

# ECOWAS Supplementary Act on Investments

THE HIGH CONTRACTING PARTIES

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

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

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

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

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

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

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

HAVING CONSIDERED the opinion of the ECOWAS Parliament;

ON THE RECOMMENDATION of the sixty first ordinary session of the Council of Ministers, held in Ouagadougou from 27 29 November 2008.

AGREE AS FOLLOWS:

## Chapter I. General Provisions

### Article 1. Definitions

(a) "company" means any corporate entity constituted or organized under the applicable law of any ECOWAS Member State, whether or not for profit, and whether privately or governmentally owned or controlled;

(b) "national" means a person who is a citizen of any Member State of ECOWAS;

(c) "investment" means

i) a company;

ii) shares, stock and other forms of equity participation in a company, and bonds, debentures and other forms of debt interests in a company;

iii) contractual rights, such as under turnkey, construction or management contracts, production or revenue-sharing contracts, concessions or other similar contracts;

iv) tangible property, including real property; and intangible property, including rights, such as leases, mortgages; liens and pledges on real property;

v) rights conferred pursuant to law, such as licences and permits provided that:

- Such investments are not in the nature of portfolio investments which shall not be covered by this Supplementary Act;
- There is a significant physical presence of the investment in the host State;
- The investment in the host State is made in accordance with the laws of that host State;
- The investment is part or all of a business or commercial operation; and
- The investment is made by an investor as defined herein.

(d) "investor" is any individual or company of any Member State of ECOWAS or a company that has invested or is making an investment in the territory of a Member State;

(e) "measures" includes any legal, administrative, legislative, judicial or policy decision that is taken by the host State, directly relating to and affecting an investment in the territory of the host State, but does not include measures in draft form;

(f) Member State, means a State of ECOWAS

(g) "home State" means a Member State of ECOWAS from where the investment or the investor comes;

(h) "host State" is the ECOWAS Member state where the investment is located;

(i) "ECOWAS" means the Economic Community of West African States whose creation was reiterated by Article 2 of the Revised Treaty.

(j) "Third Country" is any other State which is not a member of ECOWAS

(k) "ILO" means the International Labor Organisation

## **Article 2. Adoption of the Regional Instrument**

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

## **Article 3. Objective**

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

## **Article 4. Scope of Coverage**

(1) This Supplementary Act applies to all investments by an investor, whether the investment is made before or after the entry into force of this Supplementary Act.

(2) This Supplementary Act applies to any measure adopted or maintained by a Member State, after the entry into force of this Supplementary Act by a governmental authority of the host State.

(3) This Supplementary Act does not create retroactive obligations or responsibilities for investors. However investors who are not in compliance with on going obligations and responsibilities shall seek to comply with them within twenty four (24) months of the entry into force of this Supplementary Act.

# **Chapter II. Standards of Treatment to Member States' Investors**

## **Article 5. National Treatment**

(1) Each Member State shall accord to investors of another Member State treatment no less favourable than that, which it accords, in like circumstances to any other investor operating in its territory, with respect to the management, conduct, operation, expansion and sale or other disposition of investments.

(2) Each Member State shall accord to investments of investors from another Member State treatment no less favourable than that which it accords, in like circumstances, to investments of its own investors with respect to the, managements, conduct, operation, expansion and sale or other disposition of investments.

(3) The treatment accorded by a Member State under Paragraphs (1) and (2) means, with respect to a local authority, treatment no less favourable than that which it accords, in like circumstances, to investors within the Community.

(4) The concept of "in like circumstances" requires an overall examination, on a case by-case basis, of all the circumstances of an investment, including notably:

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

## **Article 6. Most-favored-nation Treatment**

(1) This Article applies to:

- a) all measures of a Member State covered by this Supplementary Act, and
- b) all the substantive provisions of other international agreements on investment that enters into force after this Supplementary Act has entered into force.

(2) Each Member State shall accord to investors of another Member State treatment no less favourable than that it accords in like circumstances, to investors of any other state within the Community with respect to the management, conduct, operation, expansion, sale or other disposition of investments.

(3) Each Member State shall accord to investments made by investors of another Member State treatment no less favourable than that it accords in like circumstances, to investments made by investors of any other Member State of the Community or of a third party with respect to the management, conduct, operation, expansion, sale or other disposition of investments.

(4) Each Member State shall accord to investors of another Member State and to investments made by investors from other Member States, the better of the treatment required by this Article, and the national treatment obligation.

(5) Paragraphs (2) to (4) above do not oblige a State within the Community to extend to the investors of another Member State the benefit of any treatment, preference or privilege contained in:

- i) any existing or future customs union, free trade area, common market agreement or any international arrangement relating to the current or future environment to which the investor's home State is not a Party, or
- ii) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

## **Article 7. Minimum Regional Standards**

(1) Each Member State shall accord to investors from a Member State or their investments, treatment in accordance with customary international law, including fair and equitable treatment and reasonable protection and security under the domestic law. This obligation shall be understood to be consistent with the obligation of ECOWAS Member States.

(2) Paragraph (1) prescribes the customary usage of international law minimum standard of treatment of aliens as the minimum standard of treatment to be accorded to investments. The concepts of "fair and equitable treatment" and "full protection and security" are included within this standard, and do not create additional substantive rights.

(3) Each Member State shall accord to investors and their investments non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

(4) Notwithstanding Paragraph (3), if an investor of a State, in the situations referred to in that Paragraph, suffers a loss in the territory of another Member State resulting from:

- i) requisitioning of its investment or part thereof by the latter's forces or authorities; or
- ii) destruction of its investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation, the host State within the Community shall provide the investor restitution or compensation, which in either case shall be prompt, adequate and effective; and with respect to compensation, shall be in readily convertible form.

## **Article 8. Expropriation**

(1) No Member State may directly or indirectly nationalize or expropriate an investment in its territory ("expropriation"), except:

- a) for a public purpose;
- b) on a non discriminatory basis;
- c) in accordance with due process of law; and
- d) on payment of compensation in accordance with Paragraphs (2) to (6).

(2) Appropriate compensation shall normally be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value;

(3) Compensation shall be paid without delay and be fully realizable;

(4) Payment should be made in a convertible currency and compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.

(5) On payment, compensation shall be freely transferable. Awards that are significantly burdensome on a host State may be paid yearly over a period of three (3) years or such other period as may be agreed by the Member States, subject to interest at the rate established by mutual consent.

(6) This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with applicable international agreements on intellectual property.

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

## **Article 9. Senior Management and Boards of Directors**

(1) No Member State may require that an investor appoint to senior management positions individuals of any particular nationality.

(2) No Member State may require that some members of the board of directors or any committee thereof, of an investment, be of a particular nationality, or resident in the territory of that State, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

(3) Subject to generally applicable rules of entry, no Member State may unduly restrict or prevent the cross-border movement of staff engaged in respect of investments from another Member State.

## **Article 10. Transfers of Assets**

(1) Each Member State shall permit all transfers relating to an investment to be made freely and without delay. Such transfers include:

- a) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns, physical assets and other amounts derived from the investment;
- b) proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;

- c) payments made under a contract entered into by the investor or its investment, including payments made pursuant to a loan agreement;
- d) payments made pursuant to Article 8 of this Supplementary Act; and
- e) payments arising under any dispute settlement process.

(2) Each Member State shall permit transfers to be made in a freely convertible currency at the market rate of exchange prevailing on the date of transfer with respect to spot transactions in the currency to be transferred.

(3) Notwithstanding Paragraphs (1) and (2), a host State within the Community may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:

- a) bankruptcy, insolvency or the protection of the rights of creditors;
- b) issuing, trading or dealing in securities;
- c) criminal or penal offences;
- d) transfers of currency or other monetary instruments; or
- e) ensuring the satisfaction of judgments in adjudicatory proceedings

(4) Notwithstanding Paragraph (2), a host State may restrict transfers or returns in circumstances where it could otherwise restrict such transfers under this Supplementary Act.

## **Chapter III. Obligations and Duties of Investors and Investments**

### **Article 11. General Obligations**

(1) Investors and Investments are subject to the laws and regulations of the host State

(2) Investors and investments must comply with the host State measures prescribing the formalities of establishing an investment, and accept host State jurisdiction with respect to the investment.

(3) Investors shall strive through their management policies and practices, to contribute to the development objectives of the host States and the local levels of government where the investment is located.

(4) An investor shall provide such information to a potential host State Party to this Supplementary Act, as that Party may require,

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

### **Article 12. Pre-establishment Impact Assessment**

(1) Investors and Investments shall conduct an environmental and social impact assessment of the potential investment. Investors or the investments shall comply with environmental assessment screening criteria and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the host Member State for such an investment or the laws of the home State for such an investment. The investor shall comply with the minimum standards on environmental and socio-cultural impact assessment and screening that the Member States shall adopt at the first meeting of the Parties, to the extent that these are applicable to the investment in question.

(2) Investors or the investments shall make the environmental and social impact assessments accessible in the local community and to affected interests in the host State where the investment is intended to be made prior to the completion of the host State measures prescribing the formalities for establishing such investment.

(3) Investors, their investments and host State authorities shall apply the precautionary principle to their environmental and social impact assessment. The application of the precautionary principle by investors and investments shall be described in the environmental and social impact assessment they undertake.

## **Article 13. Anti-corruption**

(1) Investors and their investments shall prior to the establishment of

An investment or afterwards, refrain from involving themselves in corrupt practices as defined in Article 30 of this supplementary Act.

(2) Investors and their investments shall not be complicit in any act described in Paragraph (1) of this article, including incitement, aiding and abetting, and conspiracy to commit or authorization of such acts.

(3) The acts referred to Paragraph 1 and 2 shall be punishable in conformity with the provisions of Article 30 of this Supplementary Act.

## **Article 14. Post-establishment Obligations**

(1) Investors or investments shall, in keeping with best practice requirements relating to their activities the size of their investments, strive to comply with on hygiene, security, health and social welfare rules in force in the host country.

(2) Investors shall uphold human rights in the workplace and the community in which they are located. Investors shall not undertake or cause to be undertaken, acts that breach such human rights. Investors shall not manage or operate the investments in a manner that circumvents human rights obligations, labour standards as well as regional environmental and social obligations, to which the host State and/or home State are Parties

(3) Investors shall not by complicity with, or in assistance with others, including public authorities, violate human rights in times of peace or during socio-political upheavals.

(4) Investors and investments shall act in accordance with fundamental labour standards as stipulated in the ILO Declaration on Fundamental Principles and Rights of Work, 1998.

## **Article 15. Corporate Governance and Practices**

In accordance with the size and nature of an investment,

(1) Investments shall comply with and maintain national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices.

(2) Investors and relevant public authorities of the host State(s) shall make available to the public, any investment contract or agreement with the host State government(s), subject to the law governing the release of confidential business information.

(3) Investors shall, where appropriate, establish and maintain with the local community, liaison processes in accordance with regionally accepted standards.

(4) Where relevant regionally accepted standards of the type described in this Article are not available or have been developed without the participation of member countries, the Community shall establish such standards.

## **Article 16. Corporate Social Responsibility**

(1) In addition to the obligation to comply with:

- All applicable laws and regulations of the host Member State;
- And the obligations in this Supplementary Act and in accordance with;
- The size, capacities and nature of an investment, and taking into account;
- The development plans and priorities of the host State;
- The Millennium Development Goals and;
- The indicative list of corporate social responsibilities agreed by

The Member States.

(2) Where standards of corporate social responsibility increase, investors should endeavour to apply and achieve the higher level standards.

## **Article 17. Investor Liability**

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

## **Article 18. Relation of Investor's Liability to Dispute Settlement**

(1) Where it is established by a court of competent jurisdiction of the host State that an investor has breached Article 13 of this Supplementary Act, the investor shall not be entitled to initiate any dispute settlement process established under this Supplementary Act. A host or home State may raise this as an objection to jurisdiction in any dispute under this Supplementary Act.

(2) Where an investor is alleged by a host Member State or an intervener in a dispute settlement proceeding under this Supplementary Act to have failed to comply with its obligation relating to preestablishment impact assessment, the tribunal hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or offsetting effects this may have on the merits of a claim or on any damages awarded in the event of such award.

(3) Where a host Member State or home Member State believes that an investor or its investment has breached Article 13 or has persistently failed to comply with its obligations under Article 14 or 15, and such investor or investment has been notified by the host Member State or home Member State, as appropriate, either the host Member State or the home Member State may initiate proceedings before a tribunal established by this Supplementary Act.

(4) Where a persistent failure to comply with Article 14 or 15 is raised by a host Member State defendant or an intervener in a dispute settlement proceeding under this Supplementary Act, the tribunal hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages award in the event of such award.

(5) A host Member State may initiate a counterclaim before any tribunal established pursuant to this Supplementary Act for damages resulting from an alleged breach of the Supplementary Act.

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

## **Chapter IV. Host State Obligations**

### **Article 19. Procedural Fairness**

In accordance with the requirements of Article 7

(1) Host Member States shall ensure that their administrative, legislative and judicial processes do not operate in a manner that is arbitrary or that does not deny administrative and procedural fairness to investors and their investments. Investors or investments shall be notified in a timely fashion of administrative or judicial proceedings and changes thereof directly relating to them, unless such notice is contrary to domestic law on an exceptional basis.

(2) Hosts Member States shall act in a manner that does not create a denial of justice injudicial and administrative proceedings.

(3) Administrative decision-making processes shall include the right of administrative appeal of decisions, commensurate with the level of development of the host Member State. Judicial review of administrative decisions should also be available through domestic or regional judicial review processes.

(4) Notwithstanding the differences in administrative, legislative and judicial systems, Member States shall strive to improve the transparency, efficiency, independence and accountability of their legislative, regulatory, administrative and judicial processes, and shall provide review or appeal procedures to ensure that they operate in accordance with applicable

domestic laws.

(5) Judicial and administrative review processes shall be open to the public and documents shall be accessible by the public unless prohibited in accordance with domestic and regional laws. Decisions of such bodies shall however be available to the public.

## **Article 20. Maintenance of Environmental and other Standards**

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

## **Article 21. Minimum Standards for Environmental, Labour and Human Rights Protection**

(1) Each Member State shall ensure that its laws and regulations provide for appropriate levels of environmental protection and shall strive to continue to improve those laws and regulations.

(2) Each Member State shall ensure that its laws and regulations provide for high levels of labour and human rights protection appropriate to existing regional and international treaties that it enters into, and shall strive to continue to improve these laws and regulations.

(3) All Member States shall have a domestic social, health and environmental impact assessment laws that meet the minimum standards adopted by the Community on these matters.

(4) All Member States shall ensure that their domestic laws and policies are consistent with the ILO Declaration on Fundamental Principles and Rights of Work, 1998.

(5) All Member States shall ensure that their laws, policies and actions are consistent with the international human rights agreements to

Which they are a Party and at a minimum, with the list of human rights obligations and agreements already adopted.

## **Article 22. Publication of Information**

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

## **Article 23. Incentives**

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

# **Chapter V. Host State Rights**

## **Article 24. Performance Requirements**

(1) Member States recognize their obligations regarding trade-related investment measures established in other international agreements to which they are a Party.

(2) Subject to Paragraph (1), host States may impose performance requirements to promote domestic development benefits from investments. Measures adopted prior to the completion of the host State measures prescribing the formalities for establishing an investment shall be deemed to be in compliance with this Supplementary Act. If such measures are taken after the completion of the host State measures prescribing the formalities for establishing an investment, they shall be subject to the provisions of this Supplementary Act.

(3) Measures covered by this Article may include requirements:

a) to export a given level or percentage of goods or services;



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

## **Article 25. Implementation of Community Rules on Investment Promotion and Facilitation of Investment**

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

## **Article 26. Access to Investor Information**

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

# **Chapter VI. Home State Rights and Obligations**

## **Article 27. Assistance and Facilitation for Cross-border Investment**

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

## **Article 28. Information**

- (1) Home States shall, on request and in a timely manner, provide to a potential host State such information as is requested and available for the purposes of the host State to meet its obligations and perform

Its duties in relation to an investor or investment under this Supplementary Act and the host State's domestic law. Home States shall protect confidential business information in this regard.

(2) Home States shall, on request, and in a timely manner, provide information relevant to the home State standards that might apply under like circumstances to the investment proposed by its investor, including but not limited to the home State's environmental and social publichealth impact assessment process.

## **Article 29. Investor Liability In Home State**

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

## **Article 30. Offences and Sanctions**

(1) Member States shall consider as criminal the following offences and investigate, prosecute and punish the said offences with appropriate sanctions

(a) the offering, solicitation or acceptance of an offer, promise or gift of any pecuniary or other nature, whether directly or through intermediaries, to any public official of the host State, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties to achieve any favour in relation to a proposed investment or any licenses, permits, contracts or other rights in relation to an investment; and

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

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

(2) All home States shall ensure that any money or other forms of benefits encompassed in Paragraph (1) shall not be recoverable or deductible in any fiscal or tax policies.

(3) Home States shall, when possible, provide all available information that might assist a dispute settlement tribunal under this Supplementary Act in determining whether there has been a breach of an anti-corruption obligation.

## **Chapter VII. Relation to other Agreements**

### **Article 31. Relation to other Investment Agreements and Obligations**

(1) All investment agreements entered into by Member States prior to entry into force of this Supplementary Act, shall to the extent that the provisions of such Agreements are inconsistent with the provisions of this Supplementary Act, renegotiate those agreements within a transition period of twenty four (24) months to make them consistent with the present Community Investment Supplementary Act.

(2) Member States shall ensure that all future investment agreements to which they may become Party are fully consistent with this Supplementary Act on Investment; particularly with the balance of rights and obligations it establishes, and the principal features of the dispute settlement system. Member States may be called upon to assess compliance with these obligations.

### **Article 32. Relation to other International Agreements**

(1) Member States shall ensure that the provisions of other international trade agreements to which they are a party are consistent with the provisions of this Supplementary Act. Member States shall collaborate to ensure the effective application of the provisions of this Act within the international trade agreements.

(2) In the event of any dispute arising on this issue, the Member States shall seek to resolve such dispute within the framework of this Supplementary Act as a first step.

## **Chapter VIII. Dispute Settlement**

### **Article 33. Dispute Settlement Procedures**

(1) In the event of a dispute between Member States, or between a Member State and an investor, or between an investor

and a host State, the party wishing to raise the dispute shall issue a notice of intention to initiate arbitration to the other potential disputing Party or Parties using a dispute settlement procedure prescribed below.

(2) There shall be a minimum period of six months between the date of a notice of intention to initiate a dispute settlement process under this Supplementary Act, and the date a Party or investor as the case may be, may formally initiate a dispute. During this period, Member States make efforts to reach an amicable settlement of possible disputes. The use of good offices, conciliation, mediation or any other agreed dispute resolution process may also be applied.

(3) Where mediation is adopted as the dispute resolution process, the disputants shall use an approved mediator for this purpose.

(4) If no mediator is chosen by the disputing parties prior to three months before the expiration of the amicable settlement period, a mediator who is not a national of one of the State parties to the dispute shall be appointed. The conditions for the appointment of the said mediator shall be set out in the relevant regulation.

(5) Member States may also establish national mediation centres to facilitate the resolution of disputes between Parties and investors or investments, taking into account regional rules, customs and traditions on investment. Mediators officially appointed to such centres shall be incorporated into the Agency's list through the national mediation centres.

(6) Any dispute between a host Member State and an Investor, as envisaged under this Article that is not amicably settled through mutual discussions may be submitted to arbitration as follows:

(a) a national court;

(b) any national machinery for the settlement of investment disputes;

(c) the relevant national court of the Member States.

(7) Where in respect of any dispute envisaged under this Article, there is disagreement as to the method of dispute settlement to be adopted; the dispute shall be referred to the ECOWAS Court of Justice.

## **Article 34. Transparency of the Dispute Settlement Procedures**

(1) All documents relating to a notice of intention to arbitrate, the settlement of any dispute, the initiation of a panel or appeal, or the pleadings, evidence and decisions in them shall be available only to the parties to the disputes.

(2) Procedural and substantive oral hearings shall be open to the public also.

## **Article 35. Enforceability of Final Awards/decisions**

(1) The Final Awards/Decisions on Investment disputes made by mediations, arbitrations and judicial bodies shall be enforceable

(2) Member States parties to the Supplementary Act shall abide by the decisions of mediation, arbitration and judicial bodies on investment disputes. Notwithstanding this provision, disputant parties may seek redress from competent jurisdictions.

## **Article 36. Governing Law In Disputes**

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

# **Chapter IX. General Exceptions**

## **Article 37. National Security**

Nothing in this Supplementary Act shall be construed:

a. to require a Member State to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interest; or

b. to preclude a Member State from applying measures that it considers necessary for the fulfillment of its obligations under the United Nations Charter with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

## **Article 38. General Reservations and Exceptions**

(1) The provisions of this Supplementary Act, except Article 8, do not apply to any law or other measure of a host State the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by long-term historic discrimination in its territory, provided that such law or other measure is compatible with the requirements of Article 19.

(2) State Parties may take such measures as are necessary to avoid or abate a balance of payments emergency. Such measures shall be kept in force for as short a time as possible to address the emergency situation. Such measures shall not be subject to this Supplementary Act.

## **Chapter X. Final Provisions**

### **Article 39. Regional Co-operation**

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

### **Article 40. Amendment and Revision**

(1) Any Member State, the Council of Ministers, the ECOWAS Parliament and the ECOWAS Commission may submit proposals for the amendment or revision of this Supplementary Act.

(2) Proposals not emanating from the ECOWAS Commission shall be submitted to it. The Commission shall forward all proposals for amendment and revision to the Member States not later than thirty (30) days after their receipt. Upon expiration of the thirty (30) days notice given to Member States, the Authority of Heads of State and Government shall examine the proposals for amendment or revision of the Supplementary Act.

(3) The amendments or revisions shall be adopted by the Authority of Heads of State and Government in accordance with the provisions of Article 9 of the ECOWAS Treaty. The adopted amendments and revisions shall enter into force upon their publication in the Official Journal of the Community.

### **Article 41. Publication**

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

### **Article 42. Entry Into Force**

1. This Supplementary Act shall enter into force upon its publication. Consequently, signatory Member States and the Institutions of ECOWAS undertake to commence the implementation of its provisions on its entry into force,

2. This Supplementary Act is annexed to the ECOWAS Treaty of which it is an integral part.

### **Article 43. Depository Authority**

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

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

DONE AT ABUJA THIS 19 DAY OF DECEMBER 2008

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

