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The Domestic Investment Framework

The domestic investment framework of each country in West Africa has been shaped, in large measure, by the evolution of its policies towards investment, both local and foreign. From the early 1960s, policy-makers in many West African countries showed considerable ambivalence towards foreign investment, as well as bias against the private sector generally. As a result, they placed general restrictions on the types of economic activities in which the private sector could participate and, more specifically, on the range of activities in which foreign investors could engage, as well as on the share of particular enterprises that they could own. This policy stance obviously created space for increasing the role of the state in the economy.

The particular policy measures deployed to achieve this objective were typically implemented through 'indigenisation' laws and the nationalisation of private enterprises. In initially socialist-oriented West African countries, such as Ghana and Guinea, some private enterprises were nationalised. But even in some of the countries that were not necessarily or explicitly socialist in their socio-political orientation, legal restrictions were imposed on foreign investment. A significant example is Nigeria, where successive indigenisation decrees (in 1972 and 1977) compulsorily restricted the foreign share in enterprises to 40 and 60 per cent in certain sectors.

With the start of economic policy reforms from the mid-1980s, a radically new approach to foreign investment has emerged in virtually all West African countries and they now allow foreign participation in an increasing number of economic sectors. While this does not appear to have totally ended the fear of foreign investment and domination, it does signal that more and more of these countries are beginning to see the necessity for foreign investment and are taking steps to attract it, although with continuing sensitivity about foreign penetration in certain economic sectors that some countries regard as 'strategic'. In general, therefore, West African countries have moved from a stance of control over foreign investment in the 1960s and 1970s to its promotion since the mid-1980s.

3.1 The domestic legal framework for investment

The domestic legal framework for both local and foreign investment in the typical West African country is set out in an investment code or similar legislation. Thus national legislation is of paramount importance in establishing the legal framework for investment. In much of West Africa, this national legislation tends to be, in its current form, primarily protection oriented, in the sense that it seeks essentially to promote investment by offering special features aimed at safeguarding the interests of investors. This is a reflection of its evolution over time, shaped by a process of liberalisation that embraces at least two component parts: the removal of various restrictive government measures and the application of certain positive standards of treatment aimed at eliminating discrimination against foreign investors.

In terms of objectives, therefore, Guinea's investment code has the primary purpose of encouraging national and foreign economic operators to invest in Guinea. The purpose of Benin's investment code is to encourage private investment. In the case of Togo, the investment code provides a more elaborate statement of its purpose. Specifically, the main objectives are to encourage export-oriented investment, increase the employment of Togolese workers, promote the establishment of small and medium-scale enterprises, encourage decentralisation of economic activities and make optimum use of the country's natural resources.

With respect to the elimination of restrictions and application of more investment-friendly standards of treatment, virtually all West African countries have investment codes or similar national legislation that feature substantial degrees of liberalisation. For instance, Niger's investment code guarantees freedom to transfer capital for non-resident natural or legal persons; equal treatment of all investors, subject to the provisions of treaties and agreements concluded by Niger and other states; and no expropriation or nationalisation of the investment, except in the case of public interest covered by domestic law, when fair and equitable compensation will be paid. The Senegalese investment code also offers guarantees with respect to freedom to transfer capital and equal treatment for foreign investors. In Guinea, investment legislation provides the same rights and obligations to both private and public enterprises, whether they are national or foreign. In addition, it offers freedom to transfer capital, incomes and salaries for foreign natural or legal persons. Benin's investment code prescribes equal rights and obligations for Beninese and foreign state and private enterprises; guarantees freedom of movement for expatriate economic agents; and guarantees freedom to repatriate capital, while also prohibiting any form of nationalisation.

In the case of Ghana, both legislation on investment and the constitution provide for guarantees against expropriation and nationalisation. State acquisition of private property can be done only on the basis of payment of fair and adequate compensation. Under Ghana's investment law, foreign investors are also guaranteed unconditional transferability, in freely convertible currency, of dividends or net profits, payments to service a foreign loan, fees and charges for registered technology transfer, and remittance of proceeds on sale or liquidation of the enterprise. In Côte d'Ivoire, similar legislation affords nationals and foreigners identical treatment for investment purposes and guarantees the repatriation of earnings on invested capital, including dividends and the proceeds in the event of liquidation of the investment. The investment code of Togo offers equal rights and obligations to national and foreign enterprises, as well as freedom of capital transfer and of income and salaries for foreign natural and juridical persons. Nigeria's current investment legislation follows the same pattern in terms of standards of treatment. It guarantees foreign investment against nationalisation or expropriation by the government and guarantees the unconditional transfer in convertible currency of dividends (net of 10 per cent withholding tax) and net profits attributable to the investment, payments in respect of loan servicing, and the remittance of proceeds or other obligations following liquidation of the investment. The Mauritanian investment code provides guarantees against sovereign risk, although this actually amounts to compensation in the event of expropriation, nationalisation or requisition. In other respects, Mauritania offers the same standards of treatment as other West African countries, such as equal treatment of foreign and national investors, and free transfer of the capital and income of foreign investors.

This discussion suggests that investment legislation in West Africa generally incorporates the most common standards of treatment associated with liberal investment regimes. In particular, the MFN standard, which ensures equality of treatment as between investors from different countries, has received general acceptance and application. The principle of national treatment, providing that there shall be no discrimination as between foreign and domestic investors, appears also to be accepted and integrated into the investment legislation of many West African countries. There are, however, a number of exceptions (see below) which suggest that some West African countries wish to continue their support for local firms against foreign competitors that are deemed to be more powerful.

The investment legislation of West African countries contains provisions relating to such issues as entry and establishment conditions, regulation of ownership and operations, incentives offered to investors and dispute settlement mechanisms. Each of these issues is examined below.

3.2 Entry and establishment conditions

Investment legislation normally specifies the admission and establishment conditions which govern the process of making an investment. The principal elements of these conditions relate to access to certain activities, capital requirements and legal forms of entry, as well as the screening rules, investment authorisation and registration arrangements. In particular, control over the admission of investments may be used to determine the sectors or economic activities that are closed to foreign investment. It may also be used to allow particular investments subject to conditions relating to, for instance, the structure of ownership and the form of legal incorporation. The exercise of such control powers typically implies that prospective investors must apply to the appropriate host country authorities for permission to invest.

In this context, Niger's investment code applies to investments in the production and processing of primary agricultural, livestock or fisheries products; production for export; air transport; the building of hotels or social housing; and the production of handicrafts, cultural and artistic products. The Senegalese investment code covers a similar range of economic activities, including agriculture, fishing, livestock breeding and related processing activities; storage and packaging of products of plant, animal or fish origin; manufacturing, tourism and other hotel-related activities; cultural activities by small or medium-sized enterprises; services provided by SMEs in the areas of health and education; assembly and maintenance of industrial machinery and equipment; and the installation and management of railways. In the case of Guinea, the benefits associated with the investment code are reserved for investments in small and medium scale enterprises that export local natural resources and raw materials, and enterprises established in economically less developed zones of the country. Nigeria's investment legislation permits foreign investment in any sector except those on the 'negative list'; while in Mauritania, foreign investment is allowed in all sectors of the economy, although investment in some activities is regulated by other sector specific laws. Such activities include banking and insurance, mining and hydrocarbons.

In fact, many West African countries supplement their general investment legislation with special sector-specific investment laws, especially with respect to mining activities. Like many of these countries, Niger, for instance, regards petroleum resources and mining as the property of the state and regulates their exploitation by issuing operating permits to approved companies in accordance with the provisions of the petroleum code and the mining code. The sectoral investment laws specify their own restrictions. Guinea's mining code reserves semi-industrial and small-scale mining of precious substances and the marketing of diamonds and other gems for Guinean natural and legal persons. In Togo, by comparison, the mining code permits mining licences to be issued to both Togolese and foreign nationals, provided that they have appropriate technical and financial capacity to exploit mineral substances. In Nigeria, the Petroleum Act specifies that licences may be granted only to Nigerian citizens, although this does not exclude joint venture arrangements between the government and foreign petroleum enterprises for the exploitation of crude oil and for natural gas.

3.3 Regulation of ownership and operations

Investment legislation in West Africa covers measures relating to the ownership and control of enterprises in which foreign investment is permitted. It also covers measures relating to the regulation of the operational activities of such enterprises. These regulatory measures are particularly pervasive in the petroleum and mining sectors.

Restrictive measures relating to ownership and control of enterprises in which foreign investment is allowed may include limits on foreign ownership of the capital of an enterprise, minimum capital requirements, regulations about the legal form of ownership (e.g. compulsory joint ventures) and restrictions on management, including, for example, the nationality of directors and the number of expatriates in top management positions. Some West African countries have investment legislation which imposes no limit on foreign ownership of those enterprises in which foreign investment is allowed. Prominent examples of these include Senegal and Côte d'Ivoire. But many other West African countries apply investment laws which impose such ownership and control restrictions. Guinean investment legislation specifies a minimum capital requirement of 10 million

Guinean francs, and requires further that, if the capital of such an enterprise is less than GF50 million, it must be controlled by a national of Guinea. Similarly, Ghana's investment law prescribes minimum capital for foreign investors; it also specifies limits on foreign ownership of 40 per cent in insurance companies and 75 per cent in publicly listed companies listed on the stock exchange. In the case of Togo, the investment code prescribes a minimum capital of 25 million CFA francs (exclusive of tax) and also requires that the foreign investors must finance at least 25 per cent of the investment from their own resources. An example of legal form restriction comes from Nigerian investment legislation relating to the petroleum industry, where joint venture with the government is mandatory. The same set of laws requires ownership by Nigerians of a majority of the shares in a company seeking a broadcasting licence.

Measures relating to the regulation of the operations of enterprises in which foreign investment is permitted range from operational permits to performance requirements. To begin with, permission for entry of foreign investment must be requested and approved in all West African countries. However, in most countries application and approval processes were progressively simplified during the 1990s. To simplify procedures and reduce the time needed to process investment applications and secure necessary approvals, the National Investment Commission in Mauritania was replaced by a 'single window' under the Directorate of Private Investment Promotion in the Ministry of Economic Affairs and Development. In both Togo and Guinea, mining licences and permits are issued by the Ministry of Mines. In Côte d'Ivoire the Centre for the Promotion of Investment in Côte d'Ivoire (CEPICI)) was established in 1995 as a 'single window' to serve as a multiservice channel for the completion of the administrative formalities required for the establishment of an enterprise. In Niger, approval of enterprises under the investment code is granted by means of a joint decree of the Ministers for Industry and Finance and, in certain cases, a decree adopted by the Council of Ministers after hearing the opinion of the investment commission; this procedure is time-consuming. Senegal has tried to reduce the time required for such approvals by the creation in July 2000 of the National Agency for the Promotion of Investment and Major Works (APIX) which serves as a 'single window' for implementing the administrative formalities associated with the establishment and registration of investment enterprises.

Performance requirements associated with the regulation of the operations of foreign investment enterprises in West Africa focus largely on meeting the core objectives of investment policy. These objectives revolve around the use of local labour and other resources. For example, the investment code of Guinea requires that an approved enterprise must give priority to Guineans in employment and to the use of local raw materials, appliances and equipment in its operations. Similarly, holders of mining and quarry permits are required to give preference to Guinean enterprises for all construction procurement and service provision contracts; give priority to the employment of Guinean labour; and encourage technology transfer. In Côte d'Ivoire, approved enterprises are required to employ Ivorian managers, foremen and other workers and provide them with appropriate training. They are also required to meet national or international quality standards applicable to their goods and services. In the case of Togo, an approved enterprise must pay at least 60 per cent of its total wage bill to Togolese citizens; holders of mining licences are required to give preference to Togolese enterprises for the supply of services and priority to the employment to Togolese labour.

3.4 Investment incentives

In West Africa, the offer of investment incentives is generally viewed as an important foreign investment promotion strategy. Hence, all investment legislation in the sub-region contains offers of various incentives in association with foreign investment inflows. These incentives cover the full range of fiscal, financial and other incentives, although recent policy reforms have made some of them either redundant or no longer available. With respect to fiscal incentives, the major element typically includes tax exemption or reduction, customs duty exemption, accelerated depreciation allowances and reduction in social security contributions. Financial incentives cover direct subsidies in respect of part of capital, production or marketing costs, subsidised loans or loan guarantees, guaranteed export credits and government insurance at preferential rates. Other incentives include protection from import competition, granting of monopoly rights, subsidised infrastructural services and special treatment with respect to foreign exchange.

Examples of various elements of these incentives can be found in the investment legislation of West African countries. One of the most elaborate sets of such incentives is presented in Togo's investment code, where the range of available benefits is related to both the phase of development by eligible enterprises and the different national objectives that are to be pursued. Thus in terms of the development phase, setting-up assistance includes complete exemption from customs duty and value-added tax (VAT) on imported equipments, while operating aid includes complete exemption from profit tax for three years for all eligible enterprises, five years for SMEs, and seven years for enterprises processing local raw materials. In addition, exporting enterprises attract benefits in the form of complete exemption from corporate tax on turnover exported, as well as import duty waiver or duty-drawback with respect to imported inputs. Enterprises which create jobs receive tax allowance in respect of 50 per cent of the total wage bill of permanent Togolese employees; while the applicable pay-roll tax is applied at the rate of 2 per cent for five years (for enterprises located in zone 1), for seven years (zone 2) and two years (zone 3). In Niger, eligible enterprises receive tax and customs duty incentives during the investment phase and for five years during the operating phase. The Senegalese investment code offers similar benefits, i.e. exemption from duties and taxes on imported machinery and materials not produced in Senegal, exemption from VAT and exemption from employers' contribution to social benefits payable on the wages of Senegalese employees. These benefits are replicated in Guinea, where the period of exemption varies over time, from investment to production phase. In Benin, full exemption is granted on corporate taxes while waivers of import duties and VAT on imported materials are granted for five, seven or nine years, depending on the zone in which the enterprise is located. In the case of Côte d'Ivoire, a similar set of incentives applies to eligible enterprises, but the benefits increase with the amount invested.

The use of fiscal, financial and other incentives by West African countries as an investment promotion strategy remains strong, even though research evidence suggests that 'the fiscal investment incentives popular in developing countries have not been effective in making up for fundamental weaknesses in the investment climates' (Morisset and Pirnia, 2002).

3.5 Dispute settlement arrangements

National investment legislation specifies the relationship between private investors and various agencies of the host government. Both the interpretation and application of this legislation with regard to various aspects of the relationship may give rise to disputes which need to be resolved if the relationship is to be sustained and remain mutually beneficial. There are three broad classes of disputes: between sovereign states (i.e the host country versus the country of the private investor); between a sovereign state and the private investor; and between the private investor and another private party. Private party disputes are typically handled by the host country judicial system or through mutually acceptable commercial arbitration. Similarly, interstate disputes can be resolved via pre-agreed interstate arbitration arrangements. In the same way, disputes between the host country and a foreign private investor are usually resolved through mechanisms provided for in the host country's national investment legislation and/or mutually acceptable multilateral dispute settlement mechanisms.

Niger offers investment protection and dispute settlement mechanisms through its membership of the International Centre for Settlement of Investment Disputes (since 1966) and the Multilateral Investment Guarantee Agency (since 2002). Niger's investment code specifically offers the right to settle disputes resulting from the interpretation or application of the code through these international dispute settlement mechanisms. Senegal's investment code offers the same right. In this case, disputes are to be settled by competent Senegalese courts, except in the case of foreigners, who can access conciliation and arbitration procedures arising from mutual agreement between the two parties, or settle disputes under an investment protection agreement or treaties between Senegal and the state of which the natural or legal person involved is a citizen.

Both Benin and Guinea are members of MIGA, which provides them with an investment dispute settlement mechanism. In the case of Ghana, there are several vehicles through which investment disputes can be resolved. The Ghana Arbitration Centre was established in 1996 to facilitate arbitration and bolster investor confidence. The Ghana Investment Act also provides that disputes may be resolved through the rules of arbitration of the United Nations Commission on International Trade Law (UNCITRAL) or, where relevant, within the framework of bilateral investment agreements. Finally, Ghana is a member of MIGA, which provides similar services. Nigeria is also a party to several multilateral investment protection treaties, including the Convention on the

Recognition and Enforcement of Foreign Arbitral Awards (since 1958), the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (since 1965) and MIGA (since 1985). Mauritania's investment code gives an aggrieved foreign investor recourse to either national or international arbitration for the settlement of any disputes arising from the interpretation or application of the code. International arbitration or conciliation is permitted under any of the following mechanisms: bilateral investment agreements or treaties, the ICSID or an ad hoc tribunal constituted in conformity with the arbitration rules of UNCITRAL. In addition, Mauritania became a member of MIGA in 1996.

As argued above, the national investment legislation in each West African country constitutes the primary means through which the legal framework for investment is established. But all West African countries have also found it worthwhile to sustain and enhance the credibility of their national investment legislation by entering into both bilateral and multilateral investment protection agreements. Thus in addition to the multilateral mechanisms noted above, all West African countries have obligated themselves under the Lomé Convention (Articles 260, 261 and 262), which embodies principles for protecting European investment in the ACP countries. Furthermore, Article 78(3) of the Cotonou Partnership Agreement specifies that 'the Parties also agree to introduce, within the economic partnership agreement … general principles on protection and promotion of investments, which will endorse the best results agreed in the competent international fora or bilaterally'.

These multilateral and regional investment protection arrangements are complemented by a series of bilateral investment protection treaties which each West African country has signed with its key investment partner countries. For example, Senegal has in force bilateral investment agreements and treaties with Switzerland (1964), Germany (1966), Sweden (1968), the Netherlands (1981), Romania (1984), the UK (1984), Republic of Korea (1985) and the USA (1990). In the case of Ghana, investment promotion and protection agreements have been signed with most OECD countries as well as South Africa, Côte d'Ivoire and Egypt. Similar arrangements exist between Nigeria and France, Switzerland, the UK, the Netherlands, North Korea, China and Turkey. In the case of Mauritania, such arrangements exist with all the north African countries, other African countries such as Burkina Faso, Cameroon, The Gambia, Ghana, Guinea and Mauritius and several European countries.

Finally, the two dominant regional integration arrangements in West Africa, ECOWAS and WAEMU, have investment promotion and protection protocols under which every West African country is obligated to permit freedom of entry, establishment and operation for all enterprises from member countries and their investments. More specifically, these regional treaties commit their members to promoting and protecting intraregional investment by extending fair and equitable treatment to private investors, creating a predictable, transparent and secure investment climate and removing administrative, fiscal and legal restrictions to such investment.

3.6 Internalising foreign investment benefits

The countries of West Africa have moved quite strongly in the direction of progressively liberalising their foreign direct investment regimes. This has been accomplished essentially by offering more equitable treatment and protection to foreign investors. In the context of this progressive liberalisation, however, West African countries also appear to be aware that the build-up of domestic industrial, managerial, technological and entrepreneurial capabilities is critical both for successfully managing foreign investment and for deriving full benefits from its presence in their economies. Hence, they have generally chosen to retain the right to continue to make judicious use of certain selective interventions as a means of supporting domestic enterprises, technology creation and capacity building. This may explain the retention by some West African countries of some investment entry barriers (for example limited access to particular sectors and/or minimum investment requirement), restrictions on ownership and control and performance requirements targeted at ensuring that domestic enterprises and manpower assimilate advanced technologies and acquire technical and managerial skills from their interaction with foreign investors.

The continued use of selective investment restrictions may, however, have a more benign explanation. As the analysis above makes clear, liberalisation of investment policies in many West African countries began only in the late 1980s and early 1990s. This process normally takes time. It should not be surprising, therefore, that although the process remains in progress in many of these countries, some restrictions are still in place. These could eventually be eliminated as the process reaches its completion.