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ECOWAS INVESTMENT POLICY

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FOREWORD

Consistent with its mandate and despite the rising protectionist rhetoric in many parts of the world, the Economic Community of West African States (ECOWAS) Commission is steadfastly espousing cooperative competition principles (as based in part on the John Nash equilibrium theory) as the foundation for regional integration in the ECOWAS common market. In addition, in light of the shifting economic landscape in many parts of the globalised economy, the ECOWAS Community (now comprising fifteen (15) Anglophone, Francophone, and Lusophone Member States) has before it a relatively unique and golden opportunity; that is, to show to the rest of the world that cooperative competition undertaken on a regional basis can yield superior economic and social welfare benefits with respect to economic efficiency, prosperity, and distribution to achieve inclusive and equitable growth and development.

To “get out in front” of this strategic issue and become a major global leader on this critical subject, the ECOWAS Commission, together with the Member States, has prepared this ECOWAS Investment Policy (ECOWIP) for adoption by the Member States. The primary purpose of the ECOWIP is to establish harmonised regional investment-climate policies for the Member States to follow that will maximise the economic and social benefits of regional integration through co-operative competition alliances in West Africa.

In developing the ECOWIP, the ECOWAS Commission relied in part on the Organisation for Economic Co-operation and Development (OECD) Policy Framework for Investment (OECD Framework). The OECD Framework serves as an internationally-recognised benchmark for best practices on investment and investment-related trade measures. In particular, the OECD Framework provides an expansive view of investment generation by examining the multi-faceted elements that affect investment, including investment facilitation and promotion capacity, investment-entry barriers, investment-related trade measures, competition policy, human capital and labour regulation, physical infrastructure development policy, financial infrastructure, corporate governance, and responsible business conduct, including the protection of the environment. The OECD Framework also provides an authoritative source for the treatment of investment incentives in a regional economy or common market setting.

As further corroborated by the World Bank Group’s (WBG) 2010 Investing Across Borders Report, OECD countries that faithfully adhere to these internationally-recognised investment standards tend to generate more investment activity than other countries that do not adopt this comprehensive approach to investment. Consequently, in developing the ECOWIP, the ECOWAS Commission and the Member States relied on what they consider to be the best source of international best practice investment principles, but carefully adapted those same principles to the unique economic, social, and business conditions of the West African markets. Such an integrated and pragmatic approach, in the view of the ECOWAS Commission and the Member States, will increase the probability of facilitating rising levels of investments and economic activity in the Community.

The ECOWAS Commission

June 12, 2017, Lagos, Nigeria

CHAPTER 1

BACKGROUND TO THE ECOWAS INVESTMENT POLICY

I. Introduction

A. International Best Practice Context

1. It is well-established that investment – whether national or foreign direct investment (FDI) -- is critical for promoting economic growth and sustainable and inclusive development. Specifically, any investment, including national, intra-regional, and extra-regional foreign investment, expands the productive capacity of any economy and drives job creation and income growth.
2. As has been advocated by the Organisation for Economic Co-operation and Development (OECD) Policy Framework for Investment (OECD Framework), an enabling investment climate is one that provides equal opportunities for all investors --- whether public or private; large or small; foreign or national. The heterogeneity of investors, the diversity of factors that drive investment decisions, and the multiple policy objectives pursued by governments all call for a “whole-of-government” approach that can enhance policy coherence. This policy coherence applies to each component of the applicable investment climate of any host country, whether by directly encouraging national and foreign investment, promoting linkages and technology “spill-overs” with the local economy, raising the skills quality of the local workforce, improving the physical and financial infrastructure of a host country, or pursuing any other similar goal.¹
3. The OECD has found, based on empirical evidence, that the effective implementation by national governments of an enabling investment climate helps to mobilise capital, improve workers’ skills, advance technology, and generate intermediate inputs to allow firms to expand. An enabling investment environment further helps national economies to channel resources to more productive uses, and, through competitive pressure and the discipline imposed by shareholders and creditors, likewise ensures that all firms strive to improve their efficiency and allows inefficient ones to exit. An enabling investment climate should also allow enterprises to invest productively and profitably in

¹ OECD, *Policy Framework for Investment 2015 Edition*, 1, 13 (2015), OECD Publishing, Paris, <http://duprasx.doi.org/10.1787/9789264208667-en>.

order to achieve the highest feasible economic and social impact in the relevant markets in which they do business.²

4. Implementation of a “whole-of-government” approach to establish an effective investment-climate policy framework is grounded in strong institutions and efficient public governance. Co-ordinated action across these dimensions can encourage investment activity and reduce the costs of doing business in the host country. Strong institutions also help to maintain a predictable and transparent environment for investors in general.³
5. To create a high-quality investment environment for all investors, whether national, intra-regional, or extra-regional foreign investors, systemic reforms may be needed in the areas outlined by the OECD Framework, including, but not limited to, the following subject matters: (i) investment regulation; (ii) investment promotion and facilitation; (iii) investment-entry barriers; (iv) investment-related trade policy; (v) competition; (vi) human resource and labour development; (vii) physical infrastructure-sector development policy; (viii) financial infrastructure development policy; (ix) public governance; (x) corporate governance; (xi) responsible business conduct, including the protection of the natural environment; (xii) investment-related tax policy; (xiii) investment incentives; and (xiv) spatial areas. Each set of policies influences investors’ decisions and the related returns of any undertaken investments.⁴
6. The majority of investment activity is carried out by national firms; however, foreign investment, including intra-regional and extra-regional foreign investment, can provide additional advantages beyond its contribution to the capital stock of a nation. Such investment can serve as a conduit for the local diffusion of international technology and expertise, such as through the creation of local supplier linkages and by providing improved access to regional and international markets by virtue of regional and global value chains (GVCs) of production.⁵
7. Even though the OECD Framework recognises that there is no “one-size-fits-all” approach to private-sector development that can contribute to success in all countries in all sectors at all times, the OECD advises that regional and international co-operation can complement and even reinforce domestic efforts to improve the business climate at the national level. Moreover, the more

² *Id.* at 14.

³ *Id.* at 19.

⁴ *See id.* at 13-20.

⁵ *Id.* at 13-14.

standards are harmonized or mutually recognised across different countries comprising a common market or an economic union, the more easily firms will be able to invest and trade both regionally and internationally. Finally, international investment-and-trade agreements can provide further transparency in respect of the regulation of foreign investors in signatory countries as well.⁶

8. With regard to international investment agreements (IIAs), the OECD Framework has determined that such agreements provide an additional layer of security to covered foreign investors and can also offer recourse to international arbitration to resolve investor-state disputes. Such agreements may even help countries to improve their own national legislation covering investment by encouraging improvements to administrative capacity, the independence of the national judicial court system, the quality of a host country's legal framework, and the strength of national institutions responsible for implementing and enforcing such legislation.⁷

B. Adaptation of International Standards to the ECOWAS Investment Policy

1. A major objective of the ECOWAS Commission under the Revised ECOWAS Treaty is to promote regional co-operation and integration that can propel the veritable establishment of an economic union in West Africa. The purpose of this economic union is to raise the standards of living of the people of West Africa, maintain and enhance economic, social, and political stability in the region, foster stronger commercial relationships amongst all of the Member States, and contribute to the economic, social, and political progress and development of the African continent.
2. In furtherance of the goals articulated in the previous paragraph, the ECOWAS Commission has adopted, among other initiatives, the ECOWAS Trade Liberalisation Scheme (ETLS) that applies to agricultural products, handicrafts, raw materials, and industrial articles of commerce. In addition, effective January 1, 2015, the ECOWAS Commission has commenced overseeing the implementation of the ECOWAS Common External Tariff (CET) with regard to international trade with third countries; that is, non-Member States. Other notable regional instruments that have been adopted to meet the goals envisaged by the Revised ECOWAS Treaty include the Protocol A/P1/5/79 Relating to the Free Movement of Persons, Residence and Establishment,

⁶ *Id.* at 20.

⁷ *Id.* at 28-29.

adopted on May 29, 1979, in Dakar, Senegal (ECOWAS Protocol on the Free Movement of Persons, Residence and Establishment).

3. ECOWAS as a region is endowed with enormous natural and human resources that should, in principle, constitute an attractive destination in the global investment marketplace. To this end, as part of its constant efforts to facilitate the intra-regional and extra-regional flow and movement of factors of production in the common market, the ECOWAS Commission has accorded a special priority to both local and foreign investment.
4. Yet, despite its natural endowments, the region as a whole still lacks an effective cross-border legal, regulatory, and institutional framework to harness its vast and diverse economic potential. Thus, there exists a real need to bridge the existing gap between the relatively abundant economic and human resources of the region, on the one hand, and the necessary investment-climate framework, on the other hand. This process is essential in order to develop the natural endowments of the region and, thereby, improve the standards of living for all Community citizens in an efficient, equitable, and inclusive manner.
5. Desirous of realising the full economic potential of the region, the Member States have been designing, adopting, and implementing aggressive investment-promotion strategies during the past two decades that have sought to position the private sector as the primary engine of economic growth and employment generation. In spite of these initiatives, the ECOWAS Member States as a whole have remained at the margin of preferred FDI-recipient locations across the globe. FDI in the region has been heavily concentrated in the oil and mineral sectors of a few natural resource rich Member States.
6. This emphasis on the natural resource sectors has resulted in the neglect of developing regional and global value-added supply chains or GVCs and other emerging sectors of the regional economy. These latter sectors include agribusiness, retail trade, services, logistics, and light-manufacturing activities. The relatively low level of investment in the region is largely explained by the following factors: (i) fragmented investment-and-trade legal, regulatory, and institutional frameworks; (ii) the small size of the domestic markets of many of the Member States in both absolute and relative terms; (iii) the relative scarcity of productive infrastructure; and (v) insufficient skilled labor in certain sectors. Incessant political instability and strife in many of the Member States, together with the recent emergence of security challenges and the 2014 Ebola pandemic, further exacerbate the underlying impediments.

7. Additionally, the relatively aggressive use of financial and non-financial incentives to attract investment in the region has often induced unhealthy competition amongst the Member States. The lack of harmonisation or, at least, overall consistency in investment-incentives schemes across the common market has adversely affected, at times, the regional investment climate. Another negative outcome of so-called “race to the bottom” tendencies is the heightened economic and social costs that are attributable to foregone national government tax revenue. This result is at odds with the synergies that are expected from economic integration that aims to foster equitable and inclusive economic development and global competitiveness of the region as a single economic policy space.
8. Hence, regional integration through the establishment of a common investment-and-trade market constitutes one of the defining strategies of the ECOWAS Commission to make the region a preferred investment destination globally. The successful implementation of this regional policy and strategy will offer investors, whether local or foreign, expanded opportunities for profitable, sustainable, and inclusive economic growth. These opportunities, in turn, can lead to growing employment generation, wealth creation, technology transfer, and improved standards of living for all residents of the ECOWAS Community.
9. Against this background, both the Heads of State of the member countries and the ECOWAS Commission have recognised the strategic importance to deepen economic integration in West Africa. Such integration is a necessary condition to achieve policy harmonisation or, at least, policy consistency that constitutes a key ingredient to create a single regional investment space in West Africa. Stated otherwise, a truly harmonised regional market will place the Community on the path towards more rapid economic growth and sustainable and inclusive economic development.
10. The need for creating an ECOWAS investment market came to the fore following the commencement of the negotiations between the ECOWAS Member States and the European Union (EU) in October 2003 to agree on the terms of the Economic Partnership Agreement (EPA). These negotiations provided the impetus, as well as the platform, for the elaboration of a specific regional position on investment. The roadmap for the EPA negotiations adopted in August 2004 envisaged the creation of an enabling environment for investment to mobilise national and regional resources and to promote the inflow of foreign capital. Nonetheless, in April 2006, the ECOWAS Ministerial Monitoring Committee charged with overseeing the EPA negotiations decided

that investment and competition issues should be removed from the EPA process. Instead, the Committee was of the view that these issues should be addressed through the adoption of common-market legal instruments that, among other objectives, would seek to harmonise the investment-related trade policies of the individual Member States in line with global best practices.

- 11.** The ECOWAS Commission subsequently embarked on a programme to develop a regional investment code in line with the Revised ECOWAS Treaty. Such a code was expected not only to strengthen the development of the private sector in the region, but also to foster the long-term economic growth of the Community. In May 2008, the ECOWAS Commission presented a draft proposal on investment-policy and investment-climate harmonisation to the ECOWAS Council of Ministers. The purpose of this proposal was to create a single ECOWAS investment-and-trade space that could ensure similar treatment of private investments in the ECOWAS region, trigger increased intra-regional and extra-regional investments in West Africa, and enhance the competitiveness of enterprises doing business in the region. Following approval by the ECOWAS Council of Ministers, the ECOWAS Heads of State adopted on December 19, 2008, a regional investment instrument; namely, the Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for Their Implementation within ECOWAS (ECOWAS Supplementary Investment Act). The ECOWAS Supplementary Investment Act was designed to serve as an initial or preliminary regional legal framework as applicable to national investment regimes of the Member States.⁸
- 12.** The adoption of the ECOWAS Supplementary Investment Act marked a significant milestone in the efforts to improve the regional legal, regulatory, and institutional framework governing investments in the common market. Even though some convergence could be ascertained in the national investment policies and codes adopted by certain Member States, unresolved differences amongst the Member States (as set out in their national investment instruments) still revealed the need for continued harmonisation of the national frameworks.
- 13.** In particular, the complete harmonisation of the national investment laws and codes in the ECOWAS region was envisioned as the optimal strategy to eliminate the inefficiencies caused by the divergence in national systems,

⁸ See Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for Their Implementation within ECOWAS adopted on December 19, 2008, in Abuja, Nigeria, http://www.privatesector.ecowas.int/en/III/Supplementary_Act_Investment.pdf.

including the unnecessary transaction costs incurred by investors as they are required to interpret and operate under different and often inconsistent investment rules at the national level. To eliminate these costs through a more perfect regional harmonisation effort, the ECOWAS Commission since 2011 – as assisted by a team of national consultants in the Member States and by a Community technical working group comprising public, private, and academic specialists – has been preparing a draft regional Investment Code that is based on the ECOWAS Investment Policy or ECOWIP as set out in this document.

14. The fundamental purpose of the ECOWIP is to lay the foundation for a harmonised, secure, transparent, stable, and predictable legal, regulatory, and institutional framework for national investment and FDI, including intra-regional and extra-regional investment, that is applicable in the ECOWAS region.
15. To this end, the ECOWIP, as based in part on the OECD Framework, but adapted to West African economic realities, consists of fifteen (15) discrete, albeit interrelated, thematic policy areas:
 - ❖ General Policy, Legal, and Regulatory Issues;
 - ❖ Investment Promotion and Facilitation Policy Framework;
 - ❖ Investment Entry and New Challenges in West Africa;
 - ❖ Investment-Related Trade Policy;
 - ❖ Competition Policy;
 - ❖ Human Capital and Labour Policy;
 - ❖ Physical Infrastructure Development Policy;
 - ❖ Financial Infrastructure Development Policy;
 - ❖ Public Governance Policy;
 - ❖ Corporate Governance Policy;
 - ❖ Responsible Business Conduct and Protection of the Environment;
 - ❖ Investment-Related Tax Policy;
 - ❖ Spatial Area Investment Policy: Special Economic Zones (SEZs);
 - ❖ Dispute Resolution; and
 - ❖ Implementation Strategy.

II. ECOWIP Strategic Vision

The strategic vision of the ECOWAS Commission under the ECOWIP is to make the existing ECOWAS common market and future economic union a preferred destination for national and foreign investment, including intra-regional and extra-regional investment, that is reinforced by effective governance that promotes sustainable and inclusive regional economic development in line with the ECOWAS Vision 2020.

III.ECOWIP Objectives

A. General Objective

The ECOWIP seeks to put in place in the region a harmonised legal, regulatory, and institutional framework to achieve the ultimate goal of regional economic integration as envisioned by the Revised ECOWAS Treaty. This positive outcome will enhance the structural transformation of the Member State economies, promote equitable and inclusive wealth and income distribution, especially amongst the working class, and reduce extreme poverty in the region through a variety of actions, including:

1. Progressive liberalisation of the investment-and-trade regimes of the individual Member States;
2. Improved protection of all investors doing business in the Member States, as well as their investments, whether nationally or foreign owned;
3. Enhanced transparency and predictability of investment-related trade rules, regulations, and procedures conducive to increased intra-regional investment and trade amongst the Member States;
4. Collective marketing of the region as an integrated investment-and-trade area; and
5. Mutually beneficial regional co-operation that creates favorable conditions for investment by investors of one Member State in the territory of other Member States, as well as for FDI originating from outside the ECOWAS common market.

B. Specific Objectives

In furtherance of its general objective, the ECOWIP seeks to achieve the following specific goals both at the regional and national levels, including:

1. To reduce and even eliminate legal, regulatory, and administrative obstacles that hamper the free flow of investment and trade in the region and in the individual Member States;
2. To establish coherent and consistent regional investment-related trade environment and incentives regimes;
3. To promote investments at both the national and regional levels;
4. To expand the common market economic space for regional actors to enjoy growing economies of scale and enhanced regional and international competitiveness;
5. To encourage collaboration amongst the national Investment Promotion Agencies (IPAs) of the Member States to achieve a co-ordinated approach to investment promotion and facilitation at the national and regional levels;

6. To facilitate the harmonisation of investment-related trade policy measures, including SEZ platforms, to attract investments (as defined in the ECOWAS Investment Code) to the ECOWAS region;
7. To improve and harmonise public and corporate governance policy throughout the region;
8. To promote responsible business conduct in the Member States, including the protection of the natural environment;
9. To enhance skill acquisition to support investment, while promoting market-driven measures aimed at retaining qualified labor and incentivising labor mobility within the region;
10. To facilitate the integration of national financial markets, while liberalising the cross-border flow of financial capital in the common market;
11. To encourage the development of modern financial instruments to enhance savings mobilisation and capital formation to support and deepen physical infrastructure development across the region; and
12. To promote the adoption of harmonised procurement policies and facilitate the implementation of transparent procurement processes and procedures across the Member States.

IV. Fundamental Principles

The ECOWIP is buttressed on the following fundamental principles:

1. A democratic and stable political landscape to promote regional security in the ECOWAS territory;
2. A liberal, progressive, facilitative, transparent, open, and competitive investment-related trade environment that encourages investment-related trade promotion, facilitation, and protection;
3. Simplified administrative procedures for the establishment of new enterprises or the acquisition of existing business entities, including streamlined permit, approval, authorisation, licensing, and concession procedures;
4. Fair and equitable treatment of national and foreign investments, including the full protection of private property rights, such as intellectual property rights (IPRs);
5. National treatment accorded to foreign investors – whether intra-regional or extra-regional investors – at the post-investment establishment stages, with any exceptions to the national treatment principle being precisely defined and circumscribed and, if feasible, subject to staged phase-out procedures or otherwise subject to specific regional goals of the ECOWICPF;

6. Preferential treatment of cross-border trade activities amongst the Member States;
7. Special and differential treatment granted to particular Member States depending on their level of development, sectoral sensitivities, and any other considerations agreed to by the Member States;
8. Reciprocal treatment in the enjoyment of concessions amongst the Member States;
9. Transparent public governance, including transparent national policies, laws, regulations, and administrative practices of the Member States that positively impact investments both nationally and regionally;
10. Coherent and stable investment-related trade policies, laws, regulations, and administrative practices at the national and Community levels;
11. Timely and unrestricted cross-border transfers of investment proceeds that do not pose national security risks, together with the unencumbered repatriation of capital in all cases, provided that the relevant investors are in compliance with all tax obligations of the host country;
12. Access of investors to effective dispute-settlement mechanisms, including private-party negotiations, mediation, conciliation, and arbitration;
13. Respect for, and compliance with, international best practices on effective corporate governance and integrity in public administration; and
14. Promotion of market-driven incentives regimes and spatial area initiatives, including SEZs.

CHAPTER 2

GENERAL POLICY, LEGAL, AND REGULATORY ISSUES

I. Introduction

A. International Best Practice Context

1. The OECD Framework underscores that the concept of investment does not refer only to policies, laws, and regulations applicable to investors and investments. Such rules also refer in a developing-country context to the contribution of investors and investments to promote the twin goals of sustainable and inclusive economic and social development, such as those outlined in national development plans of individual countries,⁹ as well as the reduction of extreme poverty.
2. To further these investment and development goals, an effective investment-climate policy, as emphasised in Chapter 1, must be grounded in strong institutions and effective public governance. As such, the key pre-requisites for a good-practice investment-climate policy include the respect for the rule of law, high-quality regulation, transparency, openness, and integrity. Active action across these multiple dimensions will encourage investment and reduce the costs of doing business in the relevant jurisdiction. Robust institutions also help to maintain a predictable and transparent environment for investors as well.¹⁰
3. Furthermore, the OECD Framework asserts that the correct and even-handed application of the rule of law can foster a flexible “whole-of-government” approach that recognises that investment-climate improvements require not only policy reform, but also changes in the manner by which governments conduct their business.¹¹ Such an approach to investment-climate policy can improve economic and social outcomes and enhance the use of public resources as well.¹²
4. This “whole-of-government” approach is particularly important with respect to investment-policy design and delivery in cases in which needed reforms do not fall under the purview of a single governmental department or agency. This

⁹ OECD, *Policy Framework for Investment 2015 Edition*, 23 (2015).

¹⁰ *Id.* at 19.

¹¹ *Id.* at 13.

¹² *Id.* at 19.

- approach is increasingly becoming a common objective for many public administrations as an effective strategy to integrate cross-disciplinary perspectives into investment policy, improve administrative co-ordination, and facilitate resource sharing that necessarily should be accompanied by “single windows” or “one-stop shops” (OSSs) (otherwise known as business service centres) that facilitate investor interface with all levels of national government.¹³
5. In addition, the OECD Framework requires that this “whole-of-government” approach to investment-climate design be transparent and inclusive. More open and inclusive policy-making processes, including the solicitation of the views of investors and other private stakeholders, contribute to policy legitimacy. Moreover, policy is more likely to be sound and not produce unintended effects if it is formed in a structured and transparent manner that solicits input from all interested parties.¹⁴
 6. With regard to the substance of any proposed regulatory reforms, the World Bank Group (WBG) Investing Across Borders (IAB) Report (2010) found that countries tend to attract more FDI if they allow foreign ownership of companies in a variety of sectors, make start-up, land acquisition, and commercial arbitration procedures efficient and transparent, and have strong laws to protect foreign investor interests. Conversely, the WBG has found that countries with sub-standard regulations and inefficient processes applicable to foreign companies receive less FDI and have smaller accumulated stocks of foreign investment.¹⁵
 7. As such, investment laws should provide sufficient security to all investors — whether national or foreign, including intra-regional and extra-regional investors — so that these actors can acquire the necessary market confidence to operate and expand their businesses in a foreign jurisdiction. For example, national laws should not limit the ability of foreign investors to develop, renew, transfer, mortgage, or sublease land. National laws and regulations also should take into account the interests of all stakeholders related to land use, including investors, governments, and local communities. Attention must be paid to environmental protection as well.¹⁶

¹³ *Id.*

¹⁴ *Id.* at 20.

¹⁵ World Bank Group, *Investing Across Borders: Indicators of Foreign Direct Investment in 87 Economies*, Washington, D.C., World Bank, 9 (2010), <http://documents.worldbank.org/curated/en/826251468341077303/Investing-across-borders-2010-indicators-of-foreign-direct-investment-regulation-in-87-economies>.

¹⁶ *Id.* at 12.

B. Adaptation of International Standards to the ECOWAS Investment Policy

1. International surveys have consistently identified general investment-related trade barriers as primary impediments in West Africa that adversely affect national, intra-regional, and foreign investors, particularly small- and medium-size enterprises (SMEs). These constraints – which generally inhibit intra-regional and extra-regional foreign investment and job-creation potential in the ECOWAS territory, while exacerbating poverty levels in the region – are attributable to several market and regulatory failures that require an innovative reform approach.
2. Indeed, the need for reforms in the ECOWAS common market is particularly acute today given the current market dynamics and the expanding regional business opportunities in West Africa. These favorable prospects stem from quickly growing populations, rising disposable incomes, rapidly urbanizing markets, and the recent emergence of African multinational enterprises (MNEs) – especially in the financial and telecommunications sectors.
3. These market dynamics suggest, despite the recent emergence of new challenges (e.g., 2014 Ebola pandemic) in the Community, that both intra-regional investment and FDI from non-ECOWAS countries can become major engines for sustainable and inclusive economic growth and development in West Africa, particularly in consumer-oriented and enabling services sectors. These sectors include distribution, logistics, transportation, retail trade, business services, tourism, and agribusiness. Nonetheless, the reduction of investment-related trade barriers, together with the liberalization of foreign investment/service markets at the individual country level, is a necessary precondition to achieve these positive outcomes.
4. It follows that any effective investment-related trade policy in the ECOWAS territory must necessarily include a comprehensive and systematic approach for improving investment-climate conditions in the relevant markets. Such a policy is premised, amongst other principles, on the well-settled tenets of non-discrimination and the even-handed application of the rule of law, transparency, and predictability as outlined above in the OECD Framework.
5. To this end, the ECOWIP reform framework was developed through an open and inclusive process and dialogue with the Member States that involved the meticulous assessment of the prevailing investment-and-trade conditions, constraints, and obstacles at the respective national levels. Specifically, the ECOWICPF has been designed precisely to help Member States to address and eliminate the investment-related trade barriers that all investors and

exporters face nationally and regionally, as well as to attract FDI from within and outside the ECOWAS common market.

II. ECOWAS Policy Principles

To address the general investment-related trade constraints existing in the ECOWAS Community today, the Member States, in close co-operation and co-ordination with the ECOWAS Commission, hereby commit under the ECOWIP to adhere to the following policy principles:

1. Pursue clear and transparent policies, laws, regulations, and administrative practices that do not impose unnecessary burdens on investors;
2. Design coherent and stable laws, regulations, and administrative practices at the national level;
3. Implement the principle of non-discriminatory treatment of all investors – whether national or foreign – with respect to the admission, establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in each Member State;
4. Pledge that any exceptions to the obligation to provide national or non-discriminatory treatment to all investors shall be clearly defined and circumscribed and brought to the attention of the ECOWAS Common Investment Market (ECIM) Council for subsequent periodic reviews;
5. Guarantee the timely and unrestricted cross-border transfer of investment proceeds that do not pose national security risks;
6. Allow the full repatriation of capital in all cases, including when an investment is liquidated, provided that investors are in compliance with all of their tax obligations in a host jurisdiction;
7. Provide timely and efficient business registration;
8. Pursue the full protection of private property rights, including contractual rights, against illegal expropriations in accordance with the international minimum standard in respect of compensation;
9. Guarantee the access of investors and traders to effective dispute-settlement mechanisms;
10. Pursue simplified systems to facilitate the free movement of Community citizens and permanent residents, capital, goods, and services within the ECOWAS common market;
11. Streamline mechanisms for travel and other visas granted to Community permanent residents who are foreign nationals;
12. Encourage the design of transparent investment-incentives regimes that are based on marginal cost-benefit considerations; and

13. Adhere to the relevant international instruments governing international trade and investment, including the World Trade Organization (WTO) Agreement on Trade-Related Investment Measures (TRIMs).

III. ECOWAS Strategies

To implement the above policy principles, the Members States, in close co-operation and co-ordination with the ECOWAS Commission, hereby pledge under the ECOWIP to pursue the following strategies and undertake the following concrete actions:

1. Modify any national laws and regulations governing investment-related trade matters through a codified procedure that involves prior consultation with all relevant public- and private-sector stakeholders;
2. Review and upgrade the applicable real property-titling system of the relevant jurisdiction to promote greater investor access, avoid unnecessary delays, and reduce registration fees as assessed on cost-recovery basis;
3. Create and maintain a functional and accessible real property registration systems in each ECOWAS Member State, including by virtue of SEZs as discussed in Chapter 14 of the ECOWIP;
4. Collaborate (to the extent feasible) in the harmonisation of a regional intellectual property system for the legal recognition, protection, registration, and enforcement of all IPRs in all of the Member States;
5. Adopt regulatory measures to enable IPR laws to promote innovation at the national and regional levels, especially through the creation of linkages between and amongst the national and regional business communities and academic and research institutions in the Member States;
6. Implement a well-functioning IPR filing processes to facilitate the access to, and utilization of, IPR systems by SMEs;
7. Protect IPR owners from violations anywhere in the ECOWAS territory;
8. Extend throughout the Community the rules applicable to the legal recognition and protection of traditional knowledge or folklore;
9. Enact and implement, where necessary, contemporary alternative dispute-resolution (ADR) systems, including private-party negotiations, out-of-court workouts, mediation, conciliation, and arbitration; and
10. Enforce expropriation laws and regulations on a non-discriminatory basis that comply with the international minimum standard, including the adoption of contemporary financial techniques and methodologies to calculate compensation for any expropriated investments.

CHAPTER 3

INVESTMENT PROMOTION AND FACILITATION POLICY FRAMEWORK

I. Introduction

A. International Best Practice Context

1. As explained in the OECD Framework, effective investment promotion leverages the positive attributes of a country's investment environment, highlights profitable investment opportunities, and helps to identify local partners. In terms of facilitation, effective OSSs or business service centres, with a single-point authority, can be a critical factor in encouraging investment decisions, especially if such streamlined administrative entities can reduce the transaction costs of the investors doing business in the relevant jurisdiction.
2. Efficient investment facilitation can also diminish corruption risks by decreasing the number of steps involved in the investment-decision-making process. A core mandate of any investment-facilitation policy includes eliminating any information gaps created by incoherent policies. This can provide investors with much needed clarity *vis-à-vis* public policies and administration.¹⁷
3. To facilitate effective investment promotion and facilitation, IPAs in host countries should have a clear mandate, while their staff should have private-sector experience. IPA structure should be lean and efficient, and its board of directors should consist of both public- and private-sector representatives.¹⁸
4. The importance of access by the general public to reliable information provided by IPAs should not be understated. Studies cited by the the WBG Investing Across Borders Report (2010) show that 70% of countries forego foreign investment opportunities as a direct result of the deficiencies that impede investment-promotion institutions when attempting to provide potential investors with accurate and up-to-date information. As a consequence, electronic and on-line services can render administrative processes more efficient and transparent and do not necessarily require costly or complex technologies.¹⁹

¹⁷ OECD, *Policy Framework for Investment 2015 Edition*, 39 (2015).

¹⁸ *Id.* at 39.

¹⁹ World Bank Group, *Investing Across Borders*, 1, 10 (2010).

5. Furthermore, the OECD Framework has found that after-care services for investors are extremely vital, especially for the purpose of retaining investors already doing business in a host jurisdiction. Effective after-care services and policy advocacy, including transmitting investors' feedback for more efficient policy-making, can be the determining factor in a decision to reinvest in the host country and can help to address the major investment-climate challenges in a host country. In this regard, the most effective IPAs worldwide devote substantial resources to policy advocacy and to resolving investors' complaints.²⁰
6. Anchoring investors through deep linkages with the local economy is another effective investment-retention strategy that can efficiently complement after-care measures. Even though investor-targeting and after-care services can attract investors and help keep them satisfied, it is the broader and more sophisticated and complex efforts to strengthen the investment ecosystem that will determine the overall investment competitiveness of any individual country or a particular economic region.²¹
7. As such, it is essential to embed investment-promotion activities within a broader economic development strategy of any country that involves investments in people and skills, improving connectivity of firms and markets, and building an open business environment to help countries benefit from GVCs, while promoting responsible investment from a social perspective.²²

B. Adaptation of International Standards to the ECOWAS Investment Policy

1. As a basic strategy, the Member States, in their efforts to promote and attract FDI, have established national institutional mechanisms to promote and facilitate investment into their national territories. Nevertheless, some of these institutions are not adequately equipped and staffed to carry out their functions effectively. Often, they have operated in such a manner as to encourage Member States to engage in so-called "cut-throat" competition for FDI at the regional level. Consequently, the region as a whole is unable to realize its full potential in attracting FDI, including intra-regional and extra-regional investments.
2. Thus, an argument can be advanced that a co-ordinated approach to investment promotion and facilitation at the regional level can yield superior

²⁰ OECD, *Policy Framework for Investment 2015 Edition*, 40 (2015).

²¹ *Id.* at 41.

²² *Id.*

results to those currently being generated by the *status quo*. To this end, it is in the best economic interests of the Community for the ECOWAS Commission and the Member States to establish a regional institutional authority – that is, the ECOWAS Regional Investment Promotion Agency (RIPA) for this purpose. The primary mandate of the proposed RIPA would be to facilitate the co-ordination of the investment-promotion and other investment-related investment functions of all of the national IPAs at the regional level.

3. Even though many ECOWAS Member States have established IPAs, only a few of these administrative entities are truly autonomous and fully empowered to perform their functions in accordance with market-based considerations. In some cases, the IPAs are subsumed as administrative units or departments under a line Ministry or operate in the Chamber of Commerce of a particular Member State. Delivering a broad-based strategy for investment promotion and facilitation requires strong political support and leadership from the highest levels of government. Accordingly, the Member States are strongly encouraged to reposition their IPAs to enable them to discharge effective investment-promotion-and-facilitation activities, as well as after-care services, to attract and retain FDI (*i.e.*, intra-regional and extra-regional foreign investment) in their national economies.
4. It follows, based on the above, that national IPAs are key intermediaries in West Africa between their national governments and private investors. Thus, they are expected to create a platform for engagement to foster mutually-beneficial collaboration. The dissemination of pertinent investment data and information by IPAs to public- and private-sector stakeholders can both galvanize reform initiatives and facilitate investment decision-making processes as well. To this end, Member States should empower their national IPAs to publish on a periodic basis investment-related trade information with regard to existing laws, regulations, incentives, reforms, and investment flows.

II. ECOWAS Policy Principles

To address the above investment-promotion and -facilitation issues at the regional level, the ECOWAS Commission, in close co-operation and co-ordination with the Member States, hereby commits under the ECOWIP to adhere to the following policy principles:

1. Pledge to create a RIPA to co-ordinate investment-promotion and -facilitation activities amongst the national IPAs of the Member States;
2. Support the creation of national IPAs in those Member States in which none exists;

3. Promote national IPAs that are autonomous and adequately funded and staffed, and that report directly to the highest political office in the relevant jurisdiction;
4. Encourage one-stop investment facilitation mechanisms to minimise administrative and regulatory bottlenecks for investment-entry and doing-business purposes as discussed in Chapter 4;
5. Facilitate national and regional collaboration to initiate reforms that translate into a more competitive regional investment climate in West Africa;
6. Foster alliances with other regional and international investment-promotion networks;
7. Encourage the establishment of national databases on investment; and
8. Promote the publication of annual reports on investment inflows and outflows for each Member State, as well as all applicable national policies, laws regulations, and amendments related thereto.

III. ECOWAS Strategies

To implement the above policy principles, the ECOWAS Commission, in close co-operation and collaboration with the Members States, hereby pledges to pursue the following strategies and execute the following concrete actions, including:

1. Implement stakeholder engagement and sensitisation initiatives to facilitate the domestication of the ECOWIP and the ECOWAS Investment Code in the Member States;
2. Establish the RIPA;
3. Support the enactment of suitable legal frameworks by the Member States to ensure that national IPAs are not only financially autonomous and adequately funded and staffed, but also report directly to the highest political office in the Member State in question;
4. Support the creation of an OSS or similar mechanisms at each national IPA;
5. Acquire funding from international donors to establish national IPAs in those Member States where none exists;
6. Provide capacity-building to strengthen existing national IPAs;
7. Organize periodic regional investment promotion fora; and
8. Establish through the RIPA a shared platform amongst national IPAs in West Africa to foster the exchange and dissemination of investment-related trade information.

CHAPTER 4

INVESTMENT ENTRY AND NEW INVESTMENT CHALLENGES IN WEST AFRICA

I. Introduction

A. International Best Practice Context

1. Consistent with the general tenets espoused by the OECD Framework as summarized in Chapters 2 and 3 of the ECOWIP, any effective investment-policy framework must strategically focus on the core investment-policy issues and governing principles. These core issues and principles, in turn, necessarily underpin successful legal, regulatory, and institutional regimes of any host country that contribute to creating a high-quality investment environment for all investors.
2. As further highlighted in Chapters 2 and 3, these core issues and principles include (i) the non-discrimination of investors regardless of their nationality, (ii) the degree of openness of the framework applicable to foreign investment, including intra-regional and extra-regional investment, (iii) the protection of all investor property rights, and (iv) effective mechanisms for settling investment disputes as discussed in Chapter 15.²³ These well-established precepts are embodied in all of the major IIAs, free trade agreements, and bilateral investment treaties (BITs) that govern a substantial amount of international investment activity in today's globalised economies.
3. One of the fundamental concepts derived from the principle of non-discrimination is the revered tenet of national treatment to be accorded to foreign investors. Foreign investors, in principle, should receive the same treatment as domestic, national, or local investors. Even though no government in the world applies the national treatment principle universally on an across-the-board fashion, the OECD has determined that a significant negative correlation exists between the degree of non-adherence to the national treatment principle by particular host-country governments and overall FDI levels. Beyond the impact on FDI, any policy that favors some firms over others also involves a cost to society – notably less competition and, hence, lower firm-level efficiency.²⁴ When discriminatory policies are necessary, they should be proportional – that is, not greater than that needed to address broader policy concerns of a host country – but established in light of measurable objectives

²³ OECD, *Policy Framework for Investment 2015 Edition*, 24 (2015).

²⁴ *Id.*

and regularly assessed against those objectives. Regular or periodic evaluations of any exceptions or derogations to the national treatment principle in any host country can be encouraged by requiring the periodic renewal or even the discontinuation of discriminatory restrictions.²⁵

4. Even though some analysts contend that burdensome investment-entry regulations provide more legal protection, global practice demonstrates that legal certainty does not require costly and complex business start-up procedures. The WBG data confirm that fast and efficient business-establishment systems are often found in investor-friendly countries, as enterprises seek to avoid administrative hurdles when establishing businesses in a foreign jurisdiction.²⁶ In a survey of companies worldwide, 16% of the firms polled identified business licensing and permits as a major constraint that impedes foreign investment. In addition, a study measuring restrictions on FDI in the services sector found that the difficulty of navigating the various requirements involved in starting a foreign business can have a chilling effect on company-investment decisions as well.²⁷
5. To this end, to increase investment levels in any host country, the competent national, provincial/state, or municipal/local governments should institute simple and transparent establishment processes. Obtaining investment approvals can be burdensome for any foreign investor, especially for SMEs. Countries should simplify or abolish such requirements -- unless foreign investment in a particular sector affects national or economic security. In addition, countries can enable investors to register businesses on-line through modern information-and-communication technologies (ICTs). “Fast-track” alternatives, even if they entail higher processing fees, are also usually valuable to foreign investors. Likewise, the foreign investment approval processes should be simple, including requiring only notifications, unless, as justified above, the foreign investment is made in a strategic sector that might impact national or economic security interests.²⁸
6. As emphasised in Chapter 1 of the ECOWIP, effective, efficient, and secure land administration is a major driver of any investment, whether national or foreign, including intra-regional and extra-regional investment. Secure and transparent land rights can unleash a country’s economic potential, with

²⁵ *Id.* at 17.

²⁶ World Bank Group, *Investing Across Borders*, 30 (2010).

²⁷ *Id.* at 29.

²⁸ *Id.* at 39.

benefits for national and foreign investors alike. Improving land security can encourage private investment, diversify labor force allocation, increase the market value of land, boost productivity, raise income and consumption, and reduce extreme poverty.²⁹

7. Making land a policy instrument for sustainable economic development requires more than providing easy access to industrial, commercial, or agricultural land for enterprises or even individuals. Such an investment policy requires ensuring that land access is complemented by necessary inputs, such as working and human capital, credit institutions, insurance, infrastructure, nimble land-registration mechanisms, and effective contract enforcement.³⁰
8. A country should have on the books clear rules for acquiring land as well. The applicable rules should remove unnecessary and burdensome steps, while enabling competent government authorities to conduct a proper process with fair and efficient protections for the greater public good.³¹

B. Adaptation of International Standards to the ECOWAS Investment Policy

1. On-the-ground diagnostics in the Member States have identified the following investment-entry barriers in the form of **administrative procedure obstacles** that typically stunt investment growth in the ECOWAS common market, including national, intra-regional, and extra-regional investment:
 - (a) **Cumbersome Approval Processes:** Excessive time and cost to obtain investment approvals, registrations, notifications, and screenings;
 - (b) **Lack of Cross-Border Legal Document Recognition:** Absence of cross-border recognition of legal documents of other Member States, including phytosanitary certificates and company articles of association;
 - (c) **Dilatory Work Permits/Visas:** Burdensome requirements and procedures governing the issuance of work/residence permits and visas for foreign national workers/executives;
 - (d) **Foreign Currency Bank Accounts:** Unavailability of foreign currency accounts for all investors;

²⁹ *Id.* at 41; see also OECD, *Policy Framework for Investment 2015 Edition*, 25 (2015).

³⁰ *Id.* at 41.

³¹ *Id.*

- (e) **Cumbersome Land Access:** Administrative procedural constraints that hamper access to, and tenure of, industrial, commercial, and agricultural land for all investors and enterprises; and
 - (f) **Inefficient Investment Incentives Regimes:** Non-transparent, discretionary, discriminatory, and *ad hoc* incentives regimes.
2. On-the-ground diagnostics in the Member States have further identified the following investment-entry barriers that impede, in particular, FDI **market access** in the ECOWAS region:
- (a) **Foreign Investment Sector Restrictions:** Sector restrictions or prohibitions imposed by a Member State against foreign investors or foreign investments;
 - (b) **Discrimination:** Discriminatory treatment of intra-regional and extra-regional foreign investments;
 - (c) **Capital Requirements:** Minimum capital requirements imposed only against foreign-owned businesses;
 - (d) **Foreign Management Restrictions:** Foreign senior director and management restrictions applied only to foreign investors;
 - (e) **Foreign Staff Quotas:** Foreign employee quotas enforced against foreign investors;
 - (f) **Company Formation Restrictions:** Joint venture/foreign equity-ceiling obligations imposed against foreign-owned businesses; and
 - (g) **Local Content Obligations:** Blanket obligatory requirements that compel foreign investors to use national suppliers or to hire local staff or workers contrary to market-driven considerations.
3. In addition, the WBG's 2016 ECOWAS Regional Doing Business Report found – based on the enforcement-of-contracts indicator that evaluates the time and cost for resolving a routine commercial dispute through the local court system – that the average ranking for the ECOWAS common market is 133 out of 189 countries surveyed.³² Similarly, the notable absence of *contemporary or truly*

³² World Bank Group, *Doing Business 2016: Measuring Regulatory Quality and Efficiency – Regional Profile 2016 Economic Community of West African States (ECOWAS)*, Washington, D.C., World Bank Group, 89 (2016), <http://documents.worldbank.org/curated/en/458941467995381198/pdf/103364-WP-PUBLIC-ADD-SERIES-DB2016-DB16-Economic-Community-West-African-States.pdf>.

international best practice investment dispute-resolution mechanisms in several Member States, including private-party negotiations, investment-grievance mechanisms, mediation, conciliation, and arbitration, exacerbates traditional investment-entry barriers in the region and, thereby, makes foreign businesses hesitant to invest in West Africa.

4. In addition to mainstream investment-entry barriers, the recent emergence of new investment challenges and threats further complicates the investment climate of the ECOWAS common market. Specifically, despite the containment of the 2014 Ebola Virus Disease (EVD) in Sierra Leone, Liberia, and Guinea, many foreign investors are still wary of West Africa in general and the Ebola affected-countries in particular. Foreign investors as a whole are not entirely convinced that EVD has been effectively contained at its source. The lack of an effective EVD containment strategy in West Africa, as well as other healthcare responses for other infectious diseases, is due in substantial part to challenged national healthcare systems, including the absence of adequate medical infrastructure, equipment, and personnel in many parts of the so-called “hot-zone” countries. This scenario has even given some foreign investors cause for concern in neighboring countries like Côte d'Ivoire that share a common border with Liberia, Sierra Leone, or Guinea. *In short, the quality of national healthcare systems actually forms part of the overall investment-climate framework that affects FDI levels in the ECOWAS common market from a foreign investor perspective.*³³
5. It follows that the absence of regional post-EVD economic recovery programs based on *innovative investment reforms* can potentially threaten FDI activity in the ECOWAS territory. As relevant here, many foreign investors view West Africa as a single economic block. These entrepreneurs believe that all of the healthcare systems of all of the Member States are inadequate to some degree. Consequently, the future re-emergence of EVD, in their view, could easily spread throughout the region. *On the other hand, if foreign investors are truly confident and convinced that health threats have been effectively contained by*

³³ See World Bank Group, *The 2014 Economic Impact of the 2014 Ebola Epidemic: Short- and Medium-Term Estimates for West Africa*, The World Bank Group, 1-3, (2014). In fact, the 2014 EVD pandemic poignantly illustrates the direct link between national healthcare systems and the economic performance of individual nations, including investment-related trade activity. Beyond the toll in human lives, the 2014 EVD epidemic has engendered significant negative economic consequences in West Africa in terms of stunted investment, reduced trade, forgone output, higher fiscal deficits, rising prices, lower real household incomes, and greater poverty. Reduced output has been roughly estimated in the order of 3.4 percentage points of Gross Domestic Product (GDP) in Liberia, 3.3 percentage points in Sierra Leone, and 2.1 percentage points in Guinea as a direct result of the 2014 EVD pandemic. *Id.*

virtue of upgraded national healthcare systems, then they are more likely to make investments in the emerging sectors of the region.

6. Likewise, the recent security challenges in Burkina Faso, Mali, and Côte d'Ivoire in 2015 and 2016, together with continued existence of Boko Haram in Nigeria, have further dampened the appetite of many foreign investors to make additional capital outlays in West Africa. The continuing security challenges, in particular, have provoked the following adverse consequences in the region: (i) an extremely high level of perceived investment risk; (ii) lack of investor confidence; (iii) impaired physical infrastructure; (iv) challenged national political situations; (v) disrupted public administration and regulatory systems; and (vi) acute safety-and-security concerns. Hence, based on the above, the ECOWAS Commission must work in tandem with the Member States under the ECOWICPF to devise innovative solutions to confront these new threats to FDI in the region.
7. Despite the multiple challenges highlighted above, the need for investment reforms in the ECOWAS common market, including healthcare improvements, is particularly acute today given the positive market dynamics and expanding regional business opportunities in West Africa as outlined in Chapter 2. Nonetheless, as underscored above, the liberalisation of foreign investment and service markets at the individual country level in the ECOWAS region is a necessary pre-condition to take advantage of these positive economic trends and encourage true regional integration.
8. To promote the desired regional investment integration that can contribute to sustainable and inclusive job creation, economic growth, and poverty reduction in West Africa, investment-reform momentum must first be generated at the national level in the individual Member States. To gauge the commitment of each West African nation to implement investment reforms, the ECOWAS Commission pledges to collaborate with the Member States under the ECOWICPF to adopt national investment-action plans or reform agendas that adhere to good-practice standards, including those set forth in this document as derived in part from the OECD Framework and the WBG IAB Methodology and Indicators.

II. ECOWAS Policy Principles

To address the above investment challenges in West Africa – specifically, traditional investment-entry barriers against the background of emerging regional health and security challenges – the Member States, in close co-operation with the ECOWAS

Commission, hereby commit under the ECOWICPF to adhere to the following policy principles:

1. Pledge to implement the **ECOWAS Investment Climate Scorecard Tool**³⁴ at the individual country level to enable both national policy-makers and the ECOWAS Commission to achieve the following goals collaboratively:
 - (a) To identify traditional investment-entry barriers both nationally and regionally;
 - (b) To track the progress of national investment reforms;
 - (c) To share good practices and proposed investment reforms both nationally and regionally; and
 - (d) To encourage the creation of a transparent and attractive investment milieu to enhance *private-sector-led development* in West Africa;
2. Adopt national investment action plans or reform agendas at the national level that adhere to good-practice standards, including those set forth in the ECOWIP, as implemented in part by the ECOWAS Investment Climate Scorecard;
3. Adhere to the policy tenets set forth in Chapter 14 of the ECOWIP to confront the emerging new challenges affecting investment activity in the region;
4. Engage in a national and regional Public-Private Dialogue (PPD) processes designed to sustain the required investment reforms at both the national and regional levels;
5. Support the prioritisation of national and regional monitoring and peer-to-peer learning activities to facilitate investment-policy and investment-climate harmonisation in the region; and
6. Commit to collaborate with the ECOWAS Commission to draft and adopt the ECOWAS Investment Code, including the adoption of modern investment dispute-resolution provisions in line with international best practice standards as outlined in Chapter 15.

III. ECOWAS Strategies

To implement the above policy principles “on the ground” in West Africa, the Member States, in close collaboration with the ECOWAS Commission, hereby agree under the ECOWIP to pursue the following strategies and to undertake the following concrete actions, including:

³⁴ It is well documented that market and regulatory failures that can be effectively benchmarked and adequately measured have a greater likelihood of being corrected. The East African Community (EAC) Scorecard provides one practical example in this regard.

1. Apply the ECOWAS Investment Climate Scorecard Tool at the Member State level to achieve the regional policy objectives of, and investment reforms contemplated by, the ECOWIP;
2. Approve national investment action plans or reform agendas in light of the ECOWIP, the ECOWAS Investment Code, and the ECOWAS Investment Climate Scorecard Tool in order to trigger the following national investment reforms that can facilitate cross-border investment throughout the region:
 - (a) **Sector Restrictions:** Elimination of foreign investment sector restrictions at the national level;
 - (b) **Non-Discrimination:** Adherence to the national treatment principle for foreign investments;
 - (c) **Capital Requirements:** Removal of minimum capital requirements imposed against foreign investors;
 - (d) **Foreign Employee Restrictions:** Lifting of foreign management restrictions and foreign staff quotas;
 - (e) **Company Formation:** Elimination of joint venture/foreign equity-ceilings for foreign businesses;
 - (f) **Local Content:** Abolition of blanket local content requirements that are contrary to market considerations and international World Trade Organisation (WTO) obligations;
 - (g) **Administrative Procedures:** Streamlining of investment approval, registration, and screening processes;
 - (h) **Cross-Border Legal Document Validity:** Cross-border recognition of Member State legal documents;
 - (i) **Works Permits/Visas:** Removal of onerous procedures applicable to work/residence permits and visas for foreign national workers and executives (e.g., single entry visa windows for foreign nationals);
 - (j) **Bank Accounts:** Authorisation of foreign currency bank accounts for all investors;
 - (k) **Access to Land:** Lifting of administrative procedural constraints that hamper access to, and tenure of, industrial, commercial, and agricultural land for all investors and enterprises;

- (l) **Incentives:** Rationalization of inefficient investment-incentives regimes; and
 - (m) **Contract Enforcement:** Adoption of accelerated contract-enforcement mechanisms through judicial reform and modern ADR modalities.
3. Implement, in coordination with the ECOWAS Commission, the policy instruments discussed in Chapter 14 of the ECOWIP to improve national healthcare systems as part of the investment-climate landscape, as well as to confront security challenges at the national and regional levels;
 4. Relaunch the *ECOWAS Regional PPD Platform* to jump-start and sustain the above investment reforms;
 5. Conduct national and regional monitoring and peer-to-peer learning activities to facilitate investment-policy and investment-climate harmonisation in the ECOWAS territory; and
 6. Adopt the ECOWAS Investment Code that will harmonise Common Law and Civil Law traditions under international law to attract growing levels of investment in West Africa.

CHAPTER 5

INVESTMENT-RELATED TRADE POLICY

I. Introduction

A. International Best Practice Context

1. As emphasised by the OECD Framework, a coherent trade policy can influence greater and higher quality investment flows in cases in which such a policy offers opportunities for investors to enjoy economies of scale and facilitate their integration into regional and global supply chains. Nonetheless, a less supportive environment created by restrictive rules affecting imports and exports can have the opposite effect. To this end, trade-liberalising measures, undertaken unilaterally or as part of binding multilateral and preferential trade-and-investment agreements, can improve allocative efficiency, provide access to larger markets, allow for greater scale economies, and lower production and distribution costs.³⁵
2. Open, predictable, and transparent trade-and-investment policies are also necessary for countries to remain competitive in a world in which GVCs are a dominant feature of cross-border trade. More than one-half of world manufacturing imports and 70% of service imports are intermediate goods and services. When production is fragmented in such a manner, and when goods and services cross borders many times, tariffs, non-tariff barriers (NTBs), and other restrictive measures affect not only foreign suppliers, but also domestic or local producers.³⁶
3. Streamlined and efficient customs and border procedures and well-functioning transportation, logistics, communication, and other business and professional services are particularly important in this regard. Open trade-and-investment regimes, including effective customs procedures, help ensure that inputs are competitively priced, and that trade costs are reduced. To this end, countries should undertake efforts to reduce the compliance costs of customs, regulatory, and other administrative procedures at their national borders, as well as services barriers to trade.³⁷
4. Furthermore, countries should carefully analyse the effectiveness of

³⁵ OECD, *Policy Framework for Investment 2015 Edition*, 47 (2015).

³⁶ *Id.*

³⁷ *Id.* at 47-48.

investment-related trade policy measures to promote investment in targeted industries, including import tariffs, local content requirements, export restrictions, and other trade constraints, to achieve the country's economic policy objectives. In undertaking this analysis, countries should consider the adoption of alternative methods of promoting investment in priority sectors that do not discriminate against foreign investors, such as in the areas of labour market, education, innovation, and SME development policies.³⁸

5. A coherent and effective investment-related trade policy can even help to mobilise capital, skills, technology, and intermediate inputs to allow firms to expand. Such a policy further helps to channel resources to more productive uses, and, through competitive pressure and the discipline imposed by the market, helps ensure that all firms strive to improve their efficiency.
6. Although investment-related trade policy generally should allow enterprises to invest productively and profitably, reducing the cost of doing business and raising corporate profitability are not the sole objectives of such a policy. A well-balanced investment-related trade policy should ensure that investment promotes the optimal economic and social impact feasible in the host country in question.³⁹
7. It follows, based on the above, that countries that impose trade barriers on imports and exports generally do not constitute attractive destinations for FDI. A corollary to this proposition is that nations that lack effective investment legal, regulatory, and institutional frameworks are typically unable to attract the precise investment that is necessary to participate in *regional* and *global* value chains of production. Consequently, a natural link exists between investment and international trade, an outcome that manifests itself through the respective economic policies and regulatory frameworks governing these inter-related disciplines. Empirical case studies have even demonstrated a strong positive correlation between increases in investment activity, on the one hand, and increases in international trade, on the other hand.⁴⁰

B. Adaptation of International Standards to the ECOWAS Investment Policy

1. The above OECD observations constitute the underlying rationale why the ECOWIP has formulated guiding principles and policy prescriptions that apply

³⁸ *Id.* at 47.

³⁹ *Id.* at 14.

⁴⁰ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report*, United Nations (1996).

to investment-related trade measures at both the national and regional levels. As further underscored above, an effective investment-related trade policy can generate greater and higher-quality investment flows that offer opportunities for investors to enjoy economies of scale and integration into strategic GVCs. By contrast, a less supportive environment created by restrictive rules affecting imports and exports can have the opposite effect. As of 2012, official statistics demonstrated, on average, that intra-regional ECOWAS trade was only approximately 10% of all international trade on the African continent, while its share globally was only about 3%.⁴¹ An increase in intra-regional trade facilitated by an effective investment-related trade policy would enhance considerably the process of regional integration to attract foreign investors to the ECOWAS common market.

2. In this context, the ECOWAS Commission recognises, as explained later in Chapter 14 of the ECOWIP, that multi-use, integrated SEZs and other spatial areas may constitute an ideal policy instrument to improve national investment climates and international trade regimes. Indeed, SEZs constitute simultaneously *integrated international investment and trade platforms* that can attract critical FDI, promote import-and-export activity, and lead to inclusive job creation.
3. The major trade barriers relevant to investment-location decisions made in the ECOWAS Member States are tariff and NTBs. Tariffs in West Africa have served two basic purposes. The first relates to revenue generation by the national governments, and the second is to protect domestic industries and producers. Although national trade regimes for goods in West Africa have, on average, undergone substantial liberalisation since the early 1980s, there is still a need for further reforms. In principle, the ECOWAS CET that is applicable to foreign products imported into the Community from non-ECOWAS third-party countries responds to this need by providing investors with tariff-rate stability that encourages the regional integration process.
4. Nonetheless, two broad categories of traditional and non-traditional NTBs can still be found in West Africa; namely, institutional (including administrative and procedural) NTBs and those created by deficient infrastructure. Government-motivated NTBs have been maintained by more than half of the Member States as an instrument to control trade flows. A major contradiction to the principles on which the ECOWAS Revised Treaty was established is the extension of these NTBs to intra-regional trade.

⁴¹ World Trade Organisation International Trade Statistics 2012, 23 (2012).

5. Non-traditional NTBs – which also impede trade facilitation and, thereby, dampen prospects for investment in the region – include bloated bureaucracies, corruption in the customs process, slow port operations, substandard roads and communication infrastructure, inadequate storage conditions, harassment by security operatives and other personnel at numerous check points, and inter-country payment difficulties. Other traditional NTBs comprise technical requirements, including sanitary and phyto-sanitary measures,⁴² as well as other technical standards co-ordinated through a custom-valuation process, that act as protectionist measures.
6. In this vein, the Community has adopted the ECOWAS Protocol on the Free Movement of Persons, Right of Residence and Establishment, as well as the ETLS that is applicable to regional agricultural products, handicrafts, crude oil, and industrial products. The immediate consequence of the implementation of this regional policy has been the creation, in principle, of a larger, single market in the region to replace smaller, fragmented national markets. The resulting regional trade-and-investment market can undoubtedly create new opportunities for trade-and-investment flows through the expansion of enterprises taking advantage of growing economies of scale by servicing a larger regional market.
7. Services are also critical in West Africa for the generation of exports, the creation of employment opportunities, the development of other economic sectors, and ultimately wealth distribution. In addition, because of the positive link between the liberalisation of services trade and economic development, many Member States have already adopted unilateral liberalisation mechanisms to unlock their cross-border trade in services in accordance with their international obligations arising under the WTO General Agreement on Trade in Services (GATS). In spite of these efforts, however, the majority of the Member States still do not have in place any specific policies or implementation strategies that can effectively jump-start intra-regional trade in services.

⁴² The Agreement on the Application of Sanitary and Phytosanitary Measures, also known as the SPS Agreement, is a WTO international treaty. The sanitary and phytosanitary measures covered by the SPS Agreement are those aimed at protecting human, animal, and plant/crop life and health from certain risks. In accordance with the SPS Agreement, the WTO establishes constraints on Member States' policies, rules, standards, and regulations governing food safety (e.g., bacterial contaminants, pesticides, inspection, labelling), as well as animal and plant health (i.e., "phytosanitation") with respect to imported pests and infectious diseases.

8. There is also a critical need to implement a regional payment and settlement system to facilitate cross-border trade in West Africa that can further attract FDI. This innovation will reduce the current, over-dependence on the use of the relatively expensive international payment systems for trade. Moreover, the majority of the non-WAEMU members of the ECOWAS Community, including Cabo Verde, Gambia, Ghana, Liberia, Nigeria, and Sierra Leone, have fragmented exchange-rate arrangements with the WAEMU countries that are ECOWAS Member States. Multiplicity of currencies increases international trade costs as business persons are confronted with the cost of exchanging one currency for another. Work by the ECOWAS Commission to create a single ECOWAS currency has been slow and needs to be expedited.

9. A long-standing issue that deserves particular attention in the West African context is the informal economy. Due to the nature of informality, it is difficult to provide accurate estimates, but assessments show that the informal sector represents, on average, up to 60% of a West African country's GDP and up to 80% to 90% of a West African country's employment.⁴³ It is well documented that informality – which typically comprises smuggling activities – is encouraged in large part by policy, legal, and regulatory failures – including cumbersome registration and compliance obligations, such as import/export barriers, as well as high customs costs and procedures – that make the formal sector unattractive for informal entrepreneurs.⁴⁴ As a result, West African economies are confronted with several challenges in the face of informal activity in the trade sector: (i) policy and regulatory barriers that impede trade-and-investment flows; (ii) competition distortions that deter new investment; (iii) tax evasion that reduces government revenues; (iv) difficulties with policy monitoring due to a lack of reliable data; and (v) negative human and social impacts, including decreased standards of living, as a result of a lack of control on the quality of goods (e.g., food and medicine). Based on the above, it can be reasonably argued that a comprehensive investment-related trade policy in West Africa should also take into consideration the informal economy and tackle its adverse effects. As explained further in Chapter 14 of the ECOWIP, spatial areas, including SEZs, may prove to be one effective policy instrument to address the informal economy in the ECOWAS territory.

⁴³ Africa Development Forum, *The Informal Sector in Francophone Africa Firm Size, Productivity, and Institutions*, Joint Report 69935, French Development Agency (AFD) and World Bank Group (WBG), 48 (2012).

⁴⁴ *Id.*

II. ECOWAS Policy Principles

To address the multiple investment-related trade issues discussed above, the Member States and the ECOWAS Commission pledge, in tandem, to adhere to the following policy principles:

1. Take steps to reduce trade-policy uncertainty, as well as to increase trade-policy predictability, for investors in order to encourage sustained investment and trade flows into the Member States and the regional common market;
2. Promote the implementation of effective investment-related trade policies that reflect internationally-recognised standards (e.g., WTO Agreements) to stimulate regional trade-and-investment integration;
3. Design transparent and non-discriminatory investment-related trade laws;
4. Refrain from discriminating amongst national/foreign importers/exporters;
5. Encourage the adoption of policies that foster backward-and-forward trade linkages with the local economy, including informal traders;
6. Commit to reduce customs compliance costs at the national borders;
7. Adhere to the full implementation of the ECOWAS CET, except in cases of undue economic hardship for sensitive sectors in certain Member States; and
8. Promote WTO-compliant export strategies, including the implementation of national spatial areas, that can contribute to enhanced export competitiveness to attract foreign investment in the region, while providing a policy instrument to address the informal economies of the common market.

III. ECOWAS Strategies

To implement the above policy principles, the Member States, together with the ECOWAS Commission, hereby commit under the ECOWIP to pursue the following strategies and to adopt specific measures, including:

1. Ensure that information on investment-related trade laws, regulations, and administrative requirements is provided through a legally codified system;
2. Ensure that such information is communicated and disseminated through the systematic use of printed materials (e.g., official gazettes), official websites, and other electronic communication technologies, as well as through regional regulatory agencies;
3. Adopt national investment codes that are consistent with, and reinforce the rules and regulations governing, international trade matters as subject to the relevant WTO Agreements;
4. Engage in regional co-operation activities to reduce and/or eliminate custom-clearance delays, simplify national customs procedures, including

- documentation requirements and valuation methods, and eliminate trade barriers created by unauthorised check points;
5. Implement in full the ECOWAS CET, except in those cases involving undue economic hardship in sensitive product sectors in certain Member States;
 6. Establish institutional mechanisms nationally to support export-promotion strategies in cases in which none exists, including the creation of national SEZs, enterprise clusters, growth poles, and other spatial area regimes;
 7. Create and implement regional quality norms for all products in all competitive sectors, including modern sanitary and phytosanitary standards in the agribusiness sector, in order to encourage access to regional and global supply chains;
 8. Adopt a regional framework under the aegis of the GATS to regulate regional trade in services to encourage technology transfers and local entrepreneurship and employment;
 9. Review international trade agreements with regional trading partners to ensure the reduction or elimination of export subsidies and domestic support programmes that constitute unfair trade practices under the WTO framework that distort international trade in the ECOWAS region; and
 10. Establish a mechanism to organise and incentivise informal sector traders to enter into the formal economy, especially through leveraging the synergies with the OHADA *entreprenant* programme,⁴⁵ as well as through access-to-credit initiatives that improve financial infrastructure in the region.

⁴⁵ For the complete name of OHADA, see *infra* note 93 at page 80 and accompanying text. The OHADA *entreprenant* programme is designed to provide informal entrepreneurs in the OHADA zone with market-based incentives, such as access to credit and healthcare-insurance coverage, to entice this group to enter into the formal economy. The OHADA Permanent Secretariat already has begun rolling out this innovative programme on a pilot basis in Benin and Guinea. Other OHADA countries that are also ECOWAS Member States like Senegal have also commenced on their own *entreprenant* initiatives in their jurisdictions in accordance with the general parameters of the OHADA *entreprenant* programme.

CHAPTER 6

COMPETITION POLICY

I. Introduction

A. International Best Practice Context

1. As explained in the OECD Framework, a competitive environment encourages risk-taking and investment. In addition, extensive empirical evidence strongly suggests that industries facing greater competition experience faster productivity growth. Competition encourages more efficient firms to enter and gain market share at the expense of less efficient enterprises. Without any competition, there is little incentive to innovate. Innovation, in turn, generates new products and processes that allow firms to leapfrog their competitors and increase the economic opportunities for business success. An environment of innovation, productivity growth, and business success – to which competition typically contributes – is one that is conducive to encourage enhanced investor confidence and, as a consequence, rising levels of investment.⁴⁶
2. Creating and maintaining a competitive environment requires a well-structured competition law, an effective administrative competition authority that enforces that law, and economic policies that respect the principles of competition.⁴⁷ Such a law should generally prohibit anticompetitive vertical and horizontal agreements, as well as exclusionary practices by dominant firms. That law should also provide for the review of mergers and acquisitions to prevent the creation of conditions that can lead to a reduction in competition in the relevant market through the establishment of monopolies.⁴⁸
3. As a guiding principle, the competition rules should apply equally to all firms – whether privately or state-owned, foreign or domestic. In cases in which government interventions may affect competition, public authorities should systematically assess the impact on competition of existing or proposed policies, laws, and regulations and should further eliminate any unnecessary obstacles and distortions to competition, unless certain measures are essential to the achieve a country’s other policy goals.⁴⁹

⁴⁶ OECD, *Policy Framework for Investment 2015 Edition*, p. 53 (2015).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 54.

4. An adequately resourced, skilled, and independent competition authority is needed in any host country or, alternatively, in the relevant regional market, that must comply with its pro-competition mandate in a manner that is free from political interference. This administrative authority should have the basic powers and instruments to detect illegal uncompetitive practices and to impose sanctions for any infringements thereof to ensure a reasonable level of deterrence. This administrative authority should also provide the marketplace with confidence in a fair and transparent manner through the even-handed application of the law, the protection of fair administrative processes, clarity about the governing competition rules, consistency and predictability in the enforcement of these rules, certainty about the length of the enforcement procedures, and protection of confidential information.⁵⁰
5. Moreover, competition policy should take into consideration how the principles of fair and effective competition are applied, and how the public-sector procures its goods and services and awards concessions to the private sector. In this vein, competitive tendering that is based on clear, transparent, and non-discriminatory rules should be used to select the most qualified and efficient private suppliers, service providers, and other business entities.
6. In this context, privatisation and liberalisation policies should be designed to promote the entry of new market players to encourage sustainable and effective competition. Appropriate sectoral regulation must be introduced in order to balance the need to avoid incumbents' exploiting their advantages to foreclose the entry and expansion of new businesses with the need to provide new and existing industry players with the proper incentives to invest. Competition liberalisation, when properly implemented, is considered to have a positive effect on investment.⁵¹

B. Adaptation of International Standards to the ECOWAS Investment Policy

1. Competition policy has assumed an ever-increasing role in the global development agenda of West Africa. The promotion of a competitive environment has become a necessary policy condition to enable private businesses to operate more efficiently and profitably in the common market. In this context, as intimated above, increased competition reduces the ability of firms to raise prices far above marginal costs as a monopolist and can even incentivise firms to produce at the lowest practicable costs. The positive

⁵⁰ *Id.*

⁵¹ *Id.*

consequences of heightened competition also include incentives to innovate, to imitate, and to invest in the development of new technologies and “know-how”. Competition policy can even reinforce economic efficiency in West Africa by preventing or providing remedies for company- market structures and business practices that undermine the inter-firm rivalry in domestic and regional markets.

2. Other benefits of a coherent competition policy as implemented in the ECOWAS common market can potentially embrace the following: (i) the promotion of consumer welfare; (ii) the prevention of abuse of dominant market positions by larger enterprises; (iii) prohibitions against anti-competitive practices that negatively impact the trade performance and competitiveness of national and regional economies; (iv) the reinforcement of privatisation benefits and regulatory deregulation initiatives; and (v) the increase in any West African country’s ability to attract and maximise the benefits of both national and foreign investment.
3. The effective implementation and enforcement of an ECOWAS competition policy is frequently cited as a key consideration in the decisions of potential investors to locate in West Africa. Therefore, a regional ECOWAS competition policy is essential for purposes of attracting foreign investment to the region and should form an integral part of the ECOWIP.
4. Vital elements of a well-functioning competition-policy framework that are of interest to all investors doing business in West Africa include *transparency* in the availability and predictability in the implementation of competition laws. Transparency and predictability can also help improve the West African investment environment, because these factors can reduce the risk of inconsistent “**application of laws and regulations**” at the national and regional levels. In addition, transparency decreases compliance costs of firms and, at the same time, promotes *market confidence* by assuring investors that they are being treated fairly, and that the national government in question is exercising its powers responsibly.
5. Abuses of market power and predatory prices are common anti-competitive practices in West Africa that can have a damaging impact on overall investment activity. Predatory pricing behaviour, such as selling products below their cost of production with a view to recouping those losses after competing rivals have exited the market, or “would-be” entrants have been deterred, can inhibit investment flows. As a result, the ECOWIP must squarely address all anti-competitive practices that hinder domestic and foreign investment by providing

mechanisms that can prevent, correct, and sanction such anti-competitive behaviour.

6. A controversial element that is strongly advocated for in developing-country competition laws, but not expressly provided for in the laws of several developed countries, is the non-discriminatory treatment of foreign investors with respect to entry requirements as discussed in Chapter 4. Related to this issue is the trend that supports the elimination or curtailment of preferences by national governments to quasi-state institutions or state-controlled enterprises. Preferential programs applied to regulated industries or “national champions” are often justified on the grounds that the limits that such programmes place on competition are outweighed by other benefits to the economy at large. These benefits typically include promoting innovation or providing essential services.
7. Nevertheless, limiting competition in particular sectors runs the risk of creating inefficiencies and reducing social welfare in other parts of the economy due to the abusive exercise of monopolistic market power. Consequently, a careful balance needs to be struck between the desire for an unfettered competitive framework versus one that recognizes some degree of preferential treatment. In effect, the goal of the ECOWIP is to establish a regional policy that can create the conditions for *optimum domestic competition*, with positive “spill-over” effects in the regional market.
8. Mergers and acquisitions constitute the predominant mode of expansion for the majority of MNEs doing business in foreign markets. Nonetheless, given that MNEs have considerable financial resources at their disposal, operate in industries that are often dominated globally by a few large firms, and are able to establish dominant positions in many national markets, a careful review by the competent competition authorities of any proposed merger or acquisition is necessary. Such a review is essential to prevent anti-competitive behaviour that leads to any kind of market dominance, including global market-sharing schemes. As a result, any regional competition-policy framework in West Africa should realistically provide space for regional co-operation amongst the national competition authorities of the Member States to facilitate the review of proposals regarding mergers and acquisitions, as well as the cross-border prosecution of competition cases in the region.
9. In this context, the ECOWIP is informed by the provisions of the Supplementary Act A/SA.1/06/08 Adopting Community Competition Rules and the Modalities of their Application within ECOWAS, adopted in Abuja, Nigeria, on December

19, 2008 (ECOWAS Supplementary Competition Act). The ECOWAS Supplementary Competition Act applies to the traditional areas of competition policy, including agreements and concerted practices involving the restraint of trade, the abuse of dominant market positions, and mergers and acquisitions.

10. The ECOWAS Supplementary Competition Act also contains provisions on state aid and public enterprises couched in flexible language that preserves sufficient policy space for the Member States to pursue pro-developmental policies. For example, state aid of a quasi-social character that is bestowed to encourage the development of economically depressed areas of a Member State is considered compatible with the ECOWAS Supplementary Competition Act. Nonetheless, such state aid can constitute an actionable “specific domestic subsidy” within the meaning of the WTO Agreement on Subsidies and Countervailing Measures.

II. ECOWAS Policy Principles

In accordance with the ECOWIP, the ECOWAS Commission and the Member States pledge to co-operate in order to promote the following competition policy principles in the ECOWAS territory:

1. Encourage competition to enhance economic efficiency in production, trade, and investment activities at the national and regional levels in the ECOWAS territory;
2. Prohibit any anti-competitive business conduct that prevents, restricts, or distorts competition or trade at the national or regional levels;
3. Endeavour to preclude and eliminate anti-competitive practices that constitute an abuse of dominant market position;
4. Ensure the social welfare of consumers and the protection of their commercial interests;
5. Co-operate at the regional level in the area of competition-policy formulation and implementation, especially with regard to competition-law enforcement, including notification, consultation, and exchange of information relating to the enforcement of the competition laws and policies of both the ECOWAS Supplementary Competition Act and the individual Member States;
6. Improve the regional investment climate through the elimination of trade-related investment barriers created by anti-competitive practices;
7. Adhere to clear and transparent rules on competition to improve the ability of the regional economy to attract intra-regional and extra-regional foreign investments and to maximise the economic and social benefits of such investments;
8. Reduce competition law uncertainty, as well as increase competition-law

- predictability, to ensure sustained investment flows to the ECOWAS common market;
9. Offer market-driven investment incentives to national and foreign investors to encourage the implementation of pro-development enterprise strategies;
 10. Balance national competition policy against other national policy goals, such as the promotion of local industries, SME development, and incentives for innovation and research & development (R&D);
 11. Promote collaboration amongst and with the ECOWAS Regional Competition Authority, the West African Economic and Monetary Union (WAEMU) Competition Authority, and the national competition authorities of the ECOWAS Member States;
 12. Encourage an enforcement policy by each national competition authority that prohibits discrimination on the basis of nationality; and
 13. Undertake co-ordinated regional initiatives to reduce informal trade and to ensure the fair, transparent, and equitable application of the competition rules to all enterprises, whether formal or informal.

III. ECOWAS Strategies

1. To implement the above policy principles, the ECOWAS Commission and the Members States hereby commit under the ECOWIP to pursue the following strategies, execute the following actions, and adopt specific measures at the national and/or regional level, including:
 - (a) Enact national competition laws (as implemented and enforced by duly-established national competition authorities), with the objective of promoting economic efficiency and consumer welfare, in accordance with the applicable provisions of the ECOWAS Investment Code and the ECOWAS Supplementary Competition Act;
 - (b) Publish policies and regulations governing competition policy to ensure transparency and accessibility by all investors;
 - (c) Establish the legal right of review of administrative decisions issued by the national competition authorities by independent national judicial courts and tribunals in the first instance and by the ECOWAS Regional Competition Authority in the second instance; and
 - (d) Prohibit agreements that retrain trade, including predatory pricing and market-sharing schemes, and take corrective action to address abuses of dominant market position both nationally and regionally.
2. The ECOWAS Commission for its part shall provide adequate support to

national competition authorities to ensure an effective and pro-active enforcement of national competition laws to prevent, correct, and sanction anti-competitive practices.

3. The ECOWAS Regional Competition Authority, together with the competent national competition authorities, shall review on a periodic basis commercial activities in the regional and national markets to identify business practices that distort the efficient operation of the relevant markets or business conduct that may adversely affect the economic interests of consumers.
4. The ECOWAS Member States shall open channels of communication and encourage collaboration between and amongst national competition authorities and the ECOWAS Regional Competition Authority to facilitate the national and regional enforcement of the governing competition laws, including the evaluation of proposed cross-border mergers and acquisitions.

CHAPTER 7

HUMAN CAPITAL AND LABOUR

I. Introduction

A. International Best Practice Context

1. Competitively skilled human resources cut at the very heart of a country's competitiveness to attract investment and sustain inclusive economic growth, especially as enterprises today constantly restructure their global supply chains. As a consequence, human resource development (HRD) is a vital ingredient of various policies affecting a nation's enabling environment for investment and economic development.⁵²
2. HRD is the process of increasing the knowledge base, skill set, and capacities of all people in a society, including through education and healthcare policies. HRD also is designed to encourage companies to invest in human resources; for example, through on-the-job training and employer involvement in education. Indeed, such training programs can increase local labor productivity.⁵³
3. Well-designed national labour policies can even help to reduce income and wealth inequalities and spur inclusive economic growth, create more and higher quality jobs for all, allow investment in workers' skills, and enhance access to, and improve the quality of, on-the-job education and training. Nonetheless, attempts to improve workforce skills through vocational training – without simultaneously considering their interaction with basic educational attainment levels – are likely to be ineffective. As such, the development of comprehensive HRD policies is a fundamental consideration for the creation of a high quality, adaptable labour force that can be a key driver for the creation of sustainable and inclusive economic development.⁵⁴
4. With all sound forms of education and training, policy action can help ensure that public and private programmes are of a sufficient quality, are generally accessible, satisfy essential business needs, and are periodically reviewed. HRD policy can further promote integrated and ongoing links amongst all education and training institutions and providers, businesses, and industry to

⁵² OECD, *Policy Framework for Investment 2015 Edition*, p. 83 (2015).

⁵³ *Id.*

⁵⁴ *Id.*

tailor educational programmes to the specific business needs required by the relevant market. HRD policy can also provide young people with the information needed to make realistic choices about their studies for future employment.⁵⁵

5. In particular, effective strategies to attract workers with different skill sets can address skill needs directly, facilitate the transfer of knowledge, and promote overall country competitiveness, while mitigating potential negative effects on the domestic or national labour force. Skills strategies should further consider and take advantage of all available human capital in the relevant market, including attracting the return of highly-skilled Diaspora individuals who have studied abroad.⁵⁶
6. Nationally, special strategies are needed to address the issue of social protection for workers in the informal sectors, including those SMEs that are unable to afford private insurance against risk. Special strategies also are necessary to encourage informal enterprises and workers to move into the formal economy. In the formal economy, the co-operation and involvement of private enterprises in maintaining high standards and protecting workers, together with a willingness to negotiate in good faith with legitimate worker organisations, including labour unions, are required to achieve the best policy outcomes for any society as a whole.⁵⁷
7. Public health and access to healthcare (as discussed in Chapter 4) also affect human resources and the attractiveness of a given market to potential investors in that good health improves worker productivity.⁵⁸
8. Moreover, labour standards are essential to ensure that businesses can contribute to local economic and social development. Core labour standards are fundamental principles designed to protect basic human rights in the workforce and can enhance inclusive private sector-led growth. Enforcement of international standards, in accordance with the International Labour Organisation (ILO) Declaration, can benefit both the economy and society on a collective basis by creating a level playing field for national and foreign investments in respect of labour protection. As such, the adoption of the ILO conventions is critical for any country.⁵⁹

⁵⁵ *Id.*

⁵⁶ *Id.* at 84.

⁵⁷ *Id.* at 85.

⁵⁸ *Id.* at 83.

⁵⁹ See *id.* at 84 (providing that the core labour standards identified by the ILO aim to : (i) eliminate all forms of forced or compulsory labour; (ii) effectively abolish child labour; (iii) eliminate discrimination in respect of

9. In addition to fair and equitable labour standards, an efficient labour market requires that all individuals who are capable of contributing to the economic and social development of any nation are given the opportunity to do so.⁶⁰ Stated otherwise, explicit or implicit discrimination in the labour market on the grounds of race, sex, or age must be prevented. Effective labour standards require not only a suitable legislative framework, but also efficient implementation and enforcement of key educational, social, and labour market policies, as well as the active monitoring of relevant outcomes.⁶¹
10. Finally, sound labour market regulation must not only fulfill the social goals of employment protection generally – that is, the protection of core labour standards, occupational health and safety norms, restrictions on hiring and firing, and legal guarantees of social insurance – but also address the need to incentivise companies to invest, create jobs, and boost their productivity in order to contribute to inclusive economic growth in the national economies in which they conduct business.⁶²

B. Adaptation of International Standards to the ECOWAS Investment Policy

1. As emphasised above, human capital is one of the most significant factors of production that can improve the competitiveness and productivity of investment projects in any country. Well-trained and qualified human capital encourages MNEs to establish affiliates in nations in which such capital is relatively abundant. Qualified human capital can more easily adjust to the relatively complex technologies that accompany certain FDI, as well as adapt such technologies to the local economy. Abundant unskilled but trainable labour in a host nation also makes it possible to have relatively low wage expenses for investment projects as well.
2. A new trend in FDI is the localisation of R&D activities in developing countries in which cheaper skilled personnel is available. In this context, emerging economies, particularly those of Asia with modern ICT systems, as accompanied by robust legal, regulatory, and institutional frameworks, especially the protection of IPRs, have invested in the development of their

employment and occupation; and (iv) ensure the freedom of association and the right to bargain collectively).

⁶⁰ *Id.* at 84.

⁶¹ *Id.* at 85.

⁶² *Id.*

human capital to attract FDI for R&D programmes that has yielded significant value added to their local economies.

3. Meanwhile, West Africa as a region has faced significant challenges in attempting to follow these new trends. Despite abundant natural resources, FDI flows in the ECOWAS common market still remain relatively low, making the region one of the most underperforming FDI destinations in the world. As explained previously in the ECOWIP, the ECOWAS Member States that receive the highest levels of FDI are those that are rich in natural resources, an outcome that confirms the perception that MNEs in West Africa still give priority to low value-added primary sectors. The relative under-development of human capital in the ECOWAS regional market is a major reason underlying this enduring phenomenon.
4. Nonetheless, progress has been made in higher professional and technical education in the region, with sustained growth in the number of universities and vocational and technical training centres, as well as an increase in private investments in education and training. Consequently, the West African region is beginning to offer a relatively large specialised and young labour force to support investments in all economic sectors. Noteworthy is the remarkable achievement in the deployment of centres of excellence that are turning out technical and managerial specialists in various fields.
5. To support the efficient use of labour in the region, improve the spatial distribution thereof, and adequately confront the persistence of structural unemployment problems, the Member States themselves have undertaken actions to promote the free movement of persons as provided for in the ECOWAS Protocol on Free Movement of Persons, Right of Residence and Establishment.
6. To this end, the ECOWAS Community is working towards the harmonisation of academic curricula and the mutual recognition of certificates and diplomas to support, facilitate, and guarantee the free movement of labour, the rights of establishment, and the spatial distribution of labour across the region.
7. The Community also recognises the potential of the regional Diaspora; that is, citizens of the ECOWAS Member States residing outside the Community. The Diaspora is another potent source to help contribute to the skilled manpower stock of West Africa that can support growing investment opportunities in the ECOWAS zone. A pro-Diaspora policy can further harness this latent potential to jump-start economic development in the region.

8. As part of the reforms being implemented to improve the labour-related investment climate in the region, the ECOWAS Commission also has adopted a Labour and Employment Policy and Social Security Legislation. Furthermore, the ECOWAS Commission is in the process of attempting to harmonise the national labour and employment laws of the Member States by collaborating with individual countries regarding training-and-employment initiatives and by establishing mechanisms that promote co-operation between regional and national institutions. Nonetheless, as a result of implementation gaps at the national levels, the above programmes are only partially implemented. As a result, the ECOWAS common market is unable to take full advantage of its labour comparative advantage, especially among the younger members of its population. Accordingly, human-capital development continues to remain one of the major challenges to investment promotion in the West African region.
9. As highlighted in Chapter 4, a robust and vibrant healthcare sector is another important factor to ensure a healthy workforce that can contribute positively to productivity levels that are needed to attract intra-regional and extra-regional investments. In pursuit of this goal, the ECOWAS Commission has adopted the Protocol on the Establishment of the West African Health Organisation to provide the highest level of health services, harmonise Member States' policies on health, pool financial resources, and encourage Member States' co-operation in the development of the healthcare sector in the region. Medical SEZs, including medical villages, as discussed in Chapter 14, can further reinforce the goal of improving regional healthcare services, worker health, and worker productivity, because the region still suffers from the inadequate provision of quality healthcare services throughout the common market.

II. ECOWAS Policy Principles

In view of the above human capital challenges in the region, the ECOWAS Commission and the Member States shall endeavour to adhere to following policy principles to strengthen human-capital development in the ECOWAS common market. Specifically, the Member States agree to:

1. Give priority to the use of local skilled labor in national investment and FDI projects in cases in which market considerations warrant such a result;
2. Promote the use of skilled labor from the Diaspora;
3. Improve health-and-education sectors at all levels in the Member States;
4. Ameliorate the implementation in the region of the ECOWAS Protocol on the Free Movement of Persons, Right of Residence and Establishment;

5. Pursue the harmonisation and modernisation of academic programs and curricula, as well as the effective implementation of the General Convention A/C.1/1/03 on the Recognition and Equivalence of Degrees, Diplomas, Certificates, and Other Qualifications, in the ECOWAS Member States (2003);
6. Encourage a system of technical, vocational, and tertiary training to prepare trainees for the changing labour market in the ECOWAS markets;
7. Strengthen labor-market operation flexibility and compliance with internationally-recognised standards in the area of labour rights and workers' protection;
8. Facilitate the liberalisation and improvement of education and healthcare services in the region;
9. Encourage corporate enterprises to engage in so-called "in-house" training by virtue of performance-based financial and non-financial incentives;
10. Promote safety-and-health training in the work place;
11. Encourage the ratification of the international labour conventions, including the ILO conventions and agreements; and
12. Endorse the compulsory learning of at least two official ECOWAS languages in the primary and secondary schools of the Member States.

III. ECOWAS Strategies

To comply with the above policy principles, the ECOWAS Commission and the Member States agree to pursue the following strategies and adopt the following measures in accordance with the ECOWIP:

1. Establish and periodically update databases at the regional and national levels, as well as in the Diaspora community, regarding all major fields of human capital resources. To this end, the ECOWAS Commission, in close collaboration and co-ordination with the Member States, shall provide support to national institutions responsible for data-and-statistics collection;
2. Develop and adopt a regional SEZ/Public-Private Partnership (PPP) policy to attract investment into the healthcare and education sectors in line with the policy prescriptions articulated in Chapter 14;
3. Adopt incentives measures at the national level for firms that not only accept interns from technical and vocational institutions and universities for short-term internships, but also provide in-house training to local unskilled, skilled, and professional staff; and
4. The ECOWAS Commission for its part shall strengthen and reinforce the Committee on Trade, Customs and Immigration to facilitate the implementation

of the ECOWAS Protocol on the Free Movement of Persons, Right of Residence and Establishment and other related labour market laws in the Member States.

CHAPTER 8

PHYSICAL INFRASTRUCTURE DEVELOPMENT POLICY

I. Introduction

A. International Best Practice Context

1. It is well known that modern, reliable, and well-maintained physical infrastructure, including power, roads, bridges, and other transportation networks, can enhance economic activity and contribute to poverty reduction. Specifically, state-of-the art infrastructure can improve labour productivity, decrease production and transaction costs, and reduce environmental and other social costs. Conversely, inadequate physical infrastructure – whether in the form of electricity, water and sanitation, or communication networks – raises costs for all firms and restricts the flow of goods, services, people, and market information in any economy. These consequences have negative implications for a country's integration into strategic regional and global supply chains and broader economic development as well. By segregating markets, infrastructure deficiencies limit competition and reduce incentives to innovate and to improve productivity.⁶³
2. To maximise the contribution of physical infrastructure to economic development, countries need to establish comprehensive infrastructure strategies, reinforce the involvement of the low-income population (as well as other user groups), emphasise the essential role of maintenance and sustainability in delivering results, and support the diverse mix of financial instruments that can facilitate a broader involvement of all infrastructure providers.⁶⁴
3. Governments also need transparent processes to determine how much of the national budget is required to be spent on physical infrastructure, sectors in which to allocate such spending, and how to operate the physical infrastructure in question – whether publically, privately, or through any one of the recognised PPP modalities. This approach requires the capability and capacity of the public sector to undertake necessary cost-benefit analyses, while participating in effective decision-making processes that give due weight to the findings of such analyses. This approach also requires adequate co-ordination across agencies at all levels of government, including at the local/municipal, national, and

⁶³ OECD, *Policy Framework for Investment 2015 Edition*, p. 91 (2015).

⁶⁴ *Id.*

- regional levels. Such a co-ordinated infrastructure policy helps government administrators identify physical infrastructure needs across sectors and prioritise infrastructure-development projects in an integrated manner.
4. Extensive stakeholder consultations with all interested parties – including end-users, donors, private-sector participants, civil society, and any affected local communities – is an extremely important consideration. This strategy helps to facilitate discussions concerning key infrastructure policy objectives in order to align such objectives and ensure that infrastructure priorities and projects benefit all segments of society.
 5. In this context, the private sector can bring additional benefits to physical infrastructure development. As referenced in Annex C to the ECOWIP, the private sector can enhance “value-for-money” propositions in respect of the use of public finances for physical infrastructure development by expanding the choices for infrastructure delivery. This includes the bundling of different aspects and stages of infrastructure projects, an outcome that can trigger significant cost savings and efficiency gains for a particular host country.
 6. Furthermore, governments can benefit from more efficient risk allocation, increased competition, and private-sector managerial and technological skills. In a number of countries, adequately regulated and managed private participation in physical infrastructure development has helped boost the coverage and efficiency of utility services. To this end, simplified and competitive procurement procedures may help to increase competition and facilitate the participation of small bidders for infrastructure projects as well.⁶⁵
 7. In cases in which privately-owned infrastructure providers coexist with state-owned enterprises, specific measures designed to maintain a “level playing field” may be needed to safeguard a healthy competitive environment and reduce concerns over regulatory discretion that can give rise to corruption. Adopting strong corporate governance standards for state-owned enterprises and ensuring that all relevant laws and regulations applicable to private companies also apply to publicly-owned entities, including the insolvency and competition laws, as well as all laws that prohibit corrupt acts, can help ensure that private-sector actors and state-owned entities operate on an “equal footing” basis in the relevant jurisdiction.

⁶⁵ *Id.* at 92-93.

8. In addition, investment in physical infrastructure – in particular, private participation in infrastructure-development and management projects – is made easier in cases in which governments create and administer suitable institutional arrangements for improving regulatory predictability. Such a policy includes entrusting regulation and price-setting to specialised authorities that are competent, well-resourced, and shielded from undue influence. In this regard, well-equipped government PPP units with clear mandates and lines of accountability can help enhance project preparation, oversight of the procurement processes, and implementation and monitoring performance of infrastructure projects.⁶⁶
9. The governing legal, regulatory, and institutional framework also should facilitate effective legal and contract enforcement with special regard to infrastructure-development projects that are operated by the private sector. Specifically, the legal, regulatory, and institutional regime must protect core investor rights deemed critical by the private sector, including swift contract enforcement through either ADR or judicial remedies, as well the availability of prompt, effective, and fair compensation in cases involving any expropriation of any infrastructure assets.⁶⁷

B. Adaptation of International Standards to the ECOWAS Investment Policy

1. Consistent with the above OECD standards, physical infrastructure networks are vital for the economic development of the ECOWAS Community. As explained above, state-of-the-art infrastructure attracts additional investment by efficiently connecting businesses to their customers and suppliers. This positive result can then potentially enlarge the size of the relevant market. As a consequence, adequate infrastructure can enable businesses in West Africa to specialise and take full advantage of modern production techniques and organisational structures at both the national and regional levels. In this vein, according to World Bank data, West African growth could potentially be boosted by 1% per year as a direct consequence of physical infrastructure improvements, with power, transportation, and ICT advances playing a major role.⁶⁸
2. Nonetheless, there are multiple physical infrastructure challenges in the region.

⁶⁶ *Id.* at 94-95.

⁶⁷ *Id.* at 95.

⁶⁸ See World Bank Group Policy Research Working Paper 5191, *Assessing the Impact of Infrastructure Quality on Firm Productivity in Africa. Cross-Country Comparisons Based on Investment Climate Surveys from 1999 to 2005* (2010).

In the transportation sector, road infrastructure is, at best, in fair condition. Despite the relatively adequate condition of the road corridors, freight movement is still quite slow. Although several major international gateways that facilitate international trade do exist in the region, there are still high trucking charges and lengthy delays due to trade-facilitation obstacles. The vast majority of the movement of persons and goods between and amongst the Member States are undertaken by road transportation. Yet, the road density and ratio of paved roads to total roads in the region are relatively low. A suitable regional cabotage framework is also lacking. Generally, there exists an overall underutilisation of the region's waterways. In the rail subsector, there are relatively low levels of passenger and freight traffic, coupled with the sub-standard operational performance of railways (which are facing stiff competition from other modes of transportation). Additionally, rail gauges are not internally compatible.

3. In the air-transportation sector, the ECOWAS region has achieved some notable progress in instituting free-market pricing and reducing flight capacity and frequency constraints. However, relatively low levels of connectivity within the common market still persist as a major constraint. The collapse of the traditional flag air carriers also has had negative effects on the regional air-transportation market. One unfavourable result is that a proliferation of inadequately capitalised airlines – with small- and medium-sized aircraft characterised by obsolete technology and high operating costs – continue to proliferate in the ECOWAS region. In addition, the majority of the airport terminals of the Member States must be renovated or rebuilt for capacity, safety, and security reasons. Of significant importance is the lack of intermodal freight and passenger transportation to support the seamless use of multiple modes of transportation.
4. In terms of power, according to 2012 World Bank data, the lack of adequate generation capacity has led to unreliable service provision, with only 35.3% of actual demand being satisfied in all of Sub Saharan Africa (which includes the ECOWAS region).⁶⁹ Utilities also are generally highly inefficient with regard to distribution. For the ICT sector, relatively high prices for services hamper full market development, and many countries are still not connected to the submarine cable.
5. National governments traditionally have built, owned, and managed physical

⁶⁹ See <http://data.worldbank.org/indicator/EG.ELC.ACCS.ZS?view=chart> (2012).

infrastructure capital. This phenomenon has historically compromised the operational independence of the competent regulatory authorities. There is also the continued perception in the region that the public sector is the main driver of infrastructure development in the Member States. Nonetheless, the growth and performance of the ICT sector alone – which is dominated by private-sector investment – has proved the case for private-sector involvement to develop infrastructure in West Africa, especially through flexible PPP mechanisms.

6. Another aspect of the ECOWAS regional economy that continues to have a significant influence on physical infrastructure development is the natural geography of the individual countries of the Community. This factor must be taken into careful consideration with respect to the formulation of infrastructure-development policies, as well as to the allocation of resources for infrastructure development.
7. In particular, the ECOWAS common market is characterised by a relatively large number of small-scale economies, including those of Benin, Cabo Verde, the Gambia, Guinea Bissau, Guinea, Guinea Bissau, Liberia, Sierra Leone, and Togo. The small size of these economies prevents many of these Member States from defraying the high fixed costs associated with physical infrastructure development, because they have no economies of scale to leverage.
8. In addition, of the current ECOWAS Member States, 3 countries are landlocked,⁷⁰ 8 nations have fewer than 14 million people,⁷¹ and 6 countries have a GDP of less than USD 5 billion per year.⁷² Meanwhile, 5 countries – namely, Burkina Faso, the Ivory Coast, Liberia, Mali, and Sierra Leone – have recently emerged from conflicts that have severely damaged their national physical infrastructure networks. Similarly, other nations face additional challenges with regard to their national healthcare infrastructure, especially the 2014 Ebola-affected counties like Liberia, Sierra Leone, and Guinea.
9. Accordingly, regional integration can constitute an effective policy option to overcome the above constraints and allow the Member States both individually and collectively to participate more fully in the regional and global economies.

⁷⁰ These countries include Mali, Niger, and Burkina Faso.

⁷¹ These nations embrace Benin, Cabo Verde, The Gambia, Guinea, Guinea-Bissau, Liberia, Togo, and Sierra Leone. See <http://data.worldbank.org/indicator> (2016).

⁷² These countries encompass Cabo Verde, The Gambia, Guinea-Bissau, Liberia, Sierra Leone, and Togo. See <http://data.worldbank.org/indicator> (2016).

Specifically, a regionally integrated infrastructure-development policy would serve to facilitate and encourage the expansion of physical infrastructure facilities in the ECOWAS zone in line with regional market demand. Yet, to attract physical infrastructure delivery by the private sector, the Member State governments must offer transparent tendering-and-contracting processes that can subsequently be applied in the ECOWAS common market under a regional tendering-and-contracting framework.

II. ECOWAS Policy Principles

To address the above physical infrastructure challenges in the region, the Member States agree to adhere to the following policy principles under the ECOWIP:

1. Fully implement the provisions of all applicable ECOWAS protocols and policies governing physical infrastructure development;
2. Provide their national regulatory authorities and government infrastructure agencies, including SEZ administrative authorities, with operational independence and financial autonomy and make them accountable for their performance in accordance with all applicable law;
3. Promote and encourage regional co-operation in the development and implementation of physical infrastructural projects, including the adoption of region-wide standardised technical specifications for infrastructure construction (e.g., rail gauges);
4. Regulate prices charged for the use of infrastructure services in line with market-based competitive conditions;
5. Encourage private investors to finance and participate in infrastructure development and maintenance through flexible PPP arrangements;
6. Prioritise the development of regional intermodal transportation systems, including cabotage, to create greater efficiencies, as well as to reduce transportation obstacles that constrain the land-locked countries of the region;
7. Pursue the further liberalisation of the regional air-transportation sector through adherence to the Yamoussoukro Decision;
8. Ensure access to socio-economic infrastructure, such as electricity networks, at affordable prices based on instruments that can provide incentives to invest in the infrastructure sector at the lowest practicable cost; and
9. Facilitate access to other socio-economic infrastructure, including schools and hospitals.

III. ECOWAS Strategies

1. To implement the above policy principles, the Member States, in close collaboration and co-ordination with the ECOWAS Commission, shall

endeavour to pursue the following strategies and execute the following actions in accordance with the ECOWIP:

- (a) Liberalise transportation corridors by reducing national border formalities for transshipment carriers through simplified intermodal transportation systems, as well as through a well-defined cabotage system for the region, in addition to signing and executing bilateral agreements for the construction and maintenance of regional roads;
 - (b) Prioritise the full implementation of, and adherence to, the Yamoussoukro Decision as it relates to liberalised air-transportation access and systems;
 - (c) Regularly and impartially evaluate the continued impact of regulatory arrangements on telecommunication services and prices, with the view to establishing a regional telecommunications policy framework;
 - (d) Establish a regional PPP policy and encourage the use of PPPs, especially in the areas of transportation and power generation and distribution. To this end, the Member States and the ECOWAS Commission shall facilitate the establishment of a fund to foster PPPs in West Africa; and
 - (e) Promote, through an enabling framework, mergers and acquisitions amongst airlines operating in West Africa as one strategy to create greater efficiencies in this transportation sector.
2. The ECOWAS Commission for its part shall strengthen the ECOWAS Project Preparation and Development Unit (PPDU) that is responsible for preparing regional infrastructure projects in the transportation, energy, ICT, and water-resources sectors.

CHAPTER 9

FINANCIAL INFRASTRUCTURE DEVELOPMENT POLICY

I. Introduction

A. International Best Practice Context

1. Well-functioning financial systems are critically important for economic growth and development by providing funding for capital accumulation and by helping to allocate economic resources to their most efficient productive uses. Increased capital accumulation also can have enduring effects on the rate of economic growth if it has positive “spill-over” effects to other factors of production or to overall labor productivity.⁷³
2. A well-developed and coherent financial sector contributes to a wide range of financial services availability and enhances inclusive economic growth and development. In particular, the availability of information that appears on public credit registries or private credit bureaus allows private parties (e.g., commercial banks) to determine the creditworthiness of potential buyers, ascertain whether any existing security interest in registered property already has been perfected, and establish the priority of private creditors *vis-à-vis* all third parties, whether private or public. These features facilitate the correct assessment of commercial risk and the concomitant reduction in interest rates that can result in increased credit limits for private investors to fund their business ventures.⁷⁴
3. Effective regulation and supervision of the ever-growing financial services sectors, as reinforced by modern corporate governance standards, are extremely important for the purpose of limiting excessive risk-taking by economic agents, while, at the same time, encouraging the development of more resilient financial infrastructure systems.
4. Governments can also support the financing of investments by ensuring that private investors and creditors have clearly defined legal rights and obligations that can be enforced under applicable law. A strong legal environment and effective enforcement mechanisms are vital for access to external finance. Having efficient enforcement systems in place also facilitates the development of asset-based financing (e.g. factoring, leasing, and securitisation).

⁷³ OECD, *Policy Framework for Investment 2015 Edition*, 105 (2015).

⁷⁴ *Id.* at 106-107.

5. Effective enforcement mechanisms also require flexible insolvency regimes that allow viable firms to reorganise themselves and unviable ones to exit the market by virtue of expedited proceedings that ensure the orderly payment of debts. An efficient and state-of-the art insolvency framework should also establish a transparent process for out-of-court workouts or business turnarounds in cases in which business entities find themselves in financial distress.⁷⁵

B. Adaptation of International Standards to the ECOWAS Investment Policy

1. It is undeniable that the financial sector in the ECOWAS region has developed relatively rapidly over the past decade, especially for MNE clients, as a result of several banking reforms. Nonetheless, this development has not adequately eliminated the large gap that exists in the offering of credit to the majority of consumers in West Africa, including micro-, small-, and medium-size enterprises (MSMEs). Hence, the level of “unbanked clients” remains relatively high in the region, with access to finance constituting either the most important or the second most important obstacle that impedes investment, trade, productivity, growth, and economic development in the ECOWAS zone.
2. International surveys have consistently identified restricted access to credit as a complex constraint that adversely affects MSMEs doing business in the Community. This restraint is attributable to *multiple market and regulatory failures* that require a *multi-disciplinary reform approach*. Private MSME lending in the ECOWAS zone has long been frustrated by challenging market factors, such as adverse supply, demand, and cost conditions (including high transaction costs, relatively low bank profits, significant lending risks, exorbitant interest rates, severe informational asymmetries, and frail private banking/financial sectors). Such lending also has been obstructed by the overall sub-standard quality of the financial infrastructure in place in the region. In fact, the financial infrastructure or business-enabling environment in Sub-Saharan Africa in general presents “greater obstacles than in other regions” of the world.⁷⁶
3. The mobilisation of savings is another essential factor to promote sustainable and inclusive economic development in the ECOWAS common market. The mobilisation of savings, for instance, provides a source of funding for both

⁷⁵ *Id.* at 106.

⁷⁶ See *An Evaluation of IFC’s Investments Through the Africa Enterprise Fund*, Vol. 1, IFC, 1, 22, (February 4, 2000).

MSMEs and physical infrastructure development. By mobilising savings for productive investment and by facilitating capital inflows, as well as remittances from abroad, an enabling financial infrastructure meeting international standards can stimulate investment in both human and physical capital.

4. Furthermore, deepening the development of the regional financial sector, including through integration of national capital and money markets in the ECOWAS territory, can attract additional private foreign capital investment to the region. The development of a regional bond market as a vehicle for long-term financing can further support the Member States' ability to raise the requisite capital for physical infrastructure initiatives as well.
5. Finally, an effective financial system should be flexible and inclusive enough to support both national and regional initiatives designed to incentivise informal businesses to move towards the formal sector of the economy, including through MSME start-ups and expansions. As relevant here, access to finance – identified by 64% of the entrepreneurs doing business in the general West Africa region as the main constraint impeding economic activities⁷⁷ – is a critical component to address informality. Innovative financing mechanisms, such as leasing, factoring, and warehouse-receipt systems, can be leveraged in this context to entice informal entrepreneurs to enter into the formal economy.

II. ECOWAS Policy Principles

To address the financial infrastructure challenges facing the ECOWAS zone, the Member States, in close co-operation and co-ordination with the ECOWAS Commission, shall adhere to the following policy principles under the ECOWIP:

1. Fully implement, to the extent feasible, the provisions of the ECOWAS Program on Financial Sector Integration and Development;
2. Foster the deepening of the national and regional financial markets through the regional integration of the Member States' capital markets, the convertibility of multiple national currencies of the Community, and support for a regional payment system;
3. Facilitate the liberalisation of capital and current accounts to enhance the flow of capital into the ECOWAS zone;
4. Promote general macroeconomic stability and encourage competition in the financial services sector;
5. Secure the legal rights of borrowers, creditors, and shareholders;

⁷⁷ Doing Business in OHADA. World Bank Group (2012).

6. Ensure financial transparency and the free and transparent flow of financial information, while promoting prudential oversight of risk-taking behavior in accordance with internationally-recognised standards;
7. Encourage financial inclusion by using macroeconomic policy as an instrument to create attractive environments for savings, as well as by deploying suitable payment technologies to reach the “unbanked clients” of the region;
8. Promote robust legal, regulatory, and institutional frameworks (as reinforced by efficient judicial enforcement and ADR mechanisms) that foster transparency, swift debt enforcement and recovery, and market confidence;
9. Encourage cross-border information-sharing to improve the regional supervision of financial institutions operating in the ECOWAS territory;
10. Adhere to efficient investment-related tax principles whereby Member States eliminate or minimise fees, stamp duties, and other special taxes that are applicable to the registration of movable and immovable property on the relevant property registry;
11. Strengthen commercial banks and other financial institutions through policy interventions, trainings, and recapitalisations designed to improve the capacities of these institutions to lend to MSMEs; and
12. Pursue integrated central bank policies and regulations that aggressively promote private MSME lending and alternative modes of financing (including warehouse-receipts, factoring, and leasing legislation as the main drivers to expand MSME lending in the agribusiness sector).

III. ECOWAS Strategies

To implement the above policy principles, the Member States, in close co-operation and co-ordination with the ECOWAS Commission, shall endeavour to pursue the following strategies and adopt the following measures:

1. Harmonise national capital-market rules and regulations, as well as integrate national stock-exchange trading platforms on a regional basis, to facilitate the cross-border listing and trading of securities;
2. Establish appropriate modalities for the quotation and trading of national currencies that are applicable throughout the ECOWAS territory;
3. Create effective systems to monitor, evaluate, and respond to systemic risks affecting the regional financial markets by implementing effective cross-border supervision of financial institutions;
4. Enact and enforce national data-protection and credit-reporting laws to allow the sharing of credit information across the region, while protecting consumer rights;
5. Establish a unique regional identification-numbering system to facilitate the development of regional credit bureaus;

6. Execute banking-information exchange agreements to facilitate the monitoring and control of money laundering in the region; and
7. Adopt specific laws, regulations, and institutional frameworks designed to create the following financial infrastructure building blocks at the national and regional levels:
 - (a) **Public Credit Registries and Private Credit Bureaus**, with the objective of providing 100% coverage of all natural and corporate persons (e.g., entrepreneurs, companies), regardless of size, that operate in the formal sector of the economy, including all prior loan and other credit history, as well as all current credit exposure;
 - (b) **Secured Transactions Laws and Moveable Property Collateral Registries**, with such laws establishing clear creditor-payment hierarchy rules granting priority to secured creditors, as well as (on-line) moveable property collateral registries, that authorise lenders to acquire a perfected security interest for all categories of movable assets (e.g., inventory, accounts receivable) used as collateral to secure private MSME loans;
 - (c) **Immoveable/Real Property Collateral Registries and Transparent Legal Titling Mechanisms**, with the goal of providing computerised (on-line) immoveable property collateral registries covering all real property owned by any natural or corporate person in the relevant jurisdiction that centralises and consolidates registration procedures into a few steps and provides a transparent legal-titling mechanism;
 - (d) **Compatible National Tax Legislation** that creates a simplified tax regime and imposes relatively low fees, stamp duties, or other taxes (calculated on a cost-recovery basis) as applicable to: (i) the registration of movable/immovable property on the collateral registry; (ii) the transfer/sale of such property; and (iii) the publication of judicial/arbitral decisions;
 - (e) **Market-Based Incentives** granted to private financial institutions providing MSMEs with varying classes or kinds of loans, especially long-term financing;
 - (f) **Penalties for Submitting False Financial Information/Instruments** by virtue of the application of stringent civil and criminal penalties (as enforced by the national judiciary) that incentivise borrowers, including their legal and audit representatives, to submit correct financial statements and valid negotiable instruments (e.g., checks) to all private financial institutions,

public credit registries, private credit bureaus, and public collateral registries;

- (g) **Alternative Financing Mechanisms**, such as warehouse-receipts, factoring, and leasing legislation, especially for the agribusiness sector, including:
- ❖ **Warehouse-Receipts Financing Legislation and Contracts** that authorise agricultural commodities (*e.g.*, seeds, fertilizers, grains) owned by a borrower and held in warehouse storage to serve as collateral to secure loans based on the issuance of warehouse receipts that act as negotiable instruments;
 - ❖ **Factoring Laws/Contracts** that cover reverse-factoring and purchase-order financing that enable accounts receivables (*i.e.*, unpaid invoices) to serve as collateral to secure loans, as reinforced by transparent public/private credit registries/bureaus; and
 - ❖ **Leasing Laws/Contracts** that specify the legal rights and obligations of the lessor-owner, lessee, and supplier of capital equipment/livestock;
- (h) **MSME Business Incubators/Clusters**, as developed and operated by private-sector entities that target MSME business incubators and clusters by providing preferential MSME access to credit, especially for agribusiness clusters (*e.g.*, tea, coffee, cacao, rubber, vegetables, seafood processing);
- (i) **Judicial Debt-Recovery/Out-of-Court Enforcement Mechanisms/Pre-Trial ADR Modalities**, including laws (with expedited proceedings and clear creditor-payment hierarchy rules granting priority to secured creditors) that enable creditors to recoup the bulk of their exposed debt within reasonable time limits through streamlined judicial actions, as enhanced by out-of-court enforcement mechanisms/pre-trial ADR;
- (j) **Out-of-Court & Business-Rescue Workouts/Judicial Reorganisations**, including insolvency laws (with expedited proceedings and clear creditor-payment hierarchy rules granting priority to secured creditors) that permit creditors to recoup, on average, more than 50% of their exposed debt within reasonable time limits and at an average cost that should not exceed 10% of the debtor's estate through: (i) out-of-court/business-rescue workouts or consensual mediation/conciliation; (ii) simplified judicial reorganisations; or (iii) simplified company liquidations (OECD benchmark averages);

- (k) **Judicial Reforms, Enforcement, and Capacity Building** that contribute to resolving commercial litigation within reasonable time limits and at an average cost that should generally not exceed approximately 20% of the plaintiff's claim (OECD benchmark averages) by virtue of: (i) commercial court specialisation; (ii) rationalised civil procedures; (iii) strict enforcement of time limits and penalisation of dilatory tactics; (iv) court-management computerisation; (v) pre-trial ADR; and (vi) continuing specialised judicial education/training for judges/magistrates in commercial/financial matters;
- (l) **ADR in Place of Court Litigation: Mediation; Conciliation; Arbitration** - public/private ADR that incentivises the use of private-party negotiations, mediation/conciliation, and binding arbitration to resolve all commercial conflicts, including tax disputes, quickly – ranging from a few days, months to no more than one (1) year – that has the effect of reducing the heavy caseload of the judiciary;
- (m) **Insurance Regulation** characterised by an enabling law that establishes casualty-and-risk insurance for moveable/immovable property used as collateral, export insurance for private MSMEs, including foreign exchange contingencies, and MSME credit-risk insurance for financial institutions;
- (n) **MSME Institutional Authorities** co-ordinated by a national autonomous MSME administrative authority that can provide complete and partial loan guarantees if direct private MSME lending is not available; and
- (o) **Central Bank Policies, Rules, Regulations, and Standards Governing Lending Activities of National Commercial Banks and Other Financial Institutions**, as characterised by a strong central bank regulator that takes an active policy and regulatory role in promoting sustainable and transparent private MSME lending by virtue of coherent prudential regulatory standards in line with the Basel Accords as adapted to ECOWAS market circumstances, including:
- ❖ Prudential regulations;
 - ❖ Minimum (albeit rational) capital adequacy ratios and incentives (calibrated to fuel long-term savings and MSME lending);
 - ❖ Risk-management standards (e.g., liquidity-risk regulation);
 - ❖ Effective banking supervision; and
 - ❖ Adequate corporate governance, together with well-defined and transparent financial reporting, disclosure, accounting, and audit

practices meeting the requirements of the International Financial Reporting Standards (IFRS)/International Accounting Standards (IAS) that treat financial leases as an “off-balance-sheet” item for financial institution lessors.

CHAPTER 10

PUBLIC GOVERNANCE

I. Introduction

A. International Best Practice Context

1. Amongst the key public governance aspects that encourage investment and reduce the cost of doing business for private investors are efficient regulation, administrative transparency, and public integrity. Inadequately designed regulations, or the uneven enforcement thereof, can impede business responsiveness, divert resources away from productive investments, hinder entry into markets, reduce job creation, and generally discourage private entrepreneurship. Nothing contributes more to investor confidence than regulatory predictability that is reinforced by a transparent legal, regulatory, and institutional framework that seeks to ferret out fraud and corruption in the public sector. The quality of public services – which, in turn, is shaped by effective regulations that are applicable to both public- and private-sector players – also influences the business-investment climate of any host country. From an investor’s perspective, regulatory policy should provide strong guidance, as well as transparent benchmarks, for action by government officials.⁷⁸
2. Administrative simplification, another best-practice feature of effective public governance, aims to reduce and streamline government formalities and paperwork – the most visible component of which comprise permits, licences, approvals, and other authorisations. As pertinent here, the suitable level of regulation, including the attention focused on compliance costs when regulations are designed (through regulatory impact assessments), can help remove perverse incentives that encourage informal economic activity.⁷⁹
3. In this milieu, national governments are expected to put in place transparent mechanisms and institutions to enforce regulations and promote effective compliance thereof. In particular, inspections are one of the most important instruments used to enforce regulations and to ensure regulatory compliance. In this regard, efficient inspection planning, targeting, and communication should be clearly integrated into the overall regulatory governance scheme,

⁷⁸ OECD, *Policy Framework for Investment 2015 Edition*, 115 (2015).

⁷⁹ *Id.* at 116.

with a view towards preventing fraud and corruption and promoting ethical behavior in the public sector workplace.⁸⁰

4. Governments are further expected to enact not only statutory provisions, usually in criminal and civil law, but also administrative regulations, that can prevent and sanction any hint of fraud or corruption in the public sector. Governments should also promote modern anti-corruption measures and encourage private companies to invest in compliance systems to combat corruption.⁸¹ To this end, countries have increasingly adopted standards or codes of conduct for the private sector to follow to address potential conflicts between the interests of public officials and the private sector.
5. In addition, public-sector human-resource management policies should provide adequate conditions and incentives to improve public official performance, such as basing recruitment and job promotion on merit, providing sufficient remuneration, and taking ethical considerations into account during recruitment and performance appraisals. Organisational rules or laws also need to be instituted to encourage compliance monitoring, including immediate reporting upon the suspicion of any apparent misconduct by any public official that is subject to a transparent and independent administrative and judicial review process.⁸²
6. Similarly, the development of a consistent policy applicable to the role and functions of regulatory agencies, coupled with efficient administrative coordination mechanisms (e.g., memoranda of understanding), helps to provide confidence to the market place that regulatory decisions are made on an objective, impartial, and consistent basis, without conflicts of interest, biases, or improper influence.⁸³
7. Furthermore, countries are even expected to develop systems for the review of the legality and procedural fairness of administrative regulations and decisions, together with the decisions made by agencies empowered to issue administrative sanctions, to promote overall trust and confidence amongst the business community at large. These systems need to be easily accessible to businesses and civil society at a reasonable cost.⁸⁴

⁸⁰ *Id.* at 117.

⁸¹ *Id.* at 120.

⁸² *Id.* at 121.

⁸³ *Id.* at 117.

⁸⁴ *Id.*

8. In general, WBG data show that effective institutions that provide easily accessible and reliable information to the business community facilitate the creation of an enabling investment climate that attracts investment inflows.⁸⁵ Moreover, countries that provide their citizens with adequate public services, have solid institutions, enjoy political stability, and do not suffer from high levels of fraud and corruption tend to attract larger values of national and foreign investment as well.⁸⁶
9. The need for regulatory coherence across different levels of government and at the international level is becoming increasingly important for businesses operating across borders. To eliminate unnecessary regulatory divergences that create additional burdens for investors, as well as to address global challenges pertaining to systemic risks, the natural environment, and human health and safety issues, governments need to articulate and apply their regulations more effectively across borders and, at the same time, ensure consistent enforcement thereof across jurisdictions.⁸⁷
10. As globalisation spreads, countries are quickly shifting to open and inclusive policy-making processes to improve public administration performance. By helping governments better understand the evolving needs of businesses, while simultaneously leveraging information and ideas provided by the private sector, open and inclusive policy-making constitutes a compelling modernisation reform instrument for any nation.⁸⁸
11. As governments increasingly turn to the private sector to deliver public services to private citizens, as well as to achieve social goals on behalf of the public sector, the establishment of an efficient, effective, transparent, and accountable public procurement process, as emphasized in previous Chapters, is essential for preventing the misuse of public funds and reinforcing the trust of existing and potential investors in government. An effective public procurement system also serves the needs of the public good, provides overall customer satisfaction, delivers “value for money” in a fair, open, competitive, and transparent fashion, and ultimately ensures a “level playing field” for all businesses.

⁸⁵ World Bank Group, *Investing Across Borders 2010*, 11 (2010).

⁸⁶ *Id.*

⁸⁷ OECD, *Policy Framework for Investment 2015 Edition*, 115 (2015).

⁸⁸ *Id.* at 118.

B. Adaptation of International Standards to the ECOWAS Investment Policy

1. As discussed in the preceding sub-section, public governance – that is, the exercise of government authority through formal institutions to promote the public good – contributes significantly to the establishment of an attractive business-enabling climate for both national and foreign investors. As demonstrated above, effective public governance, investment promotion, and sustainable and inclusive economic growth are all mutually dependent and inextricably intertwined.
2. In addition, one cannot underestimate in the ECOWAS zone the critical role that democratic regimes play in promoting the establishment of an effective business-investment climate. Democracy provides the necessary linchpin by which investors can assess the rule-making process, as well as the certainty and quality of investment laws, of any given nation.
3. Investment, whether national or foreign, is generally more attracted to democratic countries for several reasons. Democracy tends to reduce political and economic uncertainty. Politically, it is reasonably assumed that regular free and fair elections, coupled with the free circulation of information within a civil society, serve as the means of disciplining public officials in order to improve the transparency of the political decision-making process. Empirical studies have shown that democratic countries are more predictable in the long-run, more stable in the short-run, and have the ability to respond to adverse shocks better than authoritarian regimes. Even China has recognised these principles in the implementation of its 1,500+ economic zones throughout the Mainland.
4. As highlighted in other Chapters, many investors have identified the uncertainty in respect of the interpretation and application of national investment frameworks, in combination with sub-standard judicial systems, as major disincentives obstructing investment in many of the Member States. As further underscored by private investors doing business in the region, conflicts of interest amongst public servants, together with fraud and corruption perpetrated in the public-sector workplace, comprise additional disincentives to investment in the ECOWAS territory.
5. The breaking down of barriers between public and private sectors – through the privatisations, PPPs, and exchanges of personnel – has also created so-called “grey zones” and additional opportunities for corruption in the ECOWAS zone. Conflicts between public officials’ pecuniary interests and their public duties have multiplied as a consequence of the outsourcing of erstwhile government functions. Undoubtedly, fraud and corruption undermine the

- integrity of governments and can even distort the efficient allocation of public and private resources, making public administration unreliable, while destroying investor confidence in the region.
6. As pointed out in other Chapters, other public governance issues that impede the free flow of investments in West Africa include: (i) institutional and legal systems that are inadequate to address the vast majority of today's modern business practices; (ii) the lack of well-trained professionals who decide to pursue public service as a long-term career choice; (iii) the inadequate remuneration of public officials; and (iv) information-and-communication deficiencies regarding government policies, decisions, and actions.
 7. Good public governance with regard to investment policies and laws must ensure that such policies and laws of the Member States are trusted by investors. Countries with a reputation of having a strong respect for the rule of law typically attract higher levels of FDI, including intra-regional and extra-regional foreign investment. From a public governance perspective, respect for the rule of law in an investment-related trade context requires that the governing law be efficient and equitable, legally binding, transparent, and predictable. As further emphasised in Chapter 2, an effective investment policy and legal framework must address all aspects of investment-entry and investment-promotion issues, provide for adequate civil and criminal penalties for any legal, regulatory, or contractual violations, and provide easy and transparent access to information.
 8. Investment-and-trade policies and laws also must be easy to understand to enable investors to ascertain the future course of economic development of any particular nation. Any investor's ability to plan and compete in West Africa depends on the relative certainty and stability of the policies and laws of the Member States, as well as the capacity of such countries to implement these policies and laws. Accordingly, the legislative policy and legal framework of the Member States should focus on creating such market confidence that is directly attributable to public governance reforms. Indeed, such initiatives correlate positively with increased investment, economic growth and development, wealth accumulation, and poverty reduction.
 9. Furthermore, the process of enacting and enforcing investment-and-trade laws by the Member States must not be arbitrary or capricious, but rather be consistent with the internationally-recognised principles espoused by the ECOWICPF. Simplicity of procedures, transparency of the applicable legal processes, participation of those business entities and individuals directly affected by such laws, and the accountability of Member State public officials

involved in the legal, regulatory, and institutional processes can all contribute to the legitimacy of the rule of law and instil investor confidence.

- 10.**As underscored throughout the ECOWIP, another key aspect of good public governance in the Community is the existence of well-functioning, independent, and financially autonomous administrative institutions, such as administrative regulatory agencies and efficient judicial courts. These agencies and courts need to be well staffed by trained and honest personnel in order to enforce the governing laws in a cost-effective, fair, and equitable manner. These institutions must be also transparent and accountable when interpreting and applying investment policies, laws, and standards in that no hint of arbitrariness, fraud, or corruption can be detected or perceived. As emphasised in Chapter 4 and Chapter 15, a well-functioning administrative law enforcement apparatus and judiciary -- whereby administrative and judicial judges interpret and apply the law in a fair, efficient, equitable, and predictable manner, without any undue delays and at affordable costs – is essential for the even-handed administration of any investment-climate framework.
- 11.**Another fundamental aspect of good public governance that needs to be implemented in West Africa is the reinforcement of political stability and security. Political stability and security can ensure the overall safety of human lives and the protection of private property. Effective political stability and security also correlate positively with relatively low levels of crime, lawlessness, terrorism, and other conflicts. Armed conflicts, civil strife, hostage taking, kidnapping, piracy, and terrorism discourage both national and foreign investors from making investments in specific host countries. Even in cases in which an investment is carried out in spite of these challenges, national and foreign firms will invariably incur significant costs to protect their premises, products, and personnel. Such enterprises may even confront demands for the payment of protection fees to armed militias or organised criminal gangs. It follows that the security systems in the ECOWAS region must provide conditions in which people and businesses have confidence in their personal security, safety, and investments.
- 12.**To this end, the ECOWAS Commission has developed very effective regional legal instruments and institutions to achieve the following public policy objectives: (i) encourage the “zero-tolerance” of military and unconstitutional interventions in public governance; (ii) resolve regional conflicts expeditiously and fairly; (iii) combat, fraud, corruption, and money laundering; and (iv) enhance the security of human lives and public and private property in the region. The relevant ECOWAS instruments include:

- (a) The ECOWAS Protocol on Democracy and Good Governance;
- (b) The ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security;
- (c) The Protocol on Conflict Resolution Framework;
- (d) The Handbook on Elections;
- (e) The ECOWAS Protocol on the Fight Against Corruption;
- (f) The Protocol on the ECOWAS Court of Justice; and
- (g) The Protocol on the Establishment of the Inter-Governmental Action Group against Money Laundering in West Africa (GIABA).

II. ECOWAS Policy Principles

To address the public governance challenges in the ECOWAS zone, the Member States, in close co-operation and co-ordination with the ECOWAS Commission, agree to adhere to the following policy principles under the ECOWIP:

1. “Zero-tolerance” for military interventions in the Member States;
2. Reform of the democratic electoral process, where needed, to ensure liberal democratic regimes, as well as the conduct of free, fair, and competitive elections that allow a politically active civil society and citizens to choose, monitor, and periodically replace their national leaders and governments;
3. Commitments to strengthen the legal and institutional capacity of the Member States to enact and enforce competitive investment-and-trade policies and laws that are transparent, cost effective, and responsive;
4. Pledge to reform and modernise the public sector at the national level to improve public service delivery, eliminate inefficient regulatory systems, and reduce overstuffed civil services that today constitute bureaucratic constraints for private business and entrepreneurs;
5. “Zero-tolerance” for fraud and corruption in the public workplace in order to restore integrity, accountability, and transparency in the public sectors;
6. Commitment to implement e-government and ICT tools to correct information-and-communication failures that adversely affect the performance of the public sectors of the Member States;
7. Adherence to the principle of administrative simplification;
8. Commitment by the Member State governments to improve their overall responsiveness to the private sector by adopting a consultative and participatory approach to policy formulation and modifications; and
9. Assurance to allow private citizens to have access to information and to participate in the national legislative process as another means to facilitate private participation, government transparency, and public accountability.

III. ECOWAS Strategies

To implement the above policy principles, the Member States, in close co-operation and co-ordination with the ECOWAS Commission, shall endeavour under the ECOWIP to pursue the following strategies and adopt the following actions:

1. Implement the general principles of the ECOWAS Protocol on Democracy and Good Governance;
2. Adopt suitable mechanisms – with the support of the ECOWAS Commission – to facilitate the monitoring of electoral reforms as required under the ECOWAS Protocol of Democracy and Good Governance;
3. Implement the ECOWAS Poverty-Alleviation Strategy;
4. Develop – with the support of the ECOWAS Commission – training and education programmes to build the capacity of national legislators, policymakers, judges, administrative officials, and law enforcement agents engaged in the formulation, implementation, and oversight of investment-related trade policies and laws in the Member States;
5. Reform, modernise, and streamline public service delivery in the Member States to reduce governance costs and bureaucracy;
6. Develop appropriate national standards of conduct governing public servants, including provisions facilitating the swift detection of fraud and corruption and encouraging “whistle blowing” of unethical conduct in public service;
7. Implement, in collaboration with the ECOWAS Commission, the provisions of the ECOWAS Protocol on the Fight against Corruption;
8. Establish and strengthen civil service quality-assurance agencies, such as the Ombudsman, at the Member State level so as to monitor the efficiency, performance, and conduct of public servants and to establish well-functioning complaint procedures for investors to expose any public wrongdoing;
9. Adopt the use of ICT techniques to disseminate information on investment-and-trade policies, laws, and standards that are tracked by the ECOWAS Commission investment-information portal/website;
10. Adopt safeguard measures to ensure compliance with the provisions of Member State public procurement laws to ensure accountability and probity in the procurement of national government contracts; and
11. Harmonise, with the support of the ECOWAS Commission, the national procurement laws to conform to international best practice standards.

CHAPTER 11

CORPORATE GOVERNANCE

I. Introduction

A. International Best Practice Context

1. The degree to which corporations and other business enterprises observe basic principles of good corporate governance is an increasingly important factor underlying investment decisions in today's globalised economy. Of particular relevance is the relation or link between corporate governance practices and the growing international character of investment.
2. If, in this context, countries are to reap the full benefits of the global capital markets, and if they are to attract long-term "patient" capital, corporate governance arrangements must be credible, well understood across borders, and adhere to internationally-recognised principles. Even if companies do not rely primarily on foreign sources of capital, adherence to good corporate governance practices will help improve the confidence of national and foreign investors, reduce the cost of capital, buttress the effective functioning of the relevant financial markets, and ultimately induce more stable sources of financing.⁸⁹
3. Specifically, good corporate governance requires an effective (albeit nimble) legal, regulatory, and institutional framework upon which all market participants can rely when they enter into contractual arrangements. In this vein, designing the legal, regulatory, and institutional framework that underpins the overall corporate governance system needs to be flexible so as to meet the ever-changing needs of companies doing business under widely different circumstances.
4. To this end, dialogue amongst policy-makers, institutions, and other interested parties concerned with improving corporate governance has proved to be an effective method of building consensus for reforms at both the national and the regional levels.⁹⁰
5. It is worthy of note that companies and their shareholders often pay the cost of inadequate corporate governance through lower valuations, reduced access to

⁸⁹ OECD, *Policy Framework for Investment 2015 Edition*, 65 (2015).

⁹⁰ *Id.* at 69.

equity finance, and difficulties with respect to succession planning and accessing outside talent on the open market. Likewise, the economy pays the hidden costs associated with ineffective corporate governance through reduced productivity, as investment funds are allocated less efficiently.⁹¹

6. In addition, participation in general shareholders' meetings is a fundamental right of all shareholders, both national and foreign, and is a critical factor to help such owners influence and oversee the corporate entity. The procedures for notification of shareholders' meetings and for casting votes should be effectively designed under applicable law to facilitate and encourage full participation in such meetings.
7. The board of directors generally should play a central role in the governance of any corporate enterprise. The board is chiefly responsible for guiding corporate strategy, monitoring managerial performance – replacing it if necessary – and overseeing systems designed to ensure that the corporate entity adheres to all governing laws and achieves an adequate return for its shareholders.
8. The board of directors should also monitor and manage potential conflicts of interest of management, board members, and shareholders. Boards have a duty to act in the best interests of the company and its shareholders and are expected to take due regard of, and deal fairly with, other external stakeholders.
9. To fulfil their responsibilities effectively, boards of directors must be able to exercise informed, objective, and independent judgements by acting as the *de jure* and *de facto* representative of all shareholders. Some of the board responsibilities are formalised as a legal duty of care and loyalty, and it is of paramount importance that these concepts be firmly anchored in law and jurisprudence.⁹²

B. Adaptation of International Standards to the ECOWAS Investment Policy

1. Based on the above discussion, the ECOWAS Commission recognises that a transparent corporate governance policy is essential to guide and regulate the activities of private investors *vis-à-vis* other public and private stakeholders. In other words, the formulation of a regional corporate governance policy in the ECOWAS zone is one major element that can boost the trust and confidence

⁹¹ *Id.* at 66.

⁹² *Id.* at 68.

of investors and consumers, facilitate investment flows, and promote sustainable and inclusive economic development in the region.

2. The ECOWAS Commission is also mindful of the existence of different legal, administrative, and institutional regimes applicable to corporate governance within the Community. Indeed, 9 of the 15 ECOWAS Member States from the French Civil Law jurisdictions have subscribed to the harmonised principles of business law, including the accompanying corporate governance framework, by virtue of their membership in the Organisation for the Harmonisation of Business Laws in Africa (OHADA under its French acronym).⁹³
3. To this end, the ECOWIP corporate governance policy will be premised on, *inter alia*, the following international corporate governance tenets:
 - (a) Equal treatment of shareholders;
 - (b) Internal mechanisms to manage conflicts of interest within companies and between companies and the government;
 - (c) Internal systems to prevent breaches of shareholders' rights;
 - (d) Uniform application of international accounting norms and standards (e.g., IFRS), as well as internationally-recognised auditing standards, in the Member States;
 - (e) Co-operation between company executives and shareholders for the pursuit of the common good;
 - (f) Transparency and fluid communication amongst private investors, creditors, and company management;
 - (g) Prevention of insider dealings;
 - (h) Compliance with company fiduciary duties; and
 - (i) Applicability of the ECOWIP corporate governance standards, or such other norms that are applicable in the region, to private and state-controlled enterprises and financial institutions.⁹⁴
4. The ECOWAS corporate governance policy thus recognizes and complements all existing regional and international initiatives in this strategic area, particularly those of the African Peer Review Mechanisms (APRM), the New Economic Partnership for African Development (NEPAD), the WBG, the African

⁹³ These countries include: Benin; Burkina Faso; Cote d'Ivoire; Guinea; Guinea-Bissau; Mali; Niger; Senegal; and Togo.

⁹⁴ Many of these corporate governance principles find their source in the OHADA Uniform Act on Commercial Companies and the Economic Interest Group adopted on January 30, 2014, in Ouagadougou, Burkina Faso (OHADA Company Act).

Development Bank (AfDB), and the United Nations Economic Commission for Africa (UNECA).

5. This policy upholds the principles of accountability of corporate entities to both shareholders and regulatory authorities and reinforces disclosure requirements to enhance shareholders' access to information. This policy also fortifies the requirement for inclusiveness and democratic principles in corporate-decision making, especially as it relates to shareholders' voting rights.

II. ECOWAS Policy Principles

To address corporate governance issues in West Africa, the Member States, in close co-operation and co-ordination with the ECOWAS Commission, shall adhere to the following policy principles in accordance with the ECOWIP:

1. Pledge to create a legal, regulatory, and institutional regime applicable to corporate governance in the event that such a framework does not already exist in the relevant jurisdiction;
2. Harmonise business laws in the region;
3. Commit to establish a standing mechanism to monitor and enforce regulations on corporate governance;
4. Recognise the rights and privileges of private investors;
5. Pledge to adopt measures to protect minority shareholders in cases in which such measures do not already exist;
6. Pursue mechanisms to manage conflicts of interest within companies and between companies and the government;
7. Commit to establish a system to prevent breaches of shareholders' rights and to impose suitable sanctions in cases of violations in the event that such measures do not already exist;
8. Adhere to polices to reduce, minimise, and even eliminate insider trading; and
9. Ensure the uniform application of international accounting norms and standards (e.g., IFRS), as well as internationally-recognised auditing standards, in the Member States.

III. ECOWAS Strategies

To implement the above policy principles, the Member States, in close co-operation and co-ordination with the ECOWAS Commission, shall endeavour to pursue the following strategies and execute the following actions in conformity with the ECOWIP:

1. Review any existing national corporate governance rules applicable anywhere in the ECOWAS zone and attempt to harmonise the same in line with a regional standard and system established under the ECOWIP;
2. Strengthen existing training facilities in the Member States that provide corporate governance capacity-building;
3. Encourage, through the dissemination of international best practices, the adoption at the Member State level of internationally-recognised corporate government standards, norms, and procedures in the event that such standards, norms, and procedures do not already exist in the relevant jurisdiction;
4. Make management and company shareholders aware of good governance principles through regional workshops and seminars;
5. Adopt at the Member State level corporate governance standards that apply to both state-controlled enterprises and financial institutions;
6. Institute targeted corporate governance improvements for SME managers and board members;
7. Strengthen the capacity of regulatory authorities that implement and enforce corporate governance rules and regulations at the Member State level by engaging with international organisations (e.g., WBG); and
8. Adopt the ECOWAS Investment Code that includes provisions applicable to corporate governance.

CHAPTER 12

RESPONSIBLE BUSINESS CONDUCT AND PROTECTION OF THE ENVIRONMENT

I. Introduction

A. International Best Practice Context

1. As a general rule, all enterprises should behave responsibly – regardless of their legal nature, size, ownership structure, or sector of the economy in which they operate. Although it is the role of businesses to act responsibly, governments also have a reciprocal duty to protect the public interest and to provide an enabling framework that encourages responsible business conduct (RBC). At a minimum, an effective RBC should seek to preserve the national sovereignty of the host country in question, as well as safeguard its natural environment and the accompanying eco-systems.
2. Specifically, RBC means that enterprises should strive to make positive contributions to economic, environmental, and social progress of a host country, with a view to achieving the following business and social objectives: (i) promote sustainable and inclusive economic and social development; (ii) avoid and address any materially adverse impacts (e.g., environmental degradation) caused by their business activities; and (iii) prevent or mitigate negative effects directly linked to the operations, products, or services of business entities. RBC can thus be an effective policy instrument for company-risk management, as well as a means for driving value propositions, as strong environmental and social governance has been positively linked with successful financial performance.⁹⁵
3. To the extent that national governments can provide an enabling investment-climate framework for businesses to act responsibly and meet their legal duty to protect the public interest from potential negative impacts of company activities, governments are more likely to achieve the following RBC goals:
 - (a) Attract and keep responsible investors in the Member States;
 - (b) Minimise the risks of potential adverse effects of their investments; and
 - (c) Ensure broader value creation and sustainable economic development.⁹⁶
4. To this end, national governments can enable RBC in several ways:

⁹⁵ OECD, *Policy Framework for Investment 2015 Edition*, 75 (2015).

⁹⁶ *Id.*

- (a) **Regulating:** Establishing and enforcing an adequate legal, regulatory, and institutional framework that protects the public good, while also monitoring business performance and compliance with critical regulatory requirements, such as environmental protection;
 - (b) **Facilitating:** Clearly communicating expectations concerning which company practices constitute good practice RBC, providing guidance with respect to specific standards and guidelines, and enabling enterprises to meet those expectations;
 - (c) **Co-operating:** Working with stakeholders in the business community, worker organisations, civil society, non-government organisations or NGOs, the general public, and internal government structures to create synergies and establish coherence in respect of RBC policy;
 - (d) **Promoting:** Demonstrating support for best practices in RBC; and
 - (e) **Exemplifying:** Acting responsibly in the context of the government's role as an economic actor.⁹⁷
5. As a consequence, national governments are expected to provide follow-up guidance on appropriate RBC management practices and endeavour to lower the cost of RBC compliance, including compliance with the environmental laws. Governments are also expected to identify and remove any barriers that influence RBC implementation and must make an aggressive attempt to engage with all businesses to strengthen their RBC practices.⁹⁸
6. Moreover, national governments are expected to co-operate internally, as well as externally with other foreign governments and stakeholders, to ensure coherence and support of the policies relevant to RBC. Governments must even comply with generally-recognised international instruments, including the United Nations Guiding Principles for Business and Human Rights, which contribute to a global level-playing field for investment.⁹⁹
7. National governments can further encourage specific public interest goals through tax benefits (e.g., environmental tax credits) that encourage

⁹⁷ *Id.* at 75-76.

⁹⁸ *Id.* at 76.

⁹⁹ *Id.* at 76-77.

businesses to make a positive contribution to economic, environmental, or social progress of the host country. Governments can even promote RBC by engaging with enterprises recognised for behaving responsibly that go beyond simply meeting their legal obligations.

B. Adaptation of International Standards to the ECOWAS Investment Policy

1. The ECOWAS Commission recognises that responsible business behaviour is crucial for building the required reciprocal trust and confidence that are needed for the efficient operation of a truly free market system. The ECOWAS Commission further recognises its responsibility, together with that of the Member States, to establish the necessary enabling framework for economic stability, social progress, and environmental protection by advancing policies, laws, and practices that help markets perform efficiently and free from undue government interference.
2. At the same time, investors in the ECOWAS territory are reasonably expected to conduct their business affairs responsibly and fairly as good corporate citizens. In other words, companies are expected to go beyond the traditional profit motive in the ECOWAS zone and maintain a harmonious balance between economic responsibilities to customers, employees, shareholders, and other stakeholders and their social responsibilities as good global citizens in the local communities in which they operate.
3. To this end, private investors in the ECOWAS region should consider adopting as a matter of course the ECOWIP RBC policy as part of their internal corporate goals. In this vein, private investors' compliance with the general RBC principles can be benchmarked against four (4) basic parameters: (i) respect for the national laws of the host Member State; (ii) adherence to core business ethical values; (iii) participation in investment-regulatory processes and inter-governmental relationships; and (iv) overall corporate social responsibility.
4. This RBC policy requires, at a minimum, that private investors respect the national sovereignty of the countries in which they operate and carry out their activities in conformity with the development policies articulated by the Member States. Private investors are further expected to adhere to the environmental, tax, labour, anti-money laundering, corruption, customs, and health and safety laws of the Member States, while respecting basic human rights, as well as the social and cultural values of the nations in which they do business.
5. Furthermore, corporate environmental responsibility imposes a particularly important duty on private investors to carry out their activities in an

- environmentally sustainable manner. In this regard, business entities must adhere to commitments to adopt preventive measures to avoid or mitigate any material degradation to the natural environment. In cases in which the business activities of private investors cause damage to the natural environment, such private entities shall be obligated under the ECOWIP to restore the environment to the *status quo ante* by applying suitable technologies for sustainable economic development.
6. Consistent with the principles espoused in other Chapters, private investors doing business in the ECOWAS common market are expected to refrain from abusing their corporate structure and modes of operation to the detriment of competition and consumers. Such abuse often manifests itself through intra-corporate transfer pricing practices¹⁰⁰ that are not based on arm's length principles or other means designed to manipulate the tax base.
 7. As part of the RBC policy of the ECOWIP, private investors conducting business in the ECOWAS zone need to observe the applicable custom-valuation regulations by declaring all imported merchandise in accordance with the legitimate, appraised customs value of such merchandise. Investors are also expected to abstain from perpetrating acts of bribery, fraud, corruption, and unethical business practices that have the deleterious effect of undermining public governance institutions.
 8. Additionally, private companies and investors doing business in the region are encouraged to adopt internal RBC policies and systems to regulate and monitor the provision of gifts, entertainment, and hospitality to government officials, as well as the payment of agents' fees and commissions, to ensure that such activity does not constitute a bribe. Moreover, investor political contributions and lobbying activities must be disclosed in annual financial statements or reports. Companies also must make these policies and systems publicly available to all company shareholders and other relevant stakeholders as a measure of enhanced transparency.
 9. To make the investment climate safe and transparent in the region, the ECOWAS Commission has adopted the ECOWAS Protocol on the Fight against Corruption and has established certain regional institutions, such as

¹⁰⁰ A transfer price is a price, adopted for accounting purposes, that is used to value transactions between and amongst affiliated enterprises integrated under the same management at artificially high or low levels. The typical purpose of transfer-pricing activities is to effect an unspecified income payment or capital transfer between and amongst the affiliated enterprises to avoid in whole or in part tax and customs-duty liability in a particular tax-and-customs jurisdiction.

GIABA and the ECOWAS Court of Justice, to tackle the twin problems of corporate corruption and money laundering in the ECOWAS territory.

- 10.** To undertake their business affairs in the ECOWAS zone in accordance with the RBC of the ECOWIP, private investors are expected to disclose to the general public and to their shareholders clear, full, and comprehensive information regarding their structure, policies, activities, and operations. This information usually includes financial, as well as non-financial, items and must be made available on an annual basis.
- 11.** The ECOWIP responsible business policy further recognises the vital role that the private sector can play in advocating for the government to adopt laws, regulations, and practices designed to enable the market to function more efficiently and transparently.
- 12.** To this latter end, private investors doing business in the ECOWAS territory are expected to avoid channelling efforts and resources to shape policies, laws, and regulations to their own individual economic advantage through the provision of illicit and non-transparent private monetary gains to public officials. This policy will further encourage investors to work closely with business associations, trade groups, civil society, and NGOs to demand accountability from government officials, as well as to create more favourable conditions for fair competition.
- 13.** The ECOWAS RBC policy even recognises that Corporate Social Responsibility (CSR) is another key component of RBC that is predicated on the principle that businesses are an indispensable part of society. Stated otherwise, business entities have the real potential to make positive contributions to the goals and objectives of any society. It is the commitment of businesses as a collective group to contribute to sustainable and inclusive economic development by working honestly with their employees, their families, their local communities, and society at large to improve the quality of life in a manner that is advantageous for both businesses and society.
- 14.** Private investors operating in the region, as part of their CSR functions, are similarly encouraged to contribute to their local communities by participating in community economic and social development projects. Investors are also strongly encouraged to partner with Civil Society Organizations (CSOs), NGOs, Community-Based Organizations (CBOs), professional associations/bodies, and local governments to support community-driven development projects as well.

II. ECOWAS Policy Principles

To achieve the above RBC objectives, the Member States, in close co-operation and co-ordination with the ECOWAS Commission, pledge to adhere to the following policy principles under the ECOWIP:

1. Promote the establishment of an enabling regulatory framework at the national level that is designed to encourage the application of the RBC tenets of the ECOWIP in the relevant jurisdictions;
2. Strengthen any existing national legal, regulatory, and institutional regimes governing corporate disclosure of financial and non-financial transactions;
3. Fortify the existing national legal, regulatory, and administrative frameworks to promote transparency in both public and business governance that can effectively reduce opportunities for corruption;
4. Encourage business enterprises to adopt voluntary codes of conduct or, alternatively, internal RBC policies;
5. Promote effective PPD and consultations and increased access to investment information between private companies and the government;
6. Collaborate with regional and inter-governmental bodies on RBC initiatives;
7. Adhere to the following policy precepts in the critical RBC area of natural environmental protection:
 - (a) **Country Sovereignty:** Recognise the sovereign right of each Member State to establish its own levels of national environmental protection and to establish, adopt, or modify its national environmental policies and laws;
 - (b) **Multilateral Environmental Agreements:** Acknowledge that multilateral environmental agreements to which the Member States are a party play an important role in protecting the natural environment;
 - (c) **Effective Environmental Protection:** Ensure that the national environmental policies and laws of the Member States provide for, and encourage, high levels of national environmental protection;
 - (d) **Enforcement Failures:** Recognise that the failure to enforce national environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between and amongst the Member States is contrary to the RBC tenets of the ECOWICPF;
 - (e) **Prohibition against Investment/Trade Restrictions:** Be mindful that it is unlawful to establish or use national environmental laws or other measures

in a manner that would constitute a disguised restriction on investment or trade between and amongst the Member States;

- (f) **Regional Co-operation:** Recognise the importance of regional co-operation as a mechanism to implement the RBC environmental principles of the ECOWICPF to strengthen the individual and joint capacities of the Member States to protect the natural environment and to promote sustainable economic development; and
- (g) **Regional Dialogue:** Acknowledge the need to enhance the mutual supportiveness amongst trade, investment, and environmental policies and laws through dialogue between and amongst the Member States on issues of mutual interest, particularly with respect to the negotiation and implementation of the relevant multilateral trade, investment, and environmental agreements.

III. ECOWAS Strategies

To implement the above policy principles, the Member States, in close co-operation and co-ordination with the ECOWAS Commission, shall endeavour to pursue the following strategies and adopt the following measures in line with the ECOWIP:

1. Conduct investor-sensitisation programmes to encourage private-business entities to develop, disseminate, and implement voluntary, cost-effective, and structured RBC policies, procedures, and practices to govern, amongst other RBC themes, matters involving environmental, labour, and consumer protection issues; health and safety regulation; customs compliance; unethical business behaviour; and corrupt practices;
2. Ensure that regulatory institutions in the Member States require investors to establish internal management systems that can monitor environmental labour, and consumer protection issues; unethical business behaviour; corrupt practices; and other RBC topics;
3. Adopt reforms that improve the disclosure requirements of private investors in respect of financial and non-financial transactions, such as “off-book” payments to related or affiliated companies;
4. Enact or amend national environmental laws and regulations to require the Member States to apply in their respective jurisdictions the following minimum policy principles:

- (a) **Multilateral Agreements:** Implement the multilateral environmental agreements to which each Member State is a party;
 - (b) **Public Awareness:** Promote public awareness of national environmental policies and laws, including enforcement and compliance procedures, by ensuring that all relevant information is made available to the general public;
 - (c) **Investigations:** Guarantee that any interested person residing or established in its national territory may request that the competent national authorities investigate alleged violations of its national environmental laws;
 - (d) **Administrative Proceedings:** Ensure that judicial, quasi-judicial, or administrative proceedings for the enforcement of its national environmental laws are actually available under applicable law, and that those proceedings are not only fair, equitable, and transparent, but also comply with due process of law;
 - (e) **Sanctions:** Provide effective sanctions or remedies for any violations of the national environmental laws to facilitate efficient enforcement;
 - (f) **Consultative Mechanisms:** Make use of existing or establish new consultative mechanisms, such as national advisory committees, to solicit the views on matters related to the protection of the natural environment;
 - (g) **Regional Co-operation:** Engage in regional environmental co-operation in the ECOWAS zone on a bilateral or plurilateral basis;
 - (h) **Contact Point:** Designate the competent national environmental authority or authorities to serve as the national contact point on matters that relate to the co-ordination of regional environmental co-operation activities; and
 - (i) **Code:** Adopt the ECOWAS Investment Code that includes internationally-recognised provisions to protect the natural environment of the Member States; and
5. Enact or amend national environmental laws and regulations to require investors to adhere, at a minimum, to the following specific legal obligations:
- (a) **Fundamental Obligation:** To carry out their business activities in strict conformity with the applicable national environmental laws, regulations, and administrative practices in the relevant jurisdiction;

- (b) **Impact Evaluations:** To undertake mandatory, pre-investment environmental and social impact assessments of their proposed business activities in respect of the natural environment and the local population;
 - (c) **Precautionary Principle:** To apply the precautionary principle to their environmental and social impact assessments and decisions taken in relation to a proposed investment, including any necessary mitigating or alternative approaches to the proposed investment;
 - (d) **Transparency:** To make the investor environmental and social impact assessments available to the general public and accessible to the affected local communities, as well as to any other affected interested persons in the Member State;
 - (e) **Restoration:** To perform the restoration for any material damage caused to the natural environment and to pay adequate compensation to all affected interested persons;
 - (f) **Information Disclosure:** To provide to the national environmental authorities, in respect of their products, processes, and services, all pertinent environmental information, together with the measures and costs necessary to avoid and mitigate against any potentially harmful effects; and
 - (g) **Hazardous Materials:** To implement in the Member States standards of operation with regard to hazardous waste generation and disposal that are equivalent to, or no less stringent than, those in their home country of origin for investments carried out by foreign investors; and
6. The ECOWAS Commission for its part shall partner with the Member States to provide further support for capacity-building initiatives for national institutions and organisations engaged in the implementation of the RBC agenda, including the protection of the natural environment and the accompanying national ecosystem.

CHAPTER 13

INVESTMENT-RELATED TAX POLICY

I. Introduction

A. International Best Practice Context

1. Revenue-collection agencies and investment-promotion authorities around the globe often have shared responsibilities, but typically work towards different policy objectives, especially in the developing world. In light of this observation, it is critical for developing countries to adopt a “whole-of-government” approach in respect of the design and implementation of national tax policies, including investment-incentives frameworks. This strategy can help facilitate effective coordination between national tax-policy makers and various administrative authorities in the host country that are mandated to promote investment, including at the local government levels. Adoption of a “whole-of-government” approach also can help to ensure consistency among the country’s tax-policy goals, its broader national and sub-national economic development objectives, and its overall investment-attraction strategy.¹⁰¹
2. To promote investment in any jurisdiction, policy makers need to assess on a regular basis the tax burden on profits to determine whether the applicable tax system is conducive to the type of investment that the country is seeking to attract. In this regard, host-country governments need to take into particular consideration the compliance costs that result from the excessive complexity of the governing tax regime, the lack of transparency thereof, if applicable, and the absence of predictability.¹⁰²
3. Despite multiple economic and financial analyses demonstrating somewhat limited investment responses to reduced tax burdens relative to foregone revenue as a result of fiscal incentives, developing nations still routinely grant such incentives to private investors to attract investment, particularly FDI. Nonetheless, more important to potential investors for investment-decision making purposes are issues related to the risks associated with the macroeconomic and overall business conditions prevailing in the host country, regulatory compliance costs, domestic market size, labour-force conditions, and location-specific profit opportunities.¹⁰³

¹⁰¹ OECD, *Policy Framework for Investment 2015 Edition*, 57 (2015).

¹⁰² *Id.*

¹⁰³ *Id.*

4. In cases in which the economy of a host country offers a relative abundance of location-specific profit opportunities, policy makers usually resist the pressures to adopt tax incentives so as to protect the country's tax-revenue base. Furthermore, a higher host-country tax burden can be considered acceptable to investors if that nation offers an attractive business-enabling climate, a stable macroeconomic environment, a coherent and predictable tax-policy regime, effective rule of law, including regulatory certainty, a well-trained labour force, and effective investment-promotion systems.¹⁰⁴
5. In the context of economic profit that is not location-specific, comparisons of the host country's effective tax burden with those of competing jurisdictions can be taken into account. Indeed, a high tax burden relative to that of competitor countries may discourage investment in the host country. Nevertheless, policy makers must be mindful that measures designed to lower a country's tax liability *vis-à-vis* that of its competitors can potentially generate "race to the bottom" tax consequences that render countries *collectively* worse off from an economic and social welfare perspective. This outcome typically occurs when such countries form part of a common market or an economic union.
6. The "race to the bottom" phenomenon is of major concern in developing countries in cases in which new tax-incentives measures are introduced or existing measures are expanded, without taking into full consideration the costs and benefits of such measures. This challenging and often controversial issue cannot be tackled in isolation, especially in a common-market or economic union setting. Instead, national governments must necessarily work together on a *regional basis* to foster co-operation in the area of investment-related tax policy under such circumstances.¹⁰⁵
7. Concerning any kind of tax incentives, including investment incentives, national policy makers should examine and weigh arguments in favour and against preferential treatment to ensure that such a differentiated policy is economically justified and meets the government's intended economic and social policy objectives. One such legitimate objective is encouraging investment in disadvantaged geographical regions of the host country in order to address a persistent market failure.

¹⁰⁴ *Id.* at 57-58.

¹⁰⁵ *Id.* at 59.

8. In any event, any evaluation of the benefits attributable to any proposed tax or investment incentives must necessarily take into account, at a minimum, the following factors:
 - (a) The direct economic and social impact to be generated in the host country by the investments entitled to incentives;
 - (b) Indirect and induced impacts stemming from inter-industry transactions and changes in income and consumption (to the extent that such an impact evaluation is feasible);
 - (c) Any positive externalities expected to be created by the incentives, such as technology and know-how transfers, enhanced environmental protection, and improved labour protection; and
 - (d) Any other social and environmental benefits in cases in which the incentives are specifically designed and granted to address specific market failures.¹⁰⁶

9. The costs that any host-country government must assess when conducting a cost-benefit analysis of any incentives proposal need to include, at a minimum, the following:
 - (a) Revenue forgone as a direct and indirect result of the incentives;
 - (b) Revenue leakages that stem from unintended and unforeseen tax-planning opportunities;
 - (c) The costs incurred by taxpayers to comply with the applicable investment-incentives regime;
 - (d) The administrative costs generated by incentives programmes that are the direct consequence of any complexity introduced by the governing legislative and regulatory framework; and
 - (e) The costs to the economy at large by virtue of creating an “uneven playing field” in cases in which domestic or national firms are not entitled to enjoy the same incentives as their foreign competitors.¹⁰⁷

10. Tax incentives, depending on their type, can give rise to certain unintended effects as emphasised in the previous paragraph. Policy-makers must recognise that all taxpayers will analyse the governing eligibility criteria and attempt to benefit from the incentive in question by engaging in “rent-seeking” behaviour. As such, policy makers should evaluate the unintended domestic and cross-border tax-planning opportunities that result from the provision of

¹⁰⁶ *Id.* at 60.

¹⁰⁷ *Id.*

investment incentives and adopt adequate measures to improve regional and international co-operation to counter abusive tax-planning strategies.¹⁰⁸

11. Finally, in creating an investment-friendly business environment, host-country governments need to be cognisant that the overall transparency and clarity of the legal provisions governing any incentives regimes are critical factors. In this context, automatic tax incentives and those that involve little or no administrative discretion in respect of their bestowal are preferred to those requiring government-decision-making and *ad hoc* judgment in selecting “winners and losers.”

B. Adaptation of International Standards to the ECOWAS Investment Policy

1. The ECOWAS Member States compete amongst themselves in offering investment incentives to attract FDI. These incentives prompt debates over which policies and incentives are the most successful in attracting FDI to West Africa. Technical studies of FDI in SSA have determined, as reiterated by the OECD above, that macroeconomic stability, the implementation of country-wide economic and political reforms, and reliable and modern infrastructure are more important factors for attracting FDI to the region than incentives. In light of such findings, the Member States should endeavour to select policies and incentives that directly address the market failures in their relevant jurisdictions, and that yield marginal benefits that are superior to their marginal costs (*i.e.*, foregone tax revenue).
2. Tax holidays are especially contentious in West Africa, because they are perceived as shifting the tax burden from corporate entities to the public sector. Often, though not in all instances, tax holidays attract (i) short-term, as opposed to long-term, investors, (ii) investors that otherwise would have invested without the incentive, especially in cases of location-specific investments, and (iii) investors eager to engage in “rent-seeking” behaviour. Given that the majority of investors doing business in the ECOWAS common market usually seek long-term access to natural resources, tax holidays in and of themselves usually provide minimal economic incentives to the majority of investors doing business in the region.
3. The empirical evidence to date strongly suggests that tax holidays do not yield an increase in FDI in Africa. By 2004, 70% of the SSA countries offered tax holidays, even as SSA’s portion of world FDI decreased during the period 1970-

¹⁰⁸ *Id.* at 61.

2004. In contrast, from 1970 to 2004, the amount of FDI into Asia quadrupled, although only approximately only 13% of the Asian countries provided tax holidays during the relevant period. From 1970 to 2004, the portion of FDI to Latin America remained unchanged, even though only approximately 8% of the countries in the region offered tax holidays during the pertinent period. The available evidence further suggests that income-tax holiday regimes may cause income shifting within related MNEs, are not useful to any company until that entity begins generating a profit, and removes economic incentives for debt financing.¹⁰⁹

4. In light of West Africa's history of relatively ineffective taxation and widespread tax evasion, the Member States should consider implementing simple tax systems at the national level that encourage compliance. In particular, the reduction of the applicable country-wide tax rate – usually the corporate income-tax rate – to attract FDI into the host country has proved to be one of the most effective policy instruments to spur economic growth. If the reduced rate is permanent, it can be one of the most transparent ways to attract investment. A notable decrease in the corporate income-tax rate sends a powerful, positive signal to private investors that the government desires that the market determine the most profitable investments to be made by the private sector. During the period 1997-2001, Ireland, Sweden, Singapore, and Hong Kong had the lowest marginal effective tax rates and were among the top-five worldwide destinations for FDI. Reduced corporate income-tax rates were the most significant contributing factor accounting for this result.¹¹⁰ China followed suit in 2007,¹¹¹ and the United States now is contemplating doing the same.¹¹²
5. Likewise, other developing countries have succeeded in implementing broad-based flat-tax regimes that establish uniform tax rates on corporate and personal income. For instance, this simplification of the tax system has led to increases in national revenue collections in the former Soviet States that now use the flat-tax system. In most cases, compliance also has increased as a consequence of improved enforcement and lower tax rates. *Saavedra et. al* determined that increased tax revenue due to the flat-tax reforms enabled 5 out

¹⁰⁹ Cleeve, E., *How effective are fiscal incentives to attract FDI to Sub-Saharan Africa?* The Journal of Developing Areas, 42(1): 135-153, 137-139 (2008).

¹¹⁰ Morisset, Jacques, "Using Tax Incentives to Attract Foreign Direct Investment," 2, *World Bank Group Private Sector and Infrastructure Network* (2003).

¹¹¹ See Enterprise Income Tax Law (People's Republic of China, 2007), http://www.fdi.gov.cn/1800000121_39_3339_0_7.html

¹¹² *Trump Tax Reform Plan: Tax Reform That Will Make America Great Again* (2016), <https://assets.donaldjtrump.com/trump-tax-reform.pdf>.

of 9 former Soviet flat-tax countries to decrease their flat tax rates.¹¹³ The ECOWAS Member States could consider adhering to these successful precedents as well.

6. The Member States could also consider implementing, amongst other tested incentives, an accelerated depreciation scheme that initially subjects capital assets to a lower tax burden. As relevant here, accelerated depreciation has the potential to encourage significant private-sector infrastructure development. Performance-based investment incentives constitute another best practice mechanism to follow as well.
7. In any event, as highlighted by the OECD best-practice standards, a country's tax regime needs to be properly designed to achieve the purpose of increasing investment, particularly FDI. One manner by which national tax regimes can be improved to attract investment in a coherent manner is to adhere to any existing guiding principles of a regional incentives policy that is premised on international best practices as grounded on solid empirical evidence. In this context, an argument exists that the Member States would be well served by contemplating engaging in multilateral consultations to ensure to some degree some consistency at the regional level in respect of investment-incentives policy.
8. In this regard, the effort at partial tax consistency – if not complete tax harmonisation – in the ECOWAS Community began on January 1, 2015, with the adoption and the implementation of the ECOWAS CET. The major policies embedded in the ECOWAS CET include:
 - (a) The imposition of uniform customs-import duties or tariff rates in a band of categories that are applicable to imported foreign merchandise of non-ECOWAS origin; and
 - (b) The abolition of customs-import duties or tariff rates on ECOWAS intra-regional trade, provided that the ECOWAS rules of origin are satisfied.
9. The extension of these consistency or harmonisation principles to investment-incentives in the ECOWAS zone could potentially trigger the following positive outcomes:

¹¹³ Saavedra, Pedro, Anton Marcincin, and Juraj Valachy, "Flat Income Tax Reforms," 253-280, *Fiscal Policy and Economic Growth: Lessons for Eastern Europe and Central Asia*, ed. Cheryl Williamson Gray and Tracey Lane, Washington, DC: World Bank (2007).

- (a) Improvements to the overall investment-incentives structure in the region;
- (b) Benefits that the private sector can enjoy through the reduction of market distortions (e.g., “race to the bottom” tendencies) that currently prevail in the Community; and
- (c) The elimination to some degree of tax arbitrage that results from differential tax treatment existing in the Member States.

10. This partial consistency or harmonisation policy is geared towards providing a regional framework that encourages the use of market-based investment incentives in the ECOWAS common market. This regional framework will thus enable the Member States to weigh the relative advantages and disadvantages of alternative policies and incentives regimes and design options to meet the twin, albeit competing, goals of investment incentives; that is, attracting investment in specific sectors, while raising tax revenues to finance the construction of basic public infrastructure that is required in the first instance to attract investment. The main purpose of this regional policy approach is to mitigate the harmful effects of “race to the bottom” competition amongst the Member States that can often distort regional competition for all regional investments, especially FDI.

11. In this milieu, the Communiqué of the Authority of the Heads of State and the Governments of ECOWAS issued at the 36th Session held at Abuja, Nigeria, on June 22, 2009, emphasised the need to pursue concrete efforts to harmonise direct taxes applicable to industrial and commercial profits, as well as to indirect taxes related principally to value added taxes (VATs).

II. ECOWAS Policy Principles

To achieve the above investment-related tax policy goals in accordance with the Communiqué of the Authority of the Heads of State and the Governments of ECOWAS issued at the 36th Session held at Abuja, Nigeria, on June 22, 2009, the Member States hereby agree to consult and collaborate amongst themselves, with a view towards achieving market-based consistency with regard to the following subject matter areas:

1. Minimum corporate income-tax rates, including flat taxes;
2. Tax allowances, such as capital allowances;
3. Interest deductions and carry forward of losses;
4. Performance-based investment incentives and accelerated depreciation;
5. Indirect taxes, including VATs;
6. Labour and environment investment incentives;
7. Tax credits, reinvested profits incentives, and location incentives;

8. Tax treatment of gains and losses, as well as the acquisition or transfer of assets, in the context of mergers and acquisitions, company reorganisations, and business turnarounds;
9. Transfer-pricing practices;
10. Withholding taxes and royalty-tax payments;
11. Taxation in the natural resource sector; and
12. Other areas agreed to by the Member States.

III. ECOWAS Strategies

To implement the above policy principles, the Member States individually and collectively shall endeavour to adopt the following strategies, provided that such actions are politically and economically feasible at both the national and regional levels:

1. Engage in regional consultations, with a view to put in place transparent, clear, and predictable national tax laws, regulations, and administrative practices that effectively address the aforementioned subject matter areas;
2. Design and publish national tax and investment strategies, which are consistent with the overall economic development strategies of the respective Member State, as based on the objective measurement of the effective tax rates for business activities in the relevant jurisdiction;
3. Adopt cost-benefit analyses of investment-incentives proposals and existing regimes that seek to measure the tax-revenue losses, tax-administration costs, and the economic and social benefits that are attributable to the proposed or existing incentives;
4. Make the referenced cost-benefit analyses available to the general public;
5. Establish national tax systems that are generally neutral in their treatment of national and foreign investors in line with the ECOWIP;
6. Execute tax treaties to address international double taxation and tax-evasion;
7. Adopt the ECOWAS Tax Information Exchange Agreement (TIEA) to facilitate the exchange of tax information amongst the Member States concerning national and foreign investors to avert any tax abuses at the regional level;
8. Codify into domestic law national transfer-pricing rules;
9. Establish, in consultation and co-ordination with the ECOWAS Commission, training programs designed to improve the skill set of fiscal civil servants;
10. Conduct regular consultations amongst tax and investment-policy makers, investment-promotion agencies, and the private sector of the Member States to improve overall investment-related tax policy design and coherence; and
11. Any other action agreed to by the Member States.

CHAPTER 14

SPATIAL AREA INVESTMENT POLICY: SPECIAL ECONOMIC ZONES

I. Introduction

A. International Best Practice Context

1. When correctly designed, regulated, and managed, spatial areas – in particular, SEZs¹¹⁴ – provide developed and developing nations alike with an optimal policy instrument to create and harness all of the essential building blocks needed to increase investment, infrastructure construction, employment, and economic growth. In fact, SEZs provide policy-makers worldwide, including the competent Member State representatives, with an extremely efficient policy tool that can effectively implement all of the principles set forth in the ECOWICPF at designated zone sites. Governments also can more effectively promote backward-and-forward linkages with the local economy through SEZs. In this regard, SEZ legal and regulatory frameworks can incentivise private-zone investors to sub-contract local enterprises – often MSMEs – and to purchase local goods and services from these enterprises.
2. A modern, *integrated* SEZ refers to any delimited, physically-secured, and oftentimes fenced-in geographic area comprising serviced lands and facilities that offers on-site administrative regulation, management, infrastructure, and related services. The resulting geographic area can be dedicated to a virtually limitless range of *multi-use* and *integrated* economic and social activities, including manufacturing, commercial, logistics, warehousing, mineral-processing, petrochemical, *agribusiness*, electricity-generation, financial, high-technology, *healthcare*, education, ICT, residential, *tourism*, service, and other professional pursuits. If initially designed as a business incubator, an SEZ regime can also serve the needs of MSMEs inside a dedicate zone site.
3. The ILO estimated in 1975 that there were approximately 79 zones in 25 countries, employing approximately 800,000 people. Today, it is estimated that 3,500+ SEZs operate in 130+ countries. Of these, there are more than 2,300

¹¹⁴ Spatial areas, including SEZs, encompass a wide range of zone regimes and infrastructure-development areas, including export-processing zones (EPZs), free-trade zones (FTZs), free ports, industrial parks, tourist SEZs, agricultural SEZs, science-and-technology parks, competitive cities, townships, and other spatially defined areas like enterprise clusters, economic corridors, and growth poles. The common thread running through these spatial area arrangements is that each attempts to combine new infrastructure construction with free-market policy instruments to promote investment, job creation, domestic/export sales, and inclusive economic growth.

zones in 119 developing and transitional countries – mainly in the Asia-Pacific region and in the Americas – that employ roughly 66 million people.¹¹⁵ For some countries, such as China, Korea, and Mauritius, SEZs have been transformational. In fact, the China phenomenon has triggered a proliferation of SEZs globally.

4. In this context, it was the correct and successful implementation of the SEZ policy instrument in China that triggered the establishment of *strategic enterprise clusters* that constitutes the principal reason that China has emerged today as an economic juggernaut. Since 1978, China has aggressively embarked on a campaign of SEZ development designed to open the country gradually to the outside world, with a portion of the City of Shenzhen designated as the country's first experimental SEZ in 1980.¹¹⁶ The long-term goal of Beijing is to extend zones to the rest of the Chinese economy, including in the rural areas. Today, this free-market scenario constitutes the norm for the countless enterprises operating in China's approximate 1,500 free market zones, including: (i) SEZs; (ii) economic and technical development zones (ETDZs); (iii) free trade zones; (iv) EPZs; (v) high-technology development parks; (vi) industrial development zones; (vii) inner and border cities; (viii) coastal economic open zones; and (ix) old urban districts classified as economic development zones. In 2001, China became a WTO Member to maximise the economic benefits derived from its SEZ strategy and to integrate itself even further into the global economy.¹¹⁷
5. For developing countries, SEZs have traditionally been established based on sound policy and infrastructure rationales. In terms of policy, an SEZ can constitute a useful policy instrument as part of a country's overall economic growth strategy to enhance industry competitiveness and to attract FDI. Through SEZs, governments can develop and diversify exports, support local industries and enterprise clusters, and create jobs — particularly by removing or reducing administrative barriers, regulatory difficulties, and access-to-land constraints. SEZs also provide improved physical infrastructure (on-site and off-site) and services to private investors, allow for more efficient government supervision of enterprises, and today implement best-practice environmental

¹¹⁵ Jean-Pierre Singa Boyenge, *ILO database on export-processing zones (revised)*, International Labour Organisation 1, 2 (2007). http://staging.ilo.org/public/libdoc/ilo/2007/107B09_80_engl.pdf.

¹¹⁶ A distinctive Chinese SEZ characteristic is that such zones typically comprise entire cities or townships.

¹¹⁷ US-China Economic and Security Review Commission (2008).

and labour safeguards. Importantly, SEZs do not appear to crowd out domestic investment.¹¹⁸

6. A distinguishing feature of contemporary SEZs is that they provide governments in developing and post-conflict countries with an effective policy instrument to implement economic, regulatory, and institutional reforms on a *targeted, zone-by-zone basis*. Rather than attempt to accomplish the daunting task of carrying out wholesale and sweeping reforms on a countrywide basis, a developing-country government can establish multiple SEZs (or business incubators initially) throughout the nation as pilot programs and execute specific reforms gradually on a zone-by-zone basis.
7. Upon realizing positive results on a smaller, albeit on a much more manageable, scale, any country can then execute the needed reforms on a broader basis throughout the nation as a whole. As emphasised by Paul Collier, a renowned international economist, “[i]t is much easier and quicker to provide the infrastructure and services that [any] industry needs by creating a few islands of excellence rather than by trying to improve standards across the entire country.”¹¹⁹ As pertinent here, Shenzhen was the first business area in China to pilot minimum wage, pension insurance, and other worker protections that later were extended to other parts of the Mainland.¹²⁰
8. Such a targeted and sequenced approach can eventually transform the society of a host country as in the case of China. The piloted reforms, as administered by an SEZ OSS or a business-services centre, have proved to be particularly useful in remedying countries’ competitiveness shortcomings, such as those identified in the World Bank’s annual *Doing Business* report, including:
 - (a) Land acquisition/use/transfer reforms (e.g., SEZ land titling/certificates);
 - (b) Simplified company formation/business registration;
 - (c) Smart investment incentives (e.g., performance-based investment credits);
 - (d) Upgraded labour, immigration, and environmental regulation;

¹¹⁸ See Helena Johansson and Lars Nilsson, Export Processing Zones as Catalysts, *World Development* 25(12), 2115, 2123 (1997); Jin Wang, *The economic impact of special economic zones: Evidence from Chinese municipalities*, *Journal of Development Economics*, 101, 133-147 (2013); Thomas Farole, *Special Economic Zones in Africa: Comparing Performance and Learning from Global Experience*, World Bank Group, Washington D.C. (2011); Douglas Zhihua Zeng, *Global Experiences of Special Economic Zones with Focus on China and Africa: Policy Insights*, *Journal of International Commerce, Economics and Policy*, 7(3), (2016).

¹¹⁹ Collier, Paul, *Haiti: From Natural Catastrophe to Economic Security*, A Report for the Secretary-General of the United Nations, 1, 4 (January 2009).

¹²⁰ Khandelwal et al, *Special Economic Zones for Myanmar*, International Growth Centre, 17 (February 2016).

- (e) Streamlined customs procedures;
 - (f) Improved access to credit;
 - (g) Swift dispute resolution through ADR (e.g., mediation, arbitration);
 - (h) Enhanced contract enforcement;
 - (i) Improved electricity generation; and
 - (j) Gender equality.
9. Consequently, as “piloting platforms” for reforms, SEZs have served as effective “demonstration areas” in Asia (e.g., Korea) and in the Middle East (e.g., Jordan). In these cases, essential, but somewhat difficult, reforms were initially launched in a delimited geographic area before being implemented on a municipal or national basis that created positive “spillover” effects on a much larger scale. Such positive “spillover” effects may be static and generated in the short run or dynamic and created in the long run. Static outcomes may encompass initial investments by SEZ-based firms, employment generation, export-led growth, additional government tax revenues, and increased foreign exchange earnings. Dynamic outcomes tend to be structural and developmental in nature and may include the upgrading of local skills and technologies, improved local innovation capacity, structural diversification, or increased openness of the economy as a whole.¹²¹
10. Even though SEZs represent less than one percent of global employment, they can be an important source of national employment in some countries, *especially in smaller economies like many of those that comprise the ECOWAS common market*. The impact of these jobs in countries with high rates of unemployment and underemployment is significant. In this vein, SEZs have been particularly effective in generating employment opportunities for women in the formal labor market. Worldwide, 60 to 70 percent of SEZ employees are women, who tend to be engaged in labor-intensive, assembly-orientated activities that require manual dexterity, such as garments, textiles, and electrical and electronic goods production.¹²² In Bangladesh, women represent 63% of the workers in the country’s two most important zones, with the female proportion increasing to 72% for permanent jobs and to 75% in fully foreign-owned garment firms.¹²³

¹²¹ See Farole, Thomas, *Special Economic Zones in Africa: Comparing Performance and Learning from Global Experience. Directions in Development*, World Bank Group (2011) (published at <https://openknowledge.worldbank.org/handle/10986/2268>).

¹²² Farole, Thomas and Akchin, Gokhan, *Special Economic Zones: Progress, Emerging Challenges, and Future Directions*, World Bank Groups, 248-249 (2011) (published at <https://openknowledge.worldbank.org/handle/10986/2341>).

¹²³ The World Bank Group, *Fostering Women’s Economic Empowerment through Special Economic Zones: The Case of Bangladesh*, The World Bank Group, 8-9 (2011) (published at <https://openknowledge.worldbank.org/handle/10986/2341>).

11. To persuade foreign investors to make capital investments in an unfamiliar jurisdiction, contemporary SEZs usually offer “special” economic and legal advantages that must be consistent with the governing WTO disciplines. These advantages usually embrace corporate income-tax, import-duty, import-quota, and excise-tax exemptions and incentives, as well as foreign-exchange and investment freedoms. Additional zone guarantees include streamlined company-formation, business-registration, labour, immigration, environmental, land-acquisition, land-use, banking, customs, and tax procedures. Transparent legal provisions designed to protect private property rights, including IPRs, and to settle conflicts, including land controversies, by means of modern ADR techniques also comprise part of the existing package of SEZ benefits.
12. By offering smart economic performance incentives that are compatible with international WTO obligations, reduced bureaucratic interference, enhanced enforcement of property rights, and targeted access to credit, SEZs (including business incubators) have been able to create regulatory environments more conducive to business and more attractive to national and foreign enterprises. The ensuing investor confidence typically attracts the initial direct investment outlay that is necessary to create new commercial ventures, generate indigenous employment opportunities, galvanize export activities, and promote infrastructure development. In fact, exports from SEZs account for a large share of national exports: 17% in Bangladesh (2013); 44% in China (2012); 11% in the Republic of Korea (2007); 49% in the Philippines (2011); and 67% in Sri Lanka (2007).¹²⁴
13. The emerging pockets of developing infrastructure can then draw even more investment capital into the host country that is required to trigger the onward drive towards further **inclusive** economic and social development on a larger scale, such as through the formation of enterprise clusters and even growth poles. In this regard, SEZs may prove to be the correct policy paradigm to confront the growing income and wealth inequality that today arguably threatens the survival of the globalised economy.

<http://documents.worldbank.org/curated/en/653131468006880220/Fostering-womens-economic-empowerment-through-special-economic-zones-the-case-of-Bangladesh>).

¹²⁴ Asian Development Bank Data (2015).

B. Adaptation of International Standards to the ECOWAS Investment Policy

1. In addition to generating the customary economic and social benefits as summarized above, SEZs have the potential to create some rather unique positive consequences for the ECOWAS common market. As relevant here, some post-conflict jurisdictions elsewhere in the world have successfully implemented, or are in the process of implementing, SEZ regimes as an innovative policy instrument to achieve peace-building.¹²⁵ As underscored previously, post-conflict jurisdictions globally -- like Côte d'Ivoire, Liberia, Mali, and Sierra Leone in West Africa -- share to some degree similar characteristics: (a) a high level of perceived investment risk; (b) the relative lack of investor confidence; (c) ravaged or impaired infrastructure; (d) an unstable or recently stabilising political situation; (e) disrupted public administration and regulatory systems; and (f) safety-and-security concerns. As a consequence, SEZs can be used in West Africa as an *innovative* post-conflict peace-building tool through on-the-ground application of *private-sector entrepreneurship* principles.
2. Specifically, zones can serve as a viable policy vehicle to limit political, investment, and operational risks and promote security and the rule of law in a post-conflict climate. In this context, **fortressed zones** that are protected by some kind of peace-keeping apparatus (e.g., United Nations or ECOWAS security forces) can reduce political and administrative risk by devolving political and administrative authority amongst national, regional, and local/municipal governments. SEZs also can limit investment and operational risks in a post-conflict environment by reducing the size of required investments through the provision of common infrastructure. Zones can further provide geographical benefits as they allow post-conflict jurisdictions to overcome challenges of distance and communication. SEZs can even offer post-conflict governments the opportunity to develop essential infrastructure and utility services with efficient private-sector participation through flexible PPP arrangements (e.g., concessions).
3. Hence, the effective administration of a national SEZ regime in a post-conflict climate — **as developed, operated, and managed by private-sector entities**

¹²⁵ Post-conflict jurisdictions that have successfully implemented, or are in the process of implementing, SEZ regimes as a policy instrument to achieve peace-building include Gaza, El Salvador, and Rwanda. For example, in Rwanda, the government is employing SEZs as an innovative policy tool to effect needed reforms to attract investment and create jobs in such targeted sectors as agriculture, tourism, high-technology, including ICT, manufacturing, and social infrastructure like worker housing, hospitals, and school developments.

- can play the critical role of contributing to peace-building efforts in West Africa. By constituting an additional engine for private sector-led growth, providing strong security, emphasising transparency, establishing linkages with local communities, creating contemporary institutional frameworks, requiring capacity-building training, and adopting efficient legal, regulatory, and institutional regimes, SEZs have the potential to serve as a viable development mechanism in many fragile nations of the ECOWAS common market. In fact, the provision of strong personal security and safety in a former war or hostile zone — a hallmark feature of a good-practice zones regime worldwide — is a linchpin for success from both a military and economic perspective.
4. Similarly, many foreign investors are still somewhat wary of West Africa in general, because they are not convinced that a variety of infectious diseases have been contained at their source in the relevant jurisdictions. The absence of an effective infectious disease containment strategy in West Africa is due in substantial part to substandard national healthcare systems across the region. In other words, as previously explained in Chapter 4, national healthcare systems comprise part of the investment-climate framework that is stunting the full FDI development potential of the region. As a result, the Member States can take advantage of the targeted approach offered by SEZs to create healthcare spatial areas that ultimately can lead to the adoption of long-term reforms that improve the national healthcare systems comprising the ECOWAS territory. Specifically, such spatial areas, together with healthcare centres of excellence, can leverage the growing capacity-building advances in Mali, Nigeria, and Senegal to improve healthcare systems at the regional level.
 5. The Member States can also use SEZs as an innovative policy platform to confront informality in the ECOWAS territory. SEZs can achieve this objective by providing cost-effective and effective customs control and compliance that can reduce smuggling activities in the region and by further providing accelerated and cost-effective registration procedures to organise new formal business enterprises.
 6. In light of the above, it is important to emphasise at this juncture that the ECOWAS Member States are severely lagging behind their global competitors with regard to spatial area development and operation. The region continues to rely on antiquated and oftentimes public-sector driven free-zone and EPZ models that trace their historical origins to the Great Depression Era. It is now time for both the ECOWAS Commission and the Member States to learn from the successful lessons provided by the rest of the world – especially by China, the United Arab Emirates, Jordan, the Dominican Republic, Korea, Mauritius,

Morocco, Panama, and countless other nations – and finally abandon the outdated free-zone/EPZ policies and embrace the innovative SEZ policy instrument to strengthen the national and regional economies of the ECOWAS common market.

7. Significantly, a new ECOWAS SEZ investment policy that is fully integrated into the national economic policies of the Member States, including their national spatial area policies, will put ECOWAS in the position to leverage national and regional competitive advantages to participate in strategic GVCs. The successful implementation of such a contemporary trade-related investment policy will also empower the West African region to increase infrastructure investment, tackle national/regional unemployment, facilitate access to credit (especially for MSMEs), promote R&D advances, augment ECOWAS exports, provide innovative immigration, environmental, and fiscal solutions, promote peace-building efforts, and even improve healthcare systems in the region.
8. As pertinent here, the OECD, based on empirical evidence, has concluded that GVCs -- also known as factories that cross borders -- constitute an effective integration strategy for all developing countries, whether large, medium, or small. GVCs can be used to accelerate and solidify economic development, promote backward-and-forward linkages locally, regionally, and internationally, improve labor and social conditions for workers, and ultimately reduce extreme poverty.¹²⁶ The key to success for any developing country to participate in a particular GVC is to meet the stringent regional or international production requirements that must be buttressed by modern infrastructure facilities and efficient worker productivity as supported by effective capacity-building programs.
9. With regard to Africa in general and the ECOWAS zone in particular, the OECD has identified the following sectors as ideal candidates for GVC participation: (i) **agribusiness** (including processed food products and livestock); (ii) **plastics**; (iii) **rubber**; and (iv) **certain light-manufacturing activities** like textile-and-apparel production, metal products, and potentially electronics and footwear.¹²⁷ In this vein, the WBG has recently articulated the view that certain spatial areas – whether in the form of industrial zones, high-technology parks, or agribusiness SEZs – can constitute one among many effective policy instruments to enhance the prospects of any country to integrate itself

¹²⁶ Kowalski, P. et al., “Participation of Developing Countries in Global Value Chains: Implications for Trade and Trade-Related Policies,” OECD Trade Policy Papers, No. 179, OECD Publishing, Paris (2015).

¹²⁷ *Id.*

successfully into a GVC.¹²⁸ The reason underlying this conclusion is that spatial areas, especially SEZs, usually embody all of the GVC success features,¹²⁹ serve as effective investment-and-trade platforms to promote domestic and export-based value-added manufacturing, enterprise clusters, and on-the-job capacity-building, and provide countries with flexible “demonstration areas” whereby their governments can implement reforms on a targeted basis.

II. ECOWAS Policy Principles

To maximise to the fullest extent the advantages of all spatial areas – in particular, SEZs – at the national and regional levels in the ECOWAS zone, the ECOWAS Commission, in close co-operation and co-ordination with the Member States, hereby pledges under the ECOWIP to adhere to the following policy principles:

1. Promote spatial areas and SEZs in general and *agribusiness SEZs* in particular, including *agribusiness GVCs*, especially given that the ECOWAS Commission in the context of the WBG Improved Business and Investment Climate in West Africa Project has identified *agribusiness* as the most competitive private investment sector in 13 out of the 15 Member States as set out in Annex A;
2. Recognise specifically that *agribusiness spatial areas* – whether in the form of *agri-zones, agri-parks, food parks, agro-based clusters, or agribusiness SEZs* – constitute a viable policy instrument that can contribute positively to developing co-ordinated implementation platforms to achieve the following goals in the West African agriculture sector:
 - (a) Improve the overall agribusiness regulatory environment and infrastructure at designated sites;
 - (b) Encourage responsible access to, and use of, agricultural lands;
 - (c) Facilitate access to agricultural inputs and intermediate suppliers by eliminating import tariffs;

¹²⁸ Daria Taglioni and Deborah Winkler, “*Making Global Value Chains Work for Development*,” *Economic Premise*, The World Bank Group (May 2014, No. 143).

¹²⁹ GVC success factors that are typically exemplified in, and captured by, spatial area frameworks, especially SEZs, include the following: (a) low or zero import tariffs and open foreign investment legal and regulatory regimes; (b) effective cross-border trade-facilitation mechanisms, including modern logistics/customs operations and trade-friendly rules of origin; (c) efficient administrative institutions and state-of-the-art investment-climate frameworks; (d) learning infrastructure that improves upstream capacities (e.g., R&D, design, brand development); (e) effective protection of private property rights, including IPRs; and (f) proximity to large manufacturing hubs and competent local service providers. See *supra* note 126 at 108 (citing to Kowalski, P. et al.); see also *supra* note 128 at 109 (citing to Daria Taglioni and Deborah Winkler).

- (d) Promote the provision of related services (e.g., finance);
 - (e) Improve the investment-climate framework by establishing effective institutional organizations, adopting trade-facilitating rules of origin, and protecting private property rights;
 - (f) Promote logistics improvements;
 - (g) Consolidate links to research and other institutions (e.g., R&D, training);
 - (h) Attract national and especially foreign investment for technology-transfer and job-creation purposes;
 - (i) Provide viable testing grounds for innovative crop techniques and alternative energy sources;
 - (j) *Improve sanitary and phytosanitary standards (SPS)*;¹³⁰
 - (k) *Streamline access to strategic GVCs*; and
 - (l) *Improve the exporting prospects of the ECOWAS common market*;
3. Disseminate regionally that – as a direct result of well-designed, developed, and operated agribusiness SEZs – the relevant Member States that adhere to competitive market forces can successfully participate in the appropriate agribusiness GVC to maximise economic growth and development. To do so, each respective West African country can consider cultivating only those crops and engaging in only those agribusiness-production, further-processing, marketing, and distribution activities in which that country enjoys a true competitive advantage;
 4. Further recognise that improved SPS standards applied on a targeted or pilot basis in agribusiness SEZs across the region – which are designed and implemented to protect consumers and preserve plants, crops, and livestock – can enhance the food security agenda of each Member State, while, at the same time, dramatically improving the exporting prospects of all ECOWAS-origin agriculture products to critical markets, including those of Asia, the EU, and the ECOWAS market;
 5. Aggressively market the vision both regionally and internationally that the above outcomes will result in a veritable *game changer* in West Africa; that is, the envisioned, expanded export potential described above will make the ECOWAS common market an extremely attractive destination for regional agribusiness FDI. This result in and of itself will jump-start additional investments, job creation, foreign exchange revenue, social inclusion, superior

¹³⁰ For a discussion of the WTO regulation of SPS measures, see *supra* note 42 at 38.

safeguard mechanisms, and poverty reduction in West Africa;¹³¹ and

6. Support the drafting of model SEZ legal, regulatory, and institutional frameworks, in accordance with international best practice standards (as summarized in Annex B), that harmonise both the French Civil Law and English Common Law traditions of the ECOWAS Member States.

III. ECOWAS Strategies

1. To implement the above policy principles, the ECOWAS Commission and the Members States hereby commit under the ECOWIP to undertake a variety of concrete actions and adopt certain measures as summarized below.
2. Specifically, the Members States agree that it is in their best economic interests, whether individually or collectively, to pursue spatial area investment policies, including SEZ development initiatives, that promote positive outcomes and, at the same time, avoid identified failure factors. The SEZ “success” factors are dependent on the following core determinants:
 - (a) Zone location (including the potential to develop local, regional, and international linkages);
 - (b) Land allocation and basic utility provision;
 - (c) Political will of the host-country government;
 - (d) Accompanying/complementary national economic development policies;
 - (e) Legal, regulatory, and institutional frameworks;
 - (f) Zone development, operation, and management; and
 - (g) Government personnel overseeing zone implementation and operation.
3. The Member States should carefully consider these core elements in their national spatial area investment policies and agendas, especially for SEZs. These elements should also be transparently reflected in the governing national legal, regulatory, and institutional frameworks that adhere to the best practice principles set out in Annex B. This strategic approach will foster spatial area/SEZ success across the ECOWAS region by encouraging the adoption and implementation of the internationally-recognised standards as outlined in Annex C. In addition, as implied above, the Member States individually and

¹³¹ By relevant comparison, the Dominican Republic successfully executed this strategy to increase banana exports to the EU market. See Villarreal, René, *Cluster: Un Modelo de Asociatividad y Competitividad Sistemática en la Cadena Global de Valor*, 1, 151-164, Centro de Capital Intelectual y Competitividad (México, 2016).

collectively should avoid committing the fatal flaws that inevitably correlate with SEZ failures that are outlined in Annex D.

4. To enable the Member States to comply with the referenced success factors and avoid the fatal flaws set forth in Annexes C and D to the ECOWIP, the Member States, in collaboration with the ECOWAS Commission, pledge to develop a Model SEZ Law and Implementing Regulations for the region. The Model Law and Regulations are expected to harmonise both the French Civil Law and the English Common Law traditions of the Member States in accordance with the international best practice tenets explained in Annex B.
5. The ECOWAS Commission will also consider accepting proposals from the Member States to repeal the adverse ECOWAS rule-of-origin requirement that applies to all spatial areas, including SEZs and free zones, situated in the ECOWAS territory. This requirement treats imported goods of foreign or extra-regional origin that are substantially transformed in any zone situated in a Member State as constituting finished “foreign products” that technically originate from outside the ECOWAS territory and are, therefore, subject to the ECOWAS CET like any extra-regional foreign product (e.g., French wine). Such proposals should consider applying the ECOWAS CET only to the extra-regional foreign origin content of any finished SEZ merchandise that is sold in the ECOWAS customs territory.
6. To increase the probability of successful SEZ implementation in West Africa, the ECOWAS Commission and the Member States further commit under the ECOWICPF to promote and adopt additional pro-market measures, including developer/operator license or concession schemes and flexible PPP arrangements, that promote *private-sector-led development* of SEZs consistent with the policy prescriptions set out in Annex C.

CHAPTER 15

DISPUTE RESOLUTION

I. Introduction

A. International Best Practice Context

1. The ability to resolve commercial disputes – in particular, disputes involving investments, private property rights, or contract breaches – is a fundamental requirement for markets to function correctly. For governments truly interested in attracting FDI, improving the rule of law also includes the country's dispute-resolution options, especially through private-party negotiations, consultations, mediation, conciliation, investor-grievance mechanisms, and investor-state ADR, including international arbitration.
2. To this end, effective dispute-resolution modalities enhance predictability in commercial relationships by assuring investors, whether national, intra-regional, or extra-regional, that their legal rights will be protected efficiently by effective ADR or judicial review. When procedures for resolving disputes are overly bureaucratic and cumbersome, or when such disputes cannot be settled in a timely and cost effective manner, companies may restrict their investment activities in a particular host jurisdiction.¹³²
3. As such, the efficiency, effectiveness, integrity, and independence of ADR tribunals and judicial courts are important factors for investors, including local SMEs. Specifically, the judicial court system in any economy can be made more attractive to investors by strengthening the independence of judges, encouraging the adoption of transparent and predictable civil procedures, and facilitating the effective execution of judgments.¹³³
4. As emphasised in Chapter 2, swift ADR mechanisms, including private-party negotiations, mediation, investor-grievance mechanisms, and investor-state ADR through international arbitration, constitute a hallmark feature of a best practice investment climate.
5. In particular, an effective commercial arbitration regime is an ever-increasing important consideration for FDI for two principal reasons. First, complex commercial contracts require flexible dispute-resolution mechanisms.

¹³² OECD, *Policy Framework for Investment 2015 Edition*, 41 (2015).

¹³³ *Id.*

Arbitration and other forms of ADR give commercial parties considerable autonomy to create systems tailored to their controversies. The characteristics of arbitration – confidentiality, flexible procedures, party autonomy, and easy enforcement (as discussed below) – also cater to the day-to-day concerns of businesses.¹³⁴ Second, companies often prefer to have alternatives to judicial court litigation. Indeed, past studies have found that more than two-thirds of MNEs prefer international arbitration, either alone or in combination with some other form of ADR, to resolve cross-border disputes.¹³⁵ Indeed, formal dispute resolution through domestic litigation can be protracted and ineffective. Even if judicial courts treat foreign companies fairly, domestic firms are more familiar with judicial court procedures and can leverage the advantages of local legal systems, lawyers, and language.

6. Moreover, foreign firms view a well-established and predictable arbitration regime as mitigating risk by providing legal security for investors, including the assurance of contract enforcement, due-process protection, and overall access to justice.¹³⁶ Not only does an efficient ADR regime assist in attracting FDI, but it also eases the burden on local judicial courts, which are often congested and have relatively unmanageable case backlogs.¹³⁷

7. In this regard, the WBG Arbitrating Commercial Disputes data for the 87 countries surveyed in 2009 demonstrate that countries which perform well on the WBG Doing Business Indicators share the following characteristics in respect of their arbitration regimes:
 - (a) Clear arbitration provisions consolidated into one law or a chapter in a civil code;¹³⁸
 - (b) Party autonomy to tailor arbitration proceedings to the particular circumstances of the commercial transaction and business relationship in question;¹³⁹
 - (c) Consistent arbitration practice (*de facto*) that is in line with effective arbitration laws (*de jure*);¹⁴⁰

¹³⁴ See World Bank Group, *Investing Across Borders*, 54 (2010).

¹³⁵ *Id.* at 55.

¹³⁶ *Id.* at 54.

¹³⁷ *Id.* at 55.

¹³⁸ *Id.* at 12.

¹³⁹ *Id.* at 11.

¹⁴⁰ *Id.*

- (d) Strong support from local judicial courts for arbitration, including consistent and efficient enforcement of arbitration awards;¹⁴¹ and
 - (e) Adherence to, and implementation of, international and regional conventions on arbitration, such as the New York Convention and the International Centre for Settlement of Investment Disputes (ICSID) Convention, that signals a government's commitment to the rule of law and its international investment-treaty obligations.¹⁴²
8. In addition to the characteristics of best practice arbitration regimes listed above, the relevant WBG indicators suggest that nations with modern arbitration frameworks typically guaranty the confidentiality of the arbitration proceeding at all stages of the process, as well as the independence and impartiality of arbitrators as highlighted above.¹⁴³

B. Adaptation of International Standards to the ECOWAS Investment Policy

1. Historically, dispute resolution in West Africa has been under the exclusive jurisdiction of the judicial courts. In this context, the legal infrastructure governing commercial litigation in West Africa has become outdated and inadequate in light of investors' expectations in the globalised economy. An insufficient number of adequately trained judges to resolve commercial controversies has been another factor impeding swift and effective justice in the Community.¹⁴⁴ In this regard, after acquiring their independence from France in the early 1960s, the West African Francophone countries relied on the legal and judicial review frameworks provided by the French that often trace their historical origins to the 19th Century.¹⁴⁵ In recent decades, these countries have sought to modernise their legislation; however, the lack of co-ordination has resulted in fragmented laws, including uncoordinated judicial review mechanisms, that have not been able to provide sufficient legal and judicial remedies to adversely affected entrepreneurs.
2. As globalisation has emerged as a key driver for economic development in the ECOWAS zone, and as dispute-resolution mechanisms have become recognised by the Member States as a critical component for investment promotion, West African countries have recently been undertaking more concentrated efforts to modernise their legal and judicial systems. These

¹⁴¹ *Id.* at 12.

¹⁴² *Id.*

¹⁴³ *Id.* at 57-58.

¹⁴⁴ Xavier Forneris, "Harmonizing Commercial Law in Africa," *Juris Périodique* 46, 77, 81 (2001).

¹⁴⁵ Joseph Issa-Sayegh and Jacqueline Lohoues-Oble, "OHADA – Harmonisation of Business Law" (2002).

initiatives have included measures to harmonise the judicial frameworks at the national and regional levels as exemplified by the adoption of the OHADA Arbitration Law that is applicable to 9 ECOWAS Member States.

3. Furthermore, with the launch of the WBG *Doing Business* project in 2002, together with the publication of the first report during the following year, countries around the world, including in West Africa, were provided with a comparative benchmark to enhance the quality of their legal and institutional frameworks governing dispute resolution. Specifically, the WBG's *Doing Business* enforcement-of-contracts indicator – which evaluates the time and cost for resolving a standardised commercial dispute through the local judicial courts – provided West African governments with a policy instrument to analyse dispute-resolution systems through the perspective of investors, whether national or foreign.
4. From this vantage point, it became evident to many West African governments that when judicial courts are efficient and transparent, investors become more confident and, thus, are more likely to invest in a particular Member State. West African nations also concluded that effective ADR modalities can further improve these results. Conversely, a recent study has shown that enterprises are more likely to restrict their investments and avoid creating new linkages with unfamiliar enterprises in a foreign jurisdiction in cases in which a country has cumbersome or time-consuming dispute-resolution procedures on the books.¹⁴⁶
5. Consequently, judicial reform initiatives were undertaken in SSA from 2005 through 2012 whereby 48 African nations began reforming their judicial review systems by virtue of the following reforms: (i) creation of specialised courts; (ii) improvement of case-management systems; (iii) streamlining of civil procedures; (iv) introduction of ICT platforms; and capacity building for judges.¹⁴⁷ Burkina Faso, Comoros, Côte d'Ivoire, Mali, and Senegal then followed suit by launching national mediation initiatives. Despite these reforms, the recent average ranking for the ECOWAS Member States concerning dispute-resolution effectiveness is 133 out of 189 countries as surveyed in 2012 by the WBG.

¹⁴⁶ Ahlquist, John S., and Aseem Prakash. 2010. "FDI and the Costs of Contract Enforcement in Developing Countries." *Policy Sciences* 43 (2): 181–200.

¹⁴⁷ World Bank Group, *Doing Business in the OHADA* (2012).

6. As a response to the inability of the judicial courts to meet the needs of global investors in West Africa, there has surfaced, as explained above, an emerging trend among several ECOWAS Member States to adopt and implement ADR mechanisms, including mediation and conciliation. Nonetheless, these new frameworks do not go far enough in that they do not contemplate contemporary private-party negotiations, consultations, and investment-grievance mechanisms.
7. In this vein, the ECOWAS Commission is called upon to identify and promote judicial review and ADR best practice standards in response to the economic needs of the region. Such promotion is expected to emphasise the importance of harmonising the English Common Law and the French Civil Law traditions under international law, especially with regard to ADR mechanisms and techniques, so as to eliminate existing investment barriers in the region.

II. ECOWAS Policy Principles

Acknowledging the dispute-resolution challenges in the region, the Member States, in close co-operation and co-ordination with the ECOWAS Commission, pledge to adhere to the following policy principles under the ECOWIP:

1. Recognise the right of investors, whether domestic or foreign, to resolve any disputes arising during the course of their business activities through the use of existing or new ADR mechanisms, including private-party negotiations, mediation, conciliation, investor-grievance mechanisms, national arbitration, and investor-state dispute resolution (e.g., international arbitration);
2. Consolidate arbitration provisions into one law or a chapter in a civil code in cases in which such a reform has not already been undertaken;
3. Commit to the establishment or modification of national ADR mechanisms to ensure the often competing objectives of dispute-resolution transparency and confidentiality, as well as to increase the efficiency and effectiveness of those proceedings for national and international investors;
4. Encourage investors to utilise national and regional ADR institutions or centres located in the Member States; and
5. Adhere to international conventions on dispute resolution to which the Member States are a party, including the ICSID Convention, the New York Convention, and the UNCITRAL Arbitration Rules.

III. ECOWAS Strategies

To implement the above policy principles, the Member States individually and collectively, in close co-ordination and co-operation with the ECOWAS Commission, shall endeavour to adopt the following strategies under the ECOWIP:

1. Adopt and implement in the ECOWAS territory private ADR mechanisms, including private-party negotiations, mediation, conciliation, and domestic and international arbitration, in their governing legal frameworks, such as in their national investment codes;
2. Adopt and implement in the ECOWAS zone public ADR mechanisms, including consultations, investor-grievance mechanisms, and investor-state arbitration, through the enactment of the ECOWAS Investment Code;
3. Consent to the submission of claims to international arbitration under international law, including the ICSID Convention and the UNCITRAL Arbitration Rules, by virtue of adopting the ECOWAS Investment Code;
4. Establish liberal arbitration mechanisms that allow parties to tailor arbitration proceedings to the particular facts and circumstances of the commercial transaction and the business relationship in question;
5. Adopt measures to ensure the impartiality of arbitrators, as well as to achieve the competing goals of transparency and confidentiality of arbitral proceedings;
6. Implement complementary “fast-track” ADR procedures designed to resolve commercial conflicts quickly with the dual objective of increasing the usage of ADR mechanisms generally and reducing the heavy caseloads of the judiciary;
7. Provide for the effective and rapid enforcement of claims settled through ADR before the local judicial courts; and
8. Undertake public awareness campaigns that promote the advantages of modern dispute-resolution modalities through official government websites, workshops, fora, and the like.

CHAPTER 16

POLICY IMPLEMENTATION

I. Institutional Framework for ECOWIP Implementation

1. The implementation of the ECOWIP shall cover the period 2018 through 2035.
2. In view of the nature and objectives of the ECOWIP, the ECOWAS Commission will co-ordinate with the Member States to facilitate general policy implementation through the ECIM Council. The ECIM Council shall discharge its duties as defined under the applicable legal instruments, including the ECOWAS Investment Code.
3. The following institutions of the respective Member States comprise another group of key Community stakeholders to implement the ECOWIP policy principles and strategies:
 - (a) Ministries, Departments and Agencies of the National Governments;
 - (b) Investment Promotion Agencies;
 - (c) Securities and Exchange Commissions;
 - (d) Accounting Standards Boards;
 - (e) Chambers of Commerce and Industry;
 - (f) Anti-Corruption Institutions;
 - (g) Professional and Industrial Associations;
 - (h) Civil Society Organizations; and
 - (i) All Other Relevant Competent Regulatory Bodies.
4. The national and regional private sectors, together with the international investment community, are also major stakeholders that will play critical roles of partnering with the Governments of the Member States to ensure the realisation of the ECOWIP policy objectives. Consultation with, and collaboration of, all stakeholders, including public- and private-sector actors at the national and regional levels, shall constitute other main activities to achieve the fundamental objectives of the ECOWIP.
5. In cases in which the institutional framework for the domestication and implementation of the ECOWIP proves to be inadequate in any Member State, the ECOWAS Commission shall work with that nation to build capacity and provide technical assistance and support.

II. Regulatory Oversight

The regulatory oversight framework applicable to the ECOWIP and the ECOWAS Investment Code are specified in the ECOWAS Investment Code.

III. Monitoring and Evaluation

The ECIM Council shall co-ordinate with the Member States to establish a transparent mechanism to carry out the monitoring and evaluation (M&E) of the progress achieved in respect of the implementation of the ECOWIP and the ECOWAS Investment Code at the national and regional levels. M&E instruments shall include the annual implementation of the ECOWAS Investment Climate Scorecard Tool, together with the issuance of any other relevant programmes or reports.

Revised in Lagos, Nigeria, 12 June 2017

ANNEX A

ECOWAS MEMBER STATE COMPETITIVE NICHE ANALYSIS¹⁴⁸

ECOWAS COUNTRIES	STRATEGIC COMPETITIVE SECTORS	EXAMPLES
BENIN	Agribusiness	Fishery/seafood, fruit (e.g., pineapple), cotton, cashews, maize
	Transportation & Logistics	Freight transportation (e.g., road, sea), storage
	Light Manufacturing	Textiles/clothing, cosmetics, packaging
	Trade & Retail	General trading
	Tourism, Leisure & Hospitality	Business and tourist hotels, as well as medical tourism
	Water & Waste Management	Water treatment, waste management
BURKINA FASO	Agribusiness	Cotton, poultry, livestock, fruit (e.g., mangoes, oranges), ground nuts, sorghum, millet, maize, animal feed
	Energy	Electricity (e.g., solar, hydro, biomass)
	Transportation & Logistics (for land-locked country)	Freight transportation (e.g., road), storage, logistics services
	Trade & Retail	General trading
CAPE VERDE	Tourism, Leisure & Hospitality	Tourist hotels and resorts
	Transportation & Logistics	Passenger transportation (e.g., sea, air), freight transportation (e.g., sea, air), storage, maintenance services (e.g., shipyards, Maintenance Repair & Overhaul/MRO)
	Agribusiness	Fishery

¹⁴⁸ Sources : (i) UNCTAD, FAO, FDI Markets, EMPEA, AVCA statistics; (ii) country national strategies as appearing on government websites and publications by national investment-promotion agencies; (iii) World Bank and IFC internal reports, analyses, and other publications; (iv) investor surveys (e.g., AVCA, E&Y, Deloitte); (v) interviews with WBG sector and product experts and specialists; (vi) industry reports as prepared by various sources, including the European Union, the African Development Bank, AFD, OECD, U.S. Department of State, U.S. Commercial Services, consulting firms (e.g., BCG, Booz, McKinsey), Chambers of Commerce, African economic outlook and academic sources; (vii) country missions undertaken by the WBG ECOWAS Investment Policy Team during calendar-year 2015 (e.g., Benin, Côte d'Ivoire, Ghana, Nigeria, Senegal, Togo).

ECOWAS COUNTRIES	STRATEGIC COMPETITIVE SECTORS	EXAMPLES
	Business Services	Support services (e.g., Business Process Outsourcing/BPO, call centers), general trading
COTE D'IVOIRE	Agribusiness (including food & beverage processing)	Cocoa, fruit (e.g., bananas, pineapple, mangoes), vegetables, coffee, maize, rice, cashews, palm oil, yams, rubber, livestock, poultry, breweries, animal feed, fishery, aquaculture
	Light Manufacturing	Textiles/clothing, metal products, rubber products, plastics, cardboard & paper, industrial machinery (e.g., electrical, mechanical), vehicle assembly, generic pharmaceuticals, cosmetics & para-pharmacy, packaging
	Transportation & Logistics	Freight transportation (e.g., road, sea, rail), storage, logistics services, passenger transportation (e.g., road, sea)
	Construction & Materials	Building materials, fixtures, construction services, heavy construction (e.g., commercial, industrial, residential, urban infrastructure, transportation)
	Trade & Retail	General trading, food retail, other retail (e.g., apparel, home improvements, electronics, automobile)
	Business Services	Support services (e.g., ICT, financial services, advisory/legal/accounting, BPO), delivery services
	Tourism, Leisure & Hospitality	Business and tourist hotels, restaurants, catering, medical tourism
	Personal Services	Healthcare services, professional & vocational education, tertiary education
	Energy	Electricity (e.g., gas, solar, biomass)
GAMBIA	Agribusiness	Fishery, aquaculture, fruit, vegetables, ground nuts, livestock (including leather products), forestry
	Tourism, Leisure & Hospitality	Tourist hotels and resorts, retirement homes
	Transportation & Logistics	Freight transportation (e.g., road, river), storage, logistics services, passenger transportation (e.g., road, river)

ECOWAS COUNTRIES	STRATEGIC COMPETITIVE SECTORS	EXAMPLES
GHANA	Agribusiness (including food & beverage processing)	Maize, fruit, vegetables, cocoa, poultry, dairy products, animal feed, fishery, aquaculture, coffee, rice
	Light Manufacturing	Textiles/clothing, cosmetics, metal products, plastics, hardware, home equipment, electrical and electronic equipment assembly, pharmaceuticals, packaging
	Construction & Materials	Building materials (e.g., cement, metal, wood products), fixtures, construction services, heavy construction (e.g., commercial, industrial, residential, urban infrastructure, transportation)
	Trade & Retail	General trading, food retail, other retail (e.g., apparel, home improvements, electronics, automobiles)
	Transportation & Logistics	Freight transportation (e.g., road, sea, air), storage, logistics services, passenger transportation (e.g., road, sea, air)
	Business Services	Support services (e.g., advisory/legal/accounting, BPO, ICT services), delivery services
	Personal Services	Professional & vocational education, tertiary education
GUINEA (CONAKRY)	Agribusiness	Rice, maize, fruit (e.g., bananas, pineapple, mangoes), palm oil, livestock, fishery
	Transportation & Logistics	Logistics services, storage, road transportation
	Trade & Retail	General trading, food retail
GUINEA-BISSAU	Agribusiness	Fishery, cashews, livestock, rice, maize, beans, cassava
	Tourism, Leisure & Hospitality	Tourist hotels
	Trade & Retail	General trading, food retail
LIBERIA	Agribusiness	Palm oil, rice, rubber, fishery, cocoa, coffee, maize, timber, cassava, animal feed, poultry, timber, beverages (e.g., juice)
	Transportation & Logistics	Logistics services, storage, road/sea transportation

ECOWAS COUNTRIES	STRATEGIC COMPETITIVE SECTORS	EXAMPLES
	Light Manufacturing	Rubber products, detergents, wood products (e.g., beams, frames), steel products (e.g., beams, pipes)
MALI	Agribusiness	Livestock, rice, fruit (e.g., mangoes), vegetables, dairy products, poultry, maize, animal feed, potatoes, cotton, millet, sorghum
	Light Manufacturing	Leather products, textiles/clothing, construction materials, packaging, fertilizers
	Energy	Electricity (e.g., hydro, wind, solar, biomass)
	Transportation & Logistics (for land-locked country)	Freight transportation (e.g., road, rail), storage, logistics services, dry ports, passenger transportation
	Trade & Retail	General trading, food retail
NIGER	Agribusiness	Rice, livestock, dairy products, millet, sorghum, cow peas
	Light Manufacturing	Textiles/clothing, cement, leather products
	Transportation & Logistics (for land-locked country)	Logistics services, storage, road transportation, dry ports
	Trade & Retail	General trading
NIGERIA	Agribusiness (including food & beverage processing)	Cocoa, ground nuts, fruit, vegetables, cotton, livestock, poultry, aquaculture, fishery, cassava, animal feed, breweries, maize, millet, sorghum, cow peas
	Light Manufacturing	Textiles/clothing, packaging, metal products, plastics, industrial machinery (e.g., electrical, mechanical), vehicle assembly, generic pharmaceuticals, cosmetics & para-pharmacy, electrical products assembly, commodity chemicals, paper & cardboard, packaging
	Construction & Materials	Building materials, fixtures, construction services, heavy construction (e.g., commercial, industrial, residential, urban infrastructure, transportation)
	Trade & Retail	General trading, food retail, other retail (e.g., apparel, home improvements, electronics, automobiles)
	Transportation & Logistics	Freight transportation (e.g., road, sea, rail, air), storage, logistics services, passenger transportation (e.g., road, air)

ECOWAS COUNTRIES	STRATEGIC COMPETITIVE SECTORS	EXAMPLES
NIGERIA (cont.)	Energy	Electricity (e.g., gas, hydro, solar)
	Business Services	Support services (e.g., advisory/legal/accounting, BPO, ICT, financial services), delivery services
	Personal Services	Healthcare services, professional & vocational education, tertiary education
SENEGAL	Agribusiness	Ground nuts, dairy products, rice, fruit, vegetables, fishery, aquaculture, millet, sorghum, livestock, poultry, animal feed
	Construction & Materials	Building materials, construction services, heavy construction (e.g., commercial, industrial, residential, urban infrastructure, transportation)
	Transportation & Logistics	Freight transportation (e.g., road, sea, rail), storage, logistics services, passenger transportation (e.g., road)
	Personal Services	Healthcare services, professional & vocational education, tertiary education
	Business Services	Support services (e.g., advisory/legal/accounting, BPO, call centers, ICT, financial services)
	Light Manufacturing	Textiles/clothing, mechanical & electrical products assembly (e.g., vehicles, industrial machinery), packaging
	Energy	Electricity (e.g., hydro, solar, transmission & distribution)
	Trade & Retail	General trading, food retail, other retail (e.g., home improvements, electronics)
	Water & Waste Management	Water treatment, waste management, desalination
SIERRA LEONE	Agribusiness	Palm oil, rubber, rice, coffee, cocoa, livestock
	Construction & Materials	Wood products (e.g., beams, frames), heavy construction (e.g., commercial buildings, residential buildings, low-income housing, road and urban infrastructure, port)
	Trade & Retail	General trading

ECOWAS COUNTRIES	STRATEGIC COMPETITIVE SECTORS	EXAMPLES
TOGO	Transportation & Logistics	Storage, logistics services, freight transportation (e.g., road, sea, rail), passenger transportation (e.g., air, road, sea)
	Agribusiness Trade & Retail	Poultry, animal feed, cocoa, cotton, rice, maize, fishery General trading
	Energy	Electricity (e.g., gas, hydro, transmission & distribution)

N.B. The strategic competitive sectors highlighted in **bold** font are priority sectors for the country in question to exploit to achieve the maximum level of FDI growth. Sectors in regular font comprise other important sectors for each country to consider.

N.B. The agribusiness sector in this Table encompasses the *entire value chain* of the mentioned crops, including production, further-processing, marketing, and distribution activities like food and beverage processing. Parts of these value chains may also overlap with other sectors (e.g., light manufacturing, transportation & logistics, trade, retail). For the purposes of this Table, the light-manufacturing industry excludes food-and-beverage processing.

N.B. The extractive, banking, and telecommunications industries have been excluded from the scope of this Table.

ANNEX B

INTERNATIONAL BEST PRACTICES APPLICABLE TO SEZ LEGAL, REGULATORY, AND INSTITUTIONAL FRAMEWORKS

The international best practice features of contemporary SEZ legal, regulatory, and institutional frameworks include the following provisions:

1. General Principles

- (a) **Standard Statutory Provisions/Definitions** that avoid interpretation conflicts;
- (b) **Authority to Establish SEZ Implementing Regulations** to reinforce and supplement the SEZ enabling law by providing additional technical details;
- (c) **Broad/Expansive SEZ Economic/Social Activities** to attract the maximum number and diversity of investors and investments; and
- (d) **National Treatment Accorded to Foreign Investors** to incentivise such investors to invest in the relevant jurisdiction.

2. SEZ Administrative Authority, One-Stop Shop (OSS), and Coordination

- (a) **Autonomous Institutional Authority** to regulate SEZs efficiently;
- (b) **Enterprise Registration through a OSS** to facilitate quick business start-ups;
- (c) **Administrative Memoranda of Understanding (MOUs) to Streamline Coordination Among other Administrative Entities** for the benefit of SEZ Developers/Operators, Zone Users, and Zone Residents.

3. Establishment of SEZs, Selection/Designation of SEZ Developers/Operators, and Licensing of Zone Users and Zone Residents

- (a) **Transparent SEZ Site-Designation Criteria** to ensure correct site selection;
- (b) **Secure Title to Land** to facilitate quick and secure SEZ investments;
- (c) **Licensing of Developers/Operators and Zone Users and Residents** to establish the transparent “rules of the game” governing private-sector players;
- (d) **Rights/Obligations of SEZ Developers/Operators, Zone Users, and Zone Residents** to provide such investors with legal certainty and confidence;
- (e) **SEZ Building Permits** to streamline the construction of SEZ infrastructure, factories, assembly plants, and residential areas; and
- (f) **Anti-Speculation Clauses** to prevent abusive land speculation.

4. Customs Procedures and Incentives

- (a) **International SEZ Customs Procedures** to streamline the admission of foreign merchandise into the SEZs and the exportation of finished products therefrom;
- (b) **Best Practice Incentives Frameworks** to attract investors that otherwise would not invest in the relevant host country;
- (c) **WTO-Compatible Performance-Based Incentives** to avoid an adverse WTO ruling that could result in the total or partial dismantling of an SEZ; and
- (d) **“Equal Footing” Policies for Local Entrepreneurs** to promote backward-and-forward linkages with local suppliers, service providers, and workers.

5. Social Safeguards

- (a) **Land Use/Environmental Regulation Meeting International Standards** to preserve and conserve the natural environment inside and outside the SEZ; and
- (b) **International Labor and Immigration Standards** to safeguard workers’ legal rights, especially those of foreign nationals.

6. Other Provisions

- (a) **Penalties for Non-Compliance** to prevent the occurrence of illicit activities;
- (b) **SEZ Conflict-of-Law Provisions** to pre-empt in the SEZ the application of any other law except the national Constitution, any ratified international treaties, or any other applicable regional legislation; and
- (c) **Efficient ADR Mechanisms** to resolve SEZ disputes efficiently and equitably.

Empirical case-study analysis demonstrates that a **strong, positive correlation** exists around the world between legal, regulatory, and institutional frameworks that adhere to the above best-practice principles and initial and often long-term positive SEZ results:

- ❖ **Morocco:** Tangiers Free Zone Law;
- ❖ **Howard SEZ in Panama:** Panama SEZ Law and Regulations;
- ❖ **Dubai:** Jebel Ali Free Zone Decree/Regulations;
- ❖ **Philippines:** The Philippines SEZ Act and Regulations;
- ❖ **Dominican Republic:** The Dominican Republic Free Zone Law;
- ❖ **Rwanda:** Rwanda SEZ Law/Regulations;
- ❖ **Mauritius:** Mauritius Freeport Act;
- ❖ **Tanzania:** Tanzania SEZ Act and Regulations;
- ❖ **Bangladesh:** Bangladesh SEZ Law and Implementing Regulations; and
- ❖ **Aqaba, Jordan:** Aqaba SEZ Law and Regulations.

ANNEX C

SEZ SUCCESS FACTORS

Successful SEZ regimes around the world share the following basic characteristics:

1. **Infrastructure Alignment:** Establishment of a proposed zone near existing public infrastructure facilities (e.g., airport, seaport) to minimise public offsite infrastructure-development expenditures;
2. **Access to Transportation:** Construction of a new SEZ near existing population centres, national and international transportation networks (including highways, roads, and railways), and enterprise clusters to provide easy access to labor, raw-material, supplier, and distribution markets;
3. **Unencumbered Land:** Designation of only those SEZ lands with undisputed legal title and little or no population displacement or relocation to minimise transaction costs, social disruption, and economic uncertainty;
4. **Suitable Sites:** Selection of sites with favourable physical characteristics and suitable soil foundation (e.g., flat, clay terrain, with little or no vegetation and no visible water issues), that are capable of being secured with minimal environmental constraints (e.g., flooding, rivers, grading, leeching);
5. **Minimum Environmental Impacts:** Designation of SEZ sites that will have minimal environmental impacts on water quality, terrestrial and aquatic biological organisms, aesthetics, air quality, and noise levels;
6. **Efficient Urban Planning:** Adoption of urban plans that adhere to best-practice urban-planning and urban-development standards regarding population density, as well as mixed-use buffer zones that effectively separate SEZ industrial, commercial, tourism, agricultural, healthcare, residential, and other land areas;
7. **Modern Land-Use Plans:** Implementation of land-use plans that are consistent with internationally-recognised standards concerning:
 - (a) Public/private construction of infrastructure facilities (e.g., sewerage and wastewater treatment plants), including social infrastructure (especially education and healthcare) to attract skilled workers;

(b) Public/private sector implementation of environmental protection technologies (e.g., storage/incineration areas); and

(c) Public/private sector provision of waste-disposal/refuse-collection capacities;

8. Phased Development: The construction of SEZ infrastructure under a phased development schedule, as based on market-demand and technical and financial feasibility studies, that effectively separates short-, medium-, and long-term development activities to allow the SEZ to grow and develop in accordance with market-demand considerations;

9. Expansion Potential: Selection of SEZ sites that have physical expansion potential, with no encroachment *vis-à-vis* urban centres or tribal communities, to meet future SEZ demand;

10. Domestic and Export Market Access: Designation of sites with proximate access to large consumer domestic or export markets, or both;

11. Power: Legal authority for private SEZ developers/operators to provide on-site power (e.g., electricity) to all of the zone users (e.g., SEZ tenants); and

12. Private Management: Implementation of pro-active SEZ policies and laws that require that the zones be privately developed and managed to increase administrative, operational, and management efficiencies and to lower costs *vis-à-vis* public-sector counterparts.

Concerning this last point, countries around the planet are increasingly delegating the physical project development and management of their zone regimes, including SEZs, to *private-sector entities*, while reserving to the public sector purely regulatory, planning, and promotional responsibilities. Nations embarking on public SEZ development often find it difficult to reconcile the divergent functions of zone regulation, ownership, investment, development, and management as conflicts of interest inevitably arise.

The available data further suggest -- from a host-country perspective -- that private zones are relatively less expensive to develop than their public-sector counterparts and yield superior economic results. The establishment and operation of privately-run zones usually require relatively less public funding, because private developers typically finance on-site infrastructure facilities, while host governments generally provide offsite infrastructure (e.g., utility connections, roads) that comprises only approximately 25% of the total infrastructure costs. Today, almost two-thirds of the more than 3,500+ zones

worldwide are developed and operated by private-sector enterprises.

Private zone entities also develop and operate SEZ regimes on a *cost-recovery basis*; consequently, private zones are generally more responsive to tenant/user needs. Moreover, privately-developed, as well as privately-operated, zones generally provide a wider range of facilities, services, and amenities, including health clinics, day-care centres, and business-support services, than their government counterparts. Private-zone operators usually offer such expanded services as part of commercial, tourism, residential, and recreational SEZ townships. Specialised services that cater to the relatively unique needs of certain industries, such as high-technology SEZs, have characterised recent trends in Mainland China, Taiwan, Malaysia, and Singapore.

Moreover, private companies usually offer more management expertise and “know-how” to zone development and operations than their public-sector counterparts. As a result, private-sector participation in zone development and management often contributes to a more *pro-active, market approach* to development and operation in terms of zone-site selection, phased construction, provision of value-added environmental facilities and services, professional property management, and promotion and marketing of zones. Thus, zone development and management are substantially enhanced when SEZs are administered, operated, or managed by private firms on a cost-recovery basis.

ANNEX D

SEZ FATAL FLAW FAILURE FACTORS

Several factors that inevitably correlate with zone failure that developed and developing-country governments alike must necessarily avoid include the following:

- 1. Faulty Governance:** Adoption of cumbersome and sub-optimal governance regimes, including *fragmented* and *uncoordinated* institutional and administrative structures, as well as governance systems in which the public sector simultaneously undertakes the conflicting roles of zone regulator, developer, administrator, operator, and manager;
- 2. Remote Sites:** Selection of remote site locations that require heavy capital expenditures to be defrayed by the host-country government, whether at the national, state/provincial, or municipal/local levels;
- 3. Inefficient Development Roll-Out:** Non-market-based development-phasing strategies that do not separate short- and medium-term zone construction and development activities from long-term undertakings;
- 4. Deficient Infrastructure:** Inadequately designed and constructed infrastructure facilities at the site;
- 5. Non-Market Based Provision of Utilities:** Highly subsidized utility services (e.g., water, power);
- 6. Market-Distorting SEZ Policies:** Uncompetitive economic policies, including the excessive reliance on tax holidays, rigid performance requirements, and protectionist labor practices;
- 7. Substandard Capacity:** Lack of adequate institutional and administrative capacity and capacity-building initiatives;
- 8. Inadequate Zone Maintenance & Marketing:** Sub-standard zone-maintenance programmes and marketing campaigns; and
- 9. PPP Gap:** Absence of public-private partnership/PPP mechanisms (e.g., joint ventures, concessions) that preclude the public sector from leveraging the competitive advantages of the private sector concerning zone construction, development, and management.