2 Rebalancing and aligning investment policy for sustainable development

This chapter undertakes a baseline comparative analysis of the legal framework governing investment at the continental, regional and national levels in ECOWAS. The analysis focuses on how governments in ECOWAS are incorporating sustainability dimensions into their national treaties and domestic investment laws, as well as on the coherence between action at the national, regional and international levels.

Investment policymaking today is placing greater emphasis on sustainable outcomes as part of a broader shift away from investment for its own sake and towards a more nuanced appraisal of its potential impact. As such, this new approach is generally to be welcomed, but many of the innovations are relatively recent. It is too soon to assess which provisions will have a lasting positive impact on sustainable development. The impact on attractiveness for foreign and domestic investment also remains unclear.

What is clear is that sustainable development requires both substantial investment and good regulation. The legal framework for investment comprises two levels: (i) a domestic regime involving many laws regulating market activities, often supplemented in Africa by an investment law; and (ii) international treaties that offer additional provisions and protections applicable to covered foreign investors. The international regime is in turn divided into bilateral, regional, and plurilateral approaches, including investment treaties as well as free trade agreements (FTAs) with an investment chapter.

At the international level, the new approach to sustainability can encompass several facets, from hortatory clauses in the Preamble or articles, to limitations on the scope of protections, to investor obligations. To date, concrete impact in preserving policy space has been difficult to demonstrate (OECD, 2022[1]).

A key factor in effectiveness of sustainability efforts may be regional standard-setting coupled with effective and aligned action at the domestic level. The development of regional approaches can allow a full debate with greater resources. National implementation aligned with regional approaches can increase visibility and coherence of the measures.

In Africa, sustainability dimensions are likely to become even more important once the African Continental Free Trade Area (AfCFTA) Investment Protocol is finalised. These developments will raise the issue of alignment between regional and national action. Comparing regional and national approaches to sustainable development is challenging. This chapter engages in an initial analysis to compare innovations at the regional and continental level with the approaches embodied in national investment-related legislation within ECOWAS. The analysis focuses on how governments in ECOWAS are incorporating sustainability dimensions into their national treaties and domestic investment laws, as well as on the coherence between action at the national and regional/international levels.

The analysis below suggests that national investment laws do not yet fully reflect innovations at a regional or continental level, although newer investment laws seem to be closer to regional practice. Furthermore, there is still considerable diversity in individual laws across the ECOWAS region. Greater coherence in approaches within and across regions in Africa at all levels could contribute to improved clarity and predictability for both governments and investors, although sufficient room should be left for further experimentation at national level.

The international regime for investment protection is under increasing strain

More than 2,500 bilateral investment treaties (BITs) and multilateral agreements with an investment chapter or provisions are in force today. Traditionally, these agreements focused on the protection of investors and investments at the post-establishment phase and had as their main goal to foster foreign investments, including by providing more legal certainty and reducing unwarranted risks for foreign investors. These international investment agreements (IIAs) constitute an important part of a country's investment framework as they offer protections and guarantees that often go beyond what is included in domestic investment laws.

IIAs typically offer covered investors substantive and procedural protection. Classic substantive standards of protection include, for instance, the protection against unlawful expropriation and against discrimination, whether between foreign and domestic investors or among foreign investors, through the National Treatment (NT) and Most-Favoured Nation (MFN) provisions. They also often cover the guarantee of fair and equitable (FET) treatment and of full protection and security (FPS), which are sometimes equated with

the international minimum standard of treatment of aliens under customary international law. Lastly, they also provide a guarantee for the free transfer of funds and profits in and out of host states. From a procedural point of view, most IIAs provide for an investor-state dispute settlement (ISDS) mechanism, which allows investors to bring claims against the state in which they invested before international arbitral tribunals for an alleged breach of the IIA.

States are currently reconsidering the role, purpose and content of investment treaties, particularly the earlier generation treaties, for several reasons. Firstly, investor-state arbitration cases have risen exponentially in the past decade, including cases involving public policy or regulatory measures, with the added risk of a regulatory chill to avoid the possibility of future disputes. Secondly, academic studies have reached inconclusive results with regard to whether the treaties increase inflows of investment. Thirdly, societal demands are mounting that international investment should contribute positively to sustainable development. It is increasingly recognised that while FDI can play a crucial role in making progress toward all SDGs, particularly in advancing decarbonisation, increasing innovation, creating quality jobs, developing human capital and promoting gender equality, the effects of FDI are not always positive and impacts can differ across areas of sustainable development.

Partly as a result, some countries such as India, Indonesia and South Africa have terminated their treaties. Many other governments have worked to improve the functioning and perceived fairness of treaties. The United Nations Commission on International Trade Law (UNCITRAL) is currently working on a comprehensive reform of the investor-state dispute settlement (ISDS) system. The OECD is also embarked on a work programme on the Future of Investment Treaties, with one track addressing investment treaties and climate change, and the other considering updating older treaties to conform to approaches widely used in recent treaties.

Treaty innovations at regional and continental level in Africa

Different countries and regions have adopted different strategies for reform, and Africa has in many ways been at the forefront of innovative approaches. These can be seen in the non-binding Pan-African Investment Code, and likely in the Investment Protocol as part of the AfCFTA, once it is completed, as well as regional approaches in the Southern African Development Community (SADC), Economic Community of West African States (ECOWAS) and elsewhere. They place much greater emphasis on achieving sustainable development outcomes from treaties, as explained below.

An increasing number of states and regional organisations, including African states and Regional Economic Communities, incorporate sustainable development considerations in their new investment agreements or model agreements and adopt innovative provisions on various policy issues. The analysis of some investment instruments adopted in Africa at the continental and regional levels reveals the states' desire to: (i) attract and protect investments that foster sustainable development; (ii) preserve their regulatory policy space, including on sustainable development-related policy issues, by better delineating and limiting some of the core standards of protection; (iii) achieve a better balance between the investors' and states' rights and obligations, including on sustainable development-related matters; (iv) make commitments on sustainable development-related issues; and (v) redesign the ISDS system.

This section reviews developments in the following regional and continental approaches:

- The SADC Finance and Investment Protocol, particularly Annex 1 on co-operation on investment (SADC FIP, signed 2006, entered into force 2010 and as revised as per the Agreement Amending Annex 1 signed in 2017);
- The SADC Model BIT (2012, a 2017 version is not available);
- The ECOWAS Supplementary Act Adopting Community Rules on Investment and the Modalities for their Implementation (ECOWAS SA, signed 2008, in force 2009);

- The ECOWAS Common Investment Code (ECOWIC, adopted in 2018);
- The draft Pan-African Investment Code (PAIC, 2016).

Language in the Preamble and in separate articles

The preambles of the SADC Model BIT and the ECOWIC provide that the parties to these instruments are "seeking to promote, encourage and increase investment opportunities that enhance sustainable development within the territories of the State Parties". The preambles also often expressly recognise the key role of investment or the private sector in achieving various sustainable development objectives, such as the reduction of poverty, the increase of productive capacity or the furtherance of human rights and human development. All of the instruments repeat the sustainable development objective in a separate article. The SADC Model BIT, ECOWIC and PAIC set out the characteristics that an investment must have to be protected (based on the Salini test in the ICSID jurisprudence), including the "significant contribution to the host State's economic development" (e.g. art. 4(4) of the PAIC).

All instruments set out in their definition of "investment" several exclusions, particularly for "portfolio investments" and certain "investments of a speculative nature". This underlines the states' desire to attract long-term or more substantial investments which have a better chance to make a positive contribution to sustainable development. Some instruments, such as the ECOWIC and PAIC, also exclude from their coverage "investments in any sector sensitive to its development or which would have an adverse impact on its economy" (art. 1(h) and art. 4(4) respectively).

Better delineation of substantive standards of protection, affirmation of the state's right to regulate and general exclusions to seek to preserve policy space on key sustainable development-related matters

The investment instruments clarify, limit and sometimes delete certain substantive standards, mainly to preserve policy space. The most recent instruments all contain detailed provisions on non-discrimination (which usually cover the National Treatment (NT) and Most-Favoured Nation (MFN) principles, apart from the SADC instruments which only cover the former) and on the protection against expropriation. They set out numerous limitations and exceptions to these standards, some of which are particularly relevant from a sustainable development point of view. For instance, nearly all the instruments list examples of elements that should be considered when assessing whether investors or investments are in "like circumstances" for the purpose of NT or MFN principles and refer to the effect on the environment. Some also authorise the adoption of measures that derogate from the NT and/or MFN principles, including regulatory measures designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment (ECOWIC, art. 7; and PAIC, art. 8 and 10 - provided they are not arbitrary). Certain instruments also exclude from the scope of MFN treatment dispute settlement procedures and/or substantive obligations of other treaties (e.g. ECOWAS SA, art, 6(1) or PAIC, art. 7(4)) which preclude investors from invoking broader provisions than those contained in these instruments. Lastly, some instruments provide that measures designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriation (the PAIC adds that the measure must be non-discriminatory but not the revised version of Annex 1 of the SADC PFI, while the SADC Model BIT leaves a choice).

The most recent instruments do not include an FET provision. The initial version of Annex 1 to the ECOWAS SA contains the FET standard but qualifies it by reference to customary international law. Some instruments also list a series of obligations relating to procedural fairness which, if breached, could constitute a breach of this standard (ECOWAS SA, art. 19). The SADC Model BIT advocates for an alternative and more restrictive option, "fair administrative treatment", which protects, inter alia, against denial of justice, un-remedied and egregious violations of due process, targeted discrimination on manifestly unjustified grounds and manifestly abusive treatment.

The instruments also aim at preserving the state's right to regulate on sustainable development-related issues by affirming this right in the agreement and by providing general exceptions. All instruments except the ECOWAS ones refer to the right to regulate and/or to the balance of rights and obligations between investors and states in their preamble. The SADC instruments also contain a separate provision affirming, inter alia, the right to take regulatory or other measures to ensure that "development in their territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives" (art. 20). All instruments except the Annex 1 of the SADC PFI (both versions) also set out general exceptions for various measures including, inter alia, those aimed at protecting human, animal or plant life and the environment or at promoting the achievement of equality in their territory or designed to protect or advance persons or categories of persons disadvantaged by long term historic discrimination (usually provided these are applied in a non-arbitrary and non-discriminatory manner). Certain instruments also authorise the state to take non-discriminatory measures to comply with its international obligations under other treaties, which could include, for instance, measures aimed at achieving the commitment of the Paris agreements or other conventions or standards that promote sustainable development (SADC Model BIT, art. 6, revised version of Annex 1 of the SADC PFI, art. 5).

Introduction of a broad range of investor obligations and mechanisms to address breaches

All instruments incorporate a broad range of obligations for investors, many of which relate to sustainable development (except for both versions of Annex 1 of the SADC PFI). The PAIC and the ECOWIC are the most comprehensive in this respect. All instruments set out a general obligation to comply with domestic laws and regulations for investors and/or their investments. Most (except both versions of Annex 1 of the SADC PFI) also incorporate more specific pre- and post-establishment obligations for investors on a wide range of topics, including the environment, labour practices and standards, human rights, corruption or corporate social responsibility (CSR).

Investors are required to conduct environmental and sometimes social impact assessment (ECOWAS SA, art. 12, ECOWIC, art. 27 and PAIC, art. 37) or to comply with the assessment screening criteria and processes applicable to the proposed investment, as required by the laws of the host state or home state or international standards, whichever is the most rigorous (SADC Model BIT, art. 13, which requires considering impacts on human rights). Many instruments specify that the precautionary principle should be applied when conducting such assessments and to decisions taken in relation to a proposed investment. Investors are also required to comply with domestic environmental laws and multilateral agreements (ECOWIC, art. 27), protect the environment in performing their activities (PAIC, art. 37), repair any damages caused (PAIC, art. 37; ECOWIC, art. 27), maintain an environmental management system (SADC Model BIT, art. 14) or use environmentally sound management practices (ECOWIC, art. 29).

All instruments (except both versions of Annex 1 of the SADC PFI) provide that investors shall not engage in corrupt practices (as a main author or as an accomplice) before or after the establishment of the investment. Many also impose obligations related to human rights (such as the obligation to uphold, support and respect such rights, not to undertake any act that would breach these rights or be an accomplice to such acts) and labour, such as the obligation to act in accordance with or apply the standards stipulated in the 1998 ILO Declaration (the SADC Model BIT and ECOWAS SA) or, more generally, to comply with international conventions on labour issues (the PAIC). Some instruments include specific obligations concerning CSR but also hortatory clauses. The ECOWIC provides that investors "shall endeavour to promote and engage in CSR in accordance with international best practices" (art. 34).

The ECOWIC and PAIC also include certain obligations but also hortatory clauses concerning the transfer and diffusion of technology (including horizontal obligations, i.e. applicable to the state as well). The ECOWIC imposes an obligation on investors "to adopt, where practicable in the course of their business activities, practices that permit the transfer and rapid diffusion of technologies" and "to diffuse technology

and upgrades as well as improvements thereof through various mechanisms such as the demonstration and competition effects, the movement of labour from foreign affiliates to local firms and through the creation of linkages between foreign and local companies and their customers" (art. 47 and 48; the PAIC uses hortatory language for the first obligation).

The enforceability for such obligations can vary and is not always clear. The ECOWAS SA is the most comprehensive on this topic while both versions of Annex 1 of the SADC PFI and the ECOWIC remain silent. Various consequences are foreseen under different treaties. For instance, several instruments (i) provide that the tribunal or competent adjudicatory body shall consider whether an alleged breach of obligations raised by the host state, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on the damages awarded (if any); and (ii) authorise to bring counterclaims against the investor (SADC Model BIT, art. 19(1) and (2); ECOWAS SA, art. 18(2), (4) and (5) and PAIC, art. 43(1) and (2)). Some of these instruments authorise the home or host state (or other actors) to initiate proceedings before a tribunal established under the instrument or to initiate civil action before the domestic courts for the breach of certain or all obligations (ECOWAS SA, art. 18(3) and SADC Model BIT art. 19(3) and (4)).

The breaches of corruption-related obligations often have separate consequences. The ECOWAS SA provides that a breach of such obligations, if established by a court, can prevent an investor from initiating dispute settlement procedures under this instrument (art. 18(1)). The SADC Model BIT considers that a breach of the article on corruption is "deemed to constitute a breach of the domestic law of the Host State concerning the establishment and operation of an investment" and therefore constitutes a breach of the treaty (art. 10(3) and 17(4) respectively). Many instruments also require the state parties to prosecute, and where convicted, penalise such acts of corruption.

Lastly, certain instruments further provide that investors can be subject to civil actions before the domestic courts of their home state or the host state for acts and decisions made in relation to their investment when such acts and decisions have led to "significant damage, personal injuries or loss of life" in the host state (ECOWAS SA, art. 17; see also SADC Model BIT, art. 17 which also includes "omissions" and does not require that such acts, decisions or omissions are made in relation to investment). The SADC Model BIT further adds that "home states shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict such actions" (see also, ECOWAS SA, art. 29).

State commitments and obligations concerning key sustainable development matters

All instruments contain obligations and commitments for the state parties concerning key sustainable development matters, including on the environment, labour, human rights and corruption. Like for the investors' obligations, both versions of Annex 1 of the SADC PFI are relatively succinct on this issue. By contrast, the ECOWIC is particularly detailed and sets out a broad range of commitments and obligations for the member states.

All instruments explicitly require the state parties not to lower certain standards. Most provide that the states recognise that "it is inappropriate" to encourage investment by relaxing labour, health, safety or environmental measures or some subset of these measures (both versions of Annex 1 of the SADC PFI, art. 13 and 11, ECOWAS SA, art. 20) or "domestic environmental and labour legislation" (SADC Model BIT). The ECOWIC goes further by providing that member states recognise that "it is unlawful" "to encourage investment by relaxing national health, safety or environmental measures" and by "reducing the protection afforded in their respective environmental laws" (art 21-22). Concerning labour, the ECOWIC uses less stringent language and provides that member states recognise that "it is inappropriate to encourage investment by relaxing domestic labour legislation" (art. 30). As a consequence, states parties commit not to waive or derogate from these measures and laws as an encouragement for investment. The original and revised versions of Annex 1 of the SADC PFI add that member states "agree not to waive or other derogate from international treaties they have ratified" as an encouragement for investment (art. 13

and 11). It is worth noting that the SADC Model BIT and ECOWIC provide for a consultation mechanism in case a member state breaches this obligation (art. 22(2) and. 21(4) respectively).

Many instruments include declarations and commitments by the state parties concerning their environmental, labour and human rights rules and standards. In certain instruments, the states, for instance, recognise the importance of multilateral agreements to which they are a party (ECOWIC, art. 23 for environmental agreements) or commit to implement them (ECOWIC, art. 23). Concerning domestic laws and regulations, most instruments provide that state parties shall (or “shall strive to”) ensure that they provide for high levels of environmental, labour and/or human rights protection (in some cases adding that international standards or treaties shall be taken into account (ECOWAS SA, art. 21(2)) and shall strive to continue to improve those laws and regulations. Certain instruments add that they shall also ensure their laws and regulation are consistent with international labour standards and/or international human rights agreements (ECOWAS SA, art. 21).

Many of the instruments also impose obligations on the states concerning the fight against corruption (ECOWIC, chapter 9, SADC Model BIT, art. 10 and ECOWAS SA, art. 30). Noticeably, the ECOWIC contains an obligation to ratify or adhere to the UN Convention against Corruption (art. 35(4)). Certain instruments, particularly the PAIC but more importantly the ECOWIC, impose other obligations on the states e.g. concerning the protection of the environment. The PAIC provides that the states shall undertake environmental impact assessments and that, with the investors, they should take all practical steps to promote, facilitate and finance the transfer of or access to environmentally sound technology and know-how (art. 30 and 37). In the ECOWIC, the member states also recognise the importance of public participation and regional cooperation on this important issue (art. 26(1)).

The instruments include various other commitments and obligations for the states which could also affect sustainable development, concerning, for instance, investment promotion and facilitation (including through investment promotion agencies and through the home state’s assistance), the transparency and accessibility of investment legal framework, the cooperation on investment related issues or the protection of fair competition or intellectual property rights.

Alternatives and additions to the traditional ISDS mechanism

Faced with growing criticism of the ISDS mechanism, the instruments adopt different innovative approaches: ISDS is either excluded or, if included, is subject to various conditions, such as prior consultations and negotiations, exhaustion of domestic remedies or respect of certain time limits. Many instruments also encourage the use of alternative dispute resolution mechanisms such as mediation before initiating arbitration proceedings. These modifications reduce the risk of potential challenges to non-discriminatory regulatory measures, such as those adopted to achieve sustainable development objectives.

The original version of Annex 1 of the SADC PFI contains an ISDS provision. Under this instrument, investor-state disputes which have not been amicably settled, can be submitted to arbitration but only after exhaustion of local remedies (art. 28). The SADC Model BIT's preferred option is a state-state dispute settlement mechanism, which allows the state parties to bring claims on behalf of the investor subject to the fulfilment of several conditions (exhaustion of local remedies and respect of certain time limits to bring the claim) (art. 28). It sets out an example of an ISDS provision, in case the states decide to negotiate and include such a mechanism in their agreement but sets out numerous conditions (including those mentioned above) (art. 29). The 2016 version of Annex 1 of the SADC PFI deleted the ISDS provision but guarantees investors access to the domestic courts “for redress of their grievance in relation to any matter concerning their investment” (art. 25).

The language used in the ECOWAS SA is not fully clear on whether investor-state arbitration is possible. The ECOWIC provides that disputes between an investor and a member state may be resolved through

various means including arbitration. The latter may be conducted at “any established public or private alternative dispute resolution centres or the arbitration division of the ECOWAS Court of Justice” but encourages use of regional and local alternative dispute settlement institutions. The Code adds that when investment contracts between a member state and an investor provide for the use of international mechanisms such as ICSID or UNCITRAL, the parties to such contracts “shall exhaust all local remedies including the ECOWAS Court of Justice or national dispute settlement systems” before resorting to these mechanisms (art. 54).

Recent studies argue that the PAIC “offers a middle ground solution to African States that are either pro-ISDS or anti-ISDS” as it leaves the use of ISDS to the discretion of member states (Mbengue and Schacherer, 2021[2]). The PAIC provides that “member states may, in line with their domestic policies, agree to utilize the [ISDS] mechanism” (art. 42(1)). Disputing parties must first seek resolution through consultations and negotiations, if they fail, the dispute may be resolved through arbitration, subject to the applicable laws of the host state and/or the mutual agreement of the parties and subject to exhaustion of local remedies (art. 43(1(d)). The PAIC also contains a fork-in-the-road provision preventing multiple proceedings (art. 43(2)).

Investment laws of the ECOWAS member states

The introduction of innovative provisions at the regional and continental levels seems to have had some spill-over benefits at domestic regulatory level. While domestic investment laws have a wider scope than IIAs – covering, for instance, the regulation of the admission of investments or the provision of incentives – they may also contain similar features, such as rights and guarantees for investors and investments.

While investment legislation involves many layers of rules and regulations covering different areas, this analysis is limited only to investment laws (and, when easily identifiable, to the accompanying regulations). It does not cover, for instance, general tax laws which may offer additional incentives, nor enterprise laws or commercial codes acts which may impose separate obligations on investors, as well as arbitration laws. This analysis also does not cover sectoral legislation which may regulate investment in specific sectors, nor wider legislation and constitutions which may provide further details on, for instance, the rules for nationalisation and expropriation. Consequently, it is not because a specific element aimed at enhancing sustainable development is absent from the investment law, such as an investor’s obligation to protect the environment, that it is not provided for in separate legislation. Investment laws nevertheless often encapsulate a government’s overall approach to investment policy and to the potential role of investment in attaining sustainable development objectives.

All ECOWAS member states have an investment law covering both domestic and foreign investments. The great majority of these laws were adopted or amended in the 2010s and 2020s. The most recent laws are in Benin, Burkina Faso, Côte d’Ivoire and Togo and the oldest are those of Nigeria, Senegal and Sierra Leone. The laws described in this section are listed below:

- Benin: *Law on Investment Code* (2020)
- Burkina Faso: *Law on the Investment Code* (2018)
- Cabo Verde: *Investment Law* (2012, amended in 2013)
- Côte d’Ivoire: *Ordonnance on the Investment Code* (2018)
- The Gambia: *Investment and Export Promotion Act* (2015)
- Ghana: *Investment Promotion Center Act* (2013)
- Guinea: *Code of Investment* (2015)
- Liberia: *Investment Act* (2010)
- Mali: *Law on the Investment Code* (2012)
- Niger: *Investment Code* (2014)
- Nigeria: *Investment Promotion Commission Act* (1995, amended in 2004?)

- Senegal: *Investment Code* (2004)
- Sierra Leone: *Investment Law* (2004)
- Togo: *Law on Investment Code* (2019)

The scope of the investment laws varies from one country to another. Some laws such as in Ghana or Nigeria primarily focus on the investment promotion agency while others focus instead on advantages and incentives on offer, together with their eligibility conditions, and set out the rules applicable to special zones, such as in Togo or Benin. But they all contain more or less detailed provisions on the rights and guarantees of investors and investments and, in some instances, impose obligations on them.

The introduction of innovative provisions at the regional and continental level seems to have spilled over, to some extent, to the domestic regulatory level. Some of the most recent laws reveal the state's desire to (i) attract and protect investments that could positively contribute to sustainable development; (ii) provide obligations for investors in investment laws, including on sustainable development-related issues, and mechanisms to sanction the breach of these obligations; and, to a more limited extent, (iii) rethink the investor-state dispute mechanisms. In contrast with the regional and continental investment instruments analysed above, the clarification of the standard of protection clauses and the commitments and obligations on the state concerning sustainable development-related issues are relatively limited in the ECOWAS investment laws.

Sustainability language and sustainable development objectives in the most recent laws

As with regional investment instruments, several of the most recent ECOWAS investment laws contain sustainability language in the article setting out the purpose of the law and, more rarely, in their preamble. Côte d'Ivoire provides that one of the objectives of the law is "to foster sustainable development through productive and socially responsible investments" (art. 3). Liberia, in the preamble, recognises the "urgent need" to revise its former law on investment "to ensure consistency with international best practice as a necessary tool for attracting sustainable domestic and foreign investment". Togo and Benin provide that the objective of their investment laws is to "promote, facilitate and protect sustainable and responsible investment", and both set out more detailed objectives in this respect. For instance, Benin's law aims to encourage the creation and development of activities which, inter alia, promote "the creation of sustainable and decent jobs, the training of national cadres and the emergence of a skilled national workforce", as well as "green industry and environmental protection" (art. 2). Guinea's law aims to establish the legal and institutional framework for private investments to foster certain objectives, many of which relate to sustainable development (including those mentioned for Benin). Burkina Faso refers to promoting "productive investments that contribute to the country's social and economic development (art. 2). Eight ECOWAS member states nevertheless make no reference to sustainability in either the Preamble or in an article setting out the purpose of the law.

Further elements of investment laws relating to sustainable investment are however worth noting:

- Cabo Verde's law provides that the investments shall be subordinated to, inter alia, "the principles and objectives of national economic and environmental policy" and that they "should help" achieve various objectives, including objectives related to sustainable development (art. 3). This language differs from that used at the regional level, depending on whether the benefit of this law could be denied if the investment does not help to achieve or actually impedes these objectives.
- Burkina Faso's law requires prior authorisation of the investor from the Minister of Industry. The application must contain various elements including the impact on the environment and safeguard measures.
- Some laws set out specific advantages and incentives for investments in sectors or activities that positively contribute to sustainable development or deny certain advantages in case of potential adverse impact on sustainable development. Burkina Faso sets out more favourable eligibility

conditions for certain advantages, extends them and provides for additional ones for companies working in various sectors including the renewable energy sector and the protection of the environment (art. 17 and 32; see also the Gambia, Section 41 and Schedule II). Togo provides that the certificate approving the granting of incentives may be denied in case of expected or serious risk of adverse impacts on the environment, public health or national security (art. 23).

- Lastly, while investment laws often exclude certain sectors or activities from their scope and, in some limited instances, list the sectors of activities that are covered, a very limited number of laws expressly exclude or include sectors or activities that could negatively or positively contribute to sustainable development. Niger provides a positive list of activities that are covered by the Code, including the production of renewable energy. The Gambia provides that investment is prohibited in certain fields, including in an enterprise which is detrimental to the natural environment, public health or which contravenes domestic laws (Section 29).

All national investment laws except four (Côte d'Ivoire, the Gambia, Nigeria and Sierra Leone) have a separate provision setting out the principle of non-discrimination post-establishment with very few relevant limitations (from a sustainable development point of view). In Burkina Faso, Niger and Senegal, NT is subject to reciprocity. Benin, Côte d'Ivoire and Guinea, a derogation is made for large and important projects or to promote domestic entrepreneurship. The remaining ECOWAS member states allow for derogations to NT for measures affecting all investors or if specifically provided for under applicable legislation. Thus, while many ECOWAS members allow for some general derogation, the approach is different from that at a regional level which focuses more on the meaning of "like circumstances" and allows for discriminatory measures "in order to achieve national development objectives" (SADC PFI).

Many of the investment laws are very succinct on the protection against expropriation and only two set out exceptions to this principle. Burkina Faso and Togo both provide that the regulatory measures designed and applied to protect public interests such as public health, security or the environment do not constitute an indirect expropriation (art. 8 and 6 respectively; Togo's law specifies that the measure must be non-discriminatory).

Two recent laws contain an FET standard without defining it precisely. Côte d'Ivoire includes an unqualified FET standard providing that, subject to bilateral, regional and multilateral agreements signed by the state, foreign natural and legal persons enjoy FET concerning the rights and obligations related to their investments (art. 25). The FET standard in Burkina Faso's law is qualified but remains relatively vague. It provides that foreign enterprises enjoy FET (and constant security and protection) thereby protecting the investor against any unjustified or discriminatory measures that could impede, in law or in fact, the management, maintenance, usage, benefice or liquidation of their investments (art. 12). No ECOWAS member state includes a reference to "fair and administrative treatment".

In other areas, it is worth noting that national investment laws in ECOWAS are usually more detailed on the guarantee of free transfer of funds and that several set out limitations to this principle. Côte d'Ivoire provides that the state can prevent a transfer of funds through the fair, non-discriminatory and good faith application of its texts concerning, inter alia, the protection of the environment (art. 28).

Incorporation of sustainable development related obligations for investors and mechanisms to sanction a breach of these obligations

Like the regional investment instruments analysed above, a great number of national investment laws impose obligations on investors and their investments (either on all of them or on those benefiting from specific advantages). Certain laws such as in Guinea and Benin contain separate chapters or sections on these obligations and provide a wide range of obligations, while others provide more ad hoc obligations. This practice is intended to strike a balance between guarantees offered to investors and conditions that investors must respect in order to be eligible for these guarantees and for incentives.

A great majority of the investment laws include a general obligation for investors and their investment to comply with domestic legislation and regulations, such as in Benin, Côte d'Ivoire, Guinea, the Gambia, and Niger. Many of these laws also impose pre and/or post-establishment obligations. While some of these obligations concern sustainable development related areas, they are more limited in scope and content than those contained in the regional ECOWAS investment instruments analysed above.

A limited number of investment laws impose pre-establishment obligations, relating mainly to corruption (e.g. art. 25 of Benin's Law provides that "the investor shall refrain from any act of corruption and any act of related offences before, during and after his establishment"; see also art. 26 of Guinea's *Investment Code*) and to the protection of the environment (e.g. Togo's law, art. 20, which requires investors to submit an environmental impact assessment when applying for specific advantages and incentives). Certain laws also sanction the provision of false or misleading statements when applying for specific advantages or incentives, which could be interpreted as a "pre-establishment obligation".

Post-establishment obligations are more frequent (as are post-establishment guarantees). Several laws require investors to comply with specific legislation and regulations including those relating to the environment and labour (e.g. Ghana, art. 34; Niger, art. 15; or Togo, art. 37), and, more rarely, to human rights or CSR (Guinea, art. 21-24; or Côte d'Ivoire, art. 36). Certain laws contain more specific obligations concerning the environment and require the investor to protect the environment by taking all necessary and appropriate measures (the Gambia, Schedule I, Part II) or by resorting to processes and technical equipment that are deemed to be the most suitable by the competent services (Burkina Faso, art. 20). Others impose more specific obligations on labour-related issues, particularly for investors or enterprises benefitting from specific advantages or incentives. Investors are often required to recruit local workers in priority at equal qualifications, to contribute to developing their skills through training and technology transfer, and to promote them (Senegal, art. 25; Mali, art. 28; Togo, art. 37; or Benin, art. 23). Lastly, some of these laws, such as in Côte d'Ivoire (art. 36), oblige the investor to refrain from any acts of corruption or to adopt ethics rules on corruption and internal and external control system for work processes.

Like the regional ECOWAS investment instruments, many of investment laws also contain mechanisms to sanction the potential breach of these obligations in different ways. Several laws provide that a breach of the obligations set out in these laws can lead to the suspension or the withdrawal of the advantages granted and/or of the certificate approving the advantages, to the repayment of the taxes and other fees that were not paid, and/or to a fine (e.g. Benin, art. 25). Côte d'Ivoire provides that the certificate approving the advantages can be withdrawn for a breach of environmental obligations that could have consequences for human and animal health (art. 48). Certain laws, such as in Togo (art. 17), also specify that the investment promotion agency or another competent body should ensure compliance with these obligations.

Limited sustainable development related obligations for states

In contrast with ECOWAS investment instruments, national investment laws do not incorporate states' obligations or commitments on key sustainable development issues such as the protection of the environment, the respect of labour standards and human rights or the fight against corruption. But several ECOWAS member states do make other commitments in these laws which could positively contribute to sustainable development. Some states undertake to establish a favourable environment for investors whose projects are covered by their investment law (Mali, art. 8 and Guinea, art. 12), to ensure transparency of the investment framework and to protect against retroactive application of adverse laws (Liberia, Section 9 and 10) – which could all foster investment, including investment that could positively contribute to sustainable development. Others undertake to protect intellectual property rights in accordance with international agreements and treaties to which they are a party – which could thus foster innovation (Liberia, Section 8; Côte d'Ivoire, art. 32; and Benin, art. 14).

Most of these laws also contain provisions concerning the establishment and functioning of a specialised agency or commission to promote and facilitate investment, thus reinforcing the possibility of attracting

investment that could positively contribute to sustainable development, although the extent to which these agencies prioritise sustainable investments is not assessed here.

Varying approaches to the availability of arbitration

All ECOWAS investment laws refer to arbitration for disputes with foreign and sometimes domestic investors but through different approaches. A first set of laws, including some more recent ones, provides advance government consent to arbitration, sometimes with limits on scope:

- Nigeria, Liberia and the Gambia's investment laws simply provide for arbitration (art. 26, 12 and 35 respectively);
- Cabo Verde provides that the dispute shall be settled by arbitration, if no other route has been agreed, or by the domestic courts if both parties agree to it (art. 14).
- Mali (art. 29), Benin (art. 45), Guinea-Bissau (art. 18-19) and Burkina Faso (art. 38-39) offer a choice between recourse to domestic courts or arbitration (and in certain cases conciliation) which specifies that initiation of arbitration suspends court proceedings.
- Niger authorises recourse to arbitration but limits it to certain disputes, i.e. those concerning the validity, interpretation, application or revision of one or several clauses in the certificate granting specific advantages (art. 45-47).

A second set of laws does not or does not appear to provide advance consent although other possible avenues are contemplated:

- Senegal (art. 12) provides that the dispute shall be settled in accordance with the conciliation and arbitration procedures resulting from an agreement between the parties or from agreements or treaties on the protection of investments concluded with the investor's home country – which suggests that if none exists, arbitration will not be possible.
- Sierra Leone and Ghana authorise recourse to arbitration and set out various procedural options but provide that "where no recourse is available through arbitration or previously established contracts or other legal instruments" (Sierra Leone) or if there is a disagreement with the investor as to the method of dispute settlement to be adopted, and if there is no arbitration agreement to the contrary (Ghana), the dispute shall be referred to the relevant legal authority (Sierra Leone) or resolved through mediation under Ghana's Alternative Dispute Resolution Act, 2010.
- Guinea and Togo provide that the dispute shall be settled by the domestic (or regional) courts but that the parties may agree to submit it to arbitration (art. 43 and 7 respectively).
- Côte d'Ivoire provides that UNCITRAL rules on conciliation shall apply to the dispute but that the parties may agree to submit their dispute to the arbitration centre of the Common Court of Justice and Arbitration of the OHADA. The investor is required to send a letter to the investment promotion agency which sets out the method of resolution chosen; by this choice the investor renounces the use of any other arbitration centre for the resolution of disputes with the state.

Table 2.1 summarises the foregoing discussion. It compares the provisions at the regional and continental level with those of national investment laws in ECOWAS member states as they relate to sustainable development. This summary of provisions in a binary fashion does not do full justice to the possible qualifications that might be included in any given provision, but overall it does provide a quick overview of the extent to which national investment laws fully reflect the innovations at regional and continental levels and which are most likely to be found in the forthcoming AfCFTA Investment Protocol.

Table 2.1. National investment laws in ECOWAS do not fully reflect broader continental approaches

	PAIC	SADC Model BIT	SADC PFI 2016	ECOWAS SA	ECOWIC	National investment laws
References to sustainable development, state's right to regulate or investor obligations in preamble or other general provisions	Yes	Yes	Yes	Yes	Yes	Yes = 7 No = 8
Limitations on the protection against expropriation (e.g public health, security and the environment)	Yes	Yes	Yes	Yes	Yes	Yes = 2 No = 13
National treatment	Yes	Yes	Yes	Yes		Yes = 11 No = 4
Limitations on NT, e.g when assessing "like circumstances"		Yes	Yes	Yes	Yes	Yes = 9 No = 2
Fair and equitable treatment (FET)	No	Either yes but qualified by customary international law or Fair Administrative Treatment	No	Yes (qualified by reference to CIL)	No	Yes (qualified) = 1 Yes (unqualified) = 1 No = 13
General exceptions for measures relating to sustainable development		Yes	No, except compliance with other treaties	Yes	Yes	
Compliance with domestic laws	Yes	Yes	Yes	Yes	Yes	Yes = 9 No = 6
Pre-establishment obligations (environment, labour, human rights, CSR, corruption)	Yes	Yes	No	Yes	Yes	Yes = 5 No = 10
Post-establishment obligations (environment, labour, human rights, CSR, corruption)	Yes	Yes	No	Yes	Yes	Yes = 12 No = 3

Source: OECD compilation

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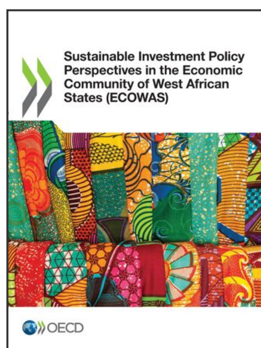

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