWAS law through a more efficient management of infringement procedures and the fostering of non-judicial, problem-solving mechanisms.

3. More Decentralized and Network-based Approach

Admittedly, it is obvious that the existing ECOWAS institutions managing investment rules cannot deliver an effective single investment market on their own. We need to re-think how to involve all relevant actors and to improve ownership of the single investment market in the member States under a common umbrella structure without destroying national institutions. This would among others include.

- * Strengthening the role of national regulators and improving the cooperation and networking of Members States' administrative, judicial and regulatory authorities; and
- * Promoting a better coordination between the authorities in charge of the various aspects of the single investment market policies (investment, trade monetary and etc) at national level, as well as between the national regulatory agencies and the ECOWAS Commission.

4. More Responsive to the Global Context Approach

Like other regions of the world, ECOWAS must think globally. To this end, a well functioning Common Investment Market for the region is needed to allow ECOWAS to compete in the global market place and use the Common Investment Market initiative to exploit globalization to its regional advantage.

The Single Investment Market priorities must therefore be linked to ECOWAS global agenda at the various multilateral level especially with the global governance institutions such as World Trade Organization (WTO), International Monetary Fund (IMF) and World Bank, as

well as the recent set of multilateral trade negotiations, particularly the economic partnership agreements (EPAs) with European Union (EU). In addition, the Common Investment Market initiative should also:

- extend the aspects of single investment market policy through all other ECOWAS neighbourhood policies;
- Increase benchmarking of ECOWAS common investment rules against practices in non-ECOWAS countries;
- Do more systematic monitoring of imports and consumption prices to check if benefits of openness to global markets are being passed on to ECOWAS consumers;
- Promote greater global regulatory convergence – including where appropriate the adoption of global standards-internationally through international organizations and bilateral agreements;
- Support global governance supervisors (.e. IFM, WTO and World Bank) and private regulators in deepening international and regional cooperation and;
- Reinforce and properly negotiate all bilateral regulatory cooperation with ECOWAS's main trading partners (particularly with EU) as activities of such partners could have negative effects on the Common Investment Market of the community.

5. More Accessible and Better Communicated Approach

Regional citizens, companies, local and regional authorities should be able to understand and be convinced to invest in the many opportunities the single investment market in ECOWAS would offer. They should be able to find clear answers to their various questions or problems through the harmonization/simplification of the various policies affecting investment into a single code for the community in a transparent manner. To facilitate the dissemination of the required information a lot will be done to improve communication of the single investment market initiative to the stakeholders and to publicize the opportunities offered by a more integrated.

CONCLUSION

An Investment comprises a comprehensive and systematic approach for improving investment condition in a community. It is based on principles of the rule of law, transparency, predictability, and non-discrimination, in tandem with human rights, public and corporate sector integrity^{xi}.

Therefore, flowing from the foregoing, there should be an urgent policy which is to be developed through an open and inclusive process that involved assessments of the current prevailing situations in Member States, this will be design to help Member States address the investment challenges facing the Community as well as to attract the inflow of investment from within and outside in a cohesive and broad-based manner.

The ECOWAS Commission recognizes that an effective investment policy must address the following key areas. Laws and Regulation, Effective Ownership Registration, Intellectual Property Rights, Contract Enforcement, Exportation Laws and Review Processes. Non-Discriminatory Treatment for National and Foreign Investors; International Cooperation and Periodic Review, and any Dispute Resolution Mechanism.

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