

SUPPLEMENTARY PROTOCOL A/SP.2/5/90 ON THE IMPLEMENTATION OF THE THIRD PHASE (RIGHT OF ESTABLISHMENT) OF THE PROTOCOL ON FREE MOVEMENT OF PERSONS, RIGHT OF RESIDENCE AND ESTABLISHMENT

THE HIGH CONTRACTING PARTIES,

MINDFUL of Article 5 of the ECOWAS Treaty establishing the Authority of Heads of State and Government and defining its composition and functions ;

MINDFUL of Article 27 of the ECOWAS Treaty relating to freedom of movement and residence within the Community ;

MINDFUL of Protocol A/P.1/5/79 dated 29 May, 1979, on Free Movement of Persons, Right of Residence and Establishment ;

MINDFUL of Protocol A/P.3/5/82 dated 29 May, 1979, establishing the Code of Citizenship of the Community ;

MINDFUL of Protocol A/P.1/11/84 dated 23 November, 1984 on Community Enterprises ;

MINDFUL of Supplementary Protocol A/SP.1/7/85 dated 6 July, 1985, establishing the Code of Conduct for the implementation of the Protocol on Free Movement of Persons, Right of Residence and Establishment ;

CONSIDERING the deadline for the implementation of Phase II (Right of Residences) of the Protocol on Free Movement of Persons, Right of Residence and Establishment, which deadline will expire on 4 June, 1990 ;

CONVINCED of the imperative need to proceed to the third phase (Right of Establishment) of the Protocol on Free Movement of Persons, Right of Residence and Establishment, in-as-much-as the uniform implementation of the provisions of ECOWAS texts on free movement of persons, goods, services and capital by all Member States is a fundamental basis of Community building and a pre-requisite for the harmonious development of the economic, social and cultural activities of the States of the region which will ensure the welfare of their peoples ;

HEREBY AGREE AS FOLLOWS :

CHAPTER 1

DEFINITIONS

Article 1

In this Protocol, the following terms shall have the meanings assigned to them hereunder :

"Treaty" means the Treaty of the Economic Community of West African States ;

"Community" means the Economic Community of West African States ;

"Member State" or **"Member States"** means a Member State or Member States of the Economic Community of West African States ;

"Host Member State" means the Member State or country of residence of the migrant worker ;

"Member State of Origin" means the Member State or country of residence of the migrant worker or the country of which he is a national ;

"Authority" means the Authority of Heads of State and Government established by Article 5 of the Treaty ;

"Council" means the Council of Ministers established by Article 6 of the Treaty ;

"Executive Secretary" and **"Executive Secretariat"** mean the Executive Secretary and the Executive Secretariat of the Community as defined in Article 8 of the Treaty.

"Commission" means the Trade, Customs, Immigration, Money and Payments Commission of the Community, as defined in Article 9 paragraph 1 (a) of the Treaty.

"Community Citizen" or **"Community Citizens"** means any national or nationals of a Member State fulfilling the conditions stipulated in the Protocol A/P.3/5/82 relating to the definition of Community Citizen ;

"Right of Residence" means the right of a citizen who is a national of one Member State to reside in a Member State other than his State of origin which issues him with a residence card or permit that may or may not allow him to hold employment ;

"Right of Establishment" means the right granted to a citizen who is a national of the Member State to settle or establish in another Member State other than his State of origin, and to have access to economic activities, to carry out these activities as well as to set up and manage enterprises, and in particular companies, under the same conditions as defined by the legislation of the host Member State for its own nationals ;

"Residence Card" or **"Residence Permit"** means the document issued by the competent authorities of a Member State granting right of residence in the territory of the Member State ;

"Resident" means any citizen, who is a national of one Member State, and who is accorded the right of residence.

"Migrant Worker" or **"Migrant"** means any citizen who is a national of one Member State, who has travelled from his country of origin to the territory of another Member State of which he is not a national and who seeks to hold employment there ;

"Competent Administrations" or "Relevant Departments" means national Administrations of Member States responsible for immigration and emigration matters ;

"Competent Authority of place of residence" means the competent local authority responsible for problems concerning the residence of foreigners in the territory of the host Member State ;

"Fundamental Rights" means the right granted to any migrant worker by this Protocol and the Conventions of the International Labour Organisation (ILO) on the protection of the rights of migrant workers.

"Border area workers" means migrant workers who, while in employment in one Member State, maintain their normal residence in a neighbouring Member State, which is their country of origin and to which they return each day or at least once a week.

"Seasonal Workers" means migrant workers in employment or practising a business on their own account in one Member State of which they are not nationals, the activity being by its nature dependent on seasonal conditions and capable of being practised only during a part of the year.

"Itinerant Workers" means migrant workers who normally residing in one Member State, may have to travel to another Member State for a short period for the requirements of their activities.

"Company" means a company constituted under civil or commercial law or any other legal entity constituted under public or private law with the exception of non-profit-making companies.

2. In this Protocol, the term **"migrant workers"** excludes :

- i. Persons on official posting who are employed by international organisations and persons employed by a State outside the territory of that State, whose entry into the country and conditions of service are governed by general international law or by specific International Agreements or Conventions ;
- ii. Persons on official posting who are employed by a State outside the territory of that State for the implementation of co-operation programmes for development agreed on with the host country, the entry into the country and conditions of service of such persons being established by specific International Agreements or Conventions ;
- iii. Persons whose working relations with an employer have not been established in the host Member State ;
- iv. Persons who become residents in their capacity as investors in a country other than their State of origin or who, since their arrival in that country, have been carrying out an economic activity as an employer.

CHAPTER II

ESTABLISHMENT OF OR ACCESS TO ENTERPRISES

Article 2

The right of establishment as defined in Article 1 above shall include access to non-salaried activities and the exercise of such activities as well as the creation and management of enterprises and companies which comply with the definition contained in Article 3 below are subject to the same conditions stipulated by the laws and regulations of the country of establishment for its own nationals.

Article 3

For the purpose of implementation of this Protocol, companies which are formed in accordance with the laws and regulations of a Member State with their headquarters, central seat of administration or principal establishment within the Community shall be considered in the same category as individual nationals of Member States. Where, however, only the statutory headquarters of the company are established in a Member State, activities of such a company should have effective and sustained links with the economy of the Member State.

CHAPTER III

PROVISIONS FOR SECTORS OF ECONOMIC ACITIVITY GOVERNED BY SPECIAL MEASURES WHERE SUCH ACTIVITY INVOLVES NON-NATIONALS

Article 4

1. In matters of establishment and services, each Member State shall undertake to accord non-discriminatory treatment to nationals and companies of other Member States.
2. If, however, for a specific activity, a Member State is unable to accord such treatment, the Member State must indicate as much, in writing, to the Executive Secretariat. Other Member States shall then not be bound to accord non-discriminatory treatment to nationals and companies of the State concerned.
3. The provisions of this Protocol and measures taken as a result thereof shall be without prejudice to the application of legislative and administrative provisions, which provide a special treatment for non-nationals and are justified by exigencies of public order, security or public health.
4. On the recommendation of the Commission, and on the proposal of the Council, the Authority shall take the relevant decision for the co-operation and harmonisation of legislative, statutory and administrative provisions which, in at least one Member State, make access to certain non-salaried activities (liberal or non-liberal professionals) and the exercise of such activities subject to protective or restrictive measures.
5. To facilitate access to non-salaried activities and the exercise of such activities, the Commission shall recommend to the Council, which shall propose to the Authority that decisions be taken for the mutual recognition at Community level of diplomas, certificates and other qualifications.
6. Activities which, in a Member State, form part, even occasionally, of the exercise of public authority, shall be exempted from the provisions of this Protocol.

CHAPTER IV

PROVISIONS FOR THE PROMOTION AND PROTECTION OF CAPITAL FOR INVESTMENT OR ALREADY INVESTED IN THE ESTABLISHMENT OF AN ENTERPRISE OR FOR THE PURPOSE OF OBTAINING ACCESS TO ECONOMIC ACTIVITY

Article 5

Member States recognise the importance of capital (whether private or public) in the promotion of development co-operation and the need to take measures conducive to the promotion of such capital. Member States shall therefore undertake, jointly and severally to :

- i. implement measures to encourage participation in development efforts by economic operators who share the objectives and priorities of development co-operation and respect the law and regulations of their respective States ;
- ii. accord fair and equitable treatment to such capital to encourage and create conditions which favour investment of such capital ;
- iii. promote effective co-operation between economic operators in their respective States.

Article 6

In order to further accelerate co-operation in their development efforts and increase directly productive investments, Member States shall undertake to adopt provisions which will facilitate and increase the flow of more stable private capital and enhance :

1. co-financing of productive investment with the private sector ;
2. the activities and efficacy of domestic financial markets ;
3. access to international financial markets.

Article 7

1. Assets and capital invested by ECOWAS citizens who are not nationals of the Member State of establishment, having been duly authorised, shall not be subject to any act of confiscation or expropriation on a discriminatory basis.
2. Any act of confiscation, expropriation or nationalisation must be followed by fair and equitable compensation.

Article 8

In recognition of the intermediary role of national development finance institutions in attracting the flow of capital for development co-operation, Member States shall undertake to encourage, as part of their monetary and financial co-operation, the establishment or enhancement of :

1. national or regional export financing and export credit guarantee institutions ;
and

2. regional payment mechanism likely to facilitate and promote intra-community trade.

Article 9

In recognition of the need to promote and protect the investments of each Member State in their respective territories, Member States shall undertake, in their mutual interest, to harmonise their national legislations, administrative rules and regulations governing the promotion and protection of investments in order to establish the foundations for the Community guarantee and insurance systems.

CHAPTER V

PROVISIONS GOVERNING THE MOVEMENT OF CAPITAL FOR INVESTMENT AND CURRENT PAYMENTS

Article 10

1. In transactions involving movement of capital for investment and current payments, Member States shall refrain from taking exchange control measures which are incompatible with their obligations under the terms of this Protocol and earlier Community provisions, particularly Protocol A/P.1/11/84 of the Authority dated 23 November, 1984 and relating to Community Enterprises.
2. However, such obligations shall not prevent Member States from taking the necessary protective measures for reasons of grave economic difficulty or serious balance of payment problems, provided that the decision-making bodies of the Community are given notification thereof.

Article 11

In the case of foreign exchange transactions related to investment and current payments, Member States shall, as far as possible, refrain from taking discriminatory measures and from according preferential treatment to nationals of third countries.

CHAPTER VI

CO-OPERATION BETWEEN RELEVANT ADMINISTRATIONS IN MEMBER STATES

Article 12

The relevant authorities of Member States shall co-operate closely with one another and with the Executive Secretariat in accordance with the general conditions for the realisation of the right of establishment in order to :

1. identify activities in which freedom of establishment has a particularly useful contribution to make to the development of production and trade and to deal with such activities in order of priority ;

2. eliminate administrative practices and procedures emanating either from internal legislation or from agreements earlier concluded between Member States which, if maintained, would be an impediment to the freedom of establishment ;
3. ensure that salaried workers of one Member State employed in the territory of another Member State shall remain in the said territory to carry out non-salaried activity on condition that they fulfill the requirements binding upon any ECOWAS citizen arriving from his State of origin for the purpose of carrying out a non-salaried activity ;
4. make possible the acquisition and exploitation of landed property situated in the territory of one Member State by a national of another Member State, in-so-far as this is permitted by the laws and regulations or the host Member State ;
5. eliminate restrictions to freedom of establishment in any sector of activity both in terms of conditions for the establishment of agencies, branches or subsidiaries and in terms of conditions of entry for staff of the parent establishment into the management or supervisory organs of the subsidiaries ;
6. co-ordinate as far as necessary with a view to making them equivalent, the guarantees required from companies by Member States to protect the interests of both partners and third parties.

CHAPTER VII

GENERAL AND MISCELLANEOUS PROVISIONS

Article 13

Member States shall undertake to institute all legislative and other measures which are in conformity with their constitutional procedures and necessary for the implementation of the provisions of this Protocol.

Article 14

Any dispute arising between Member States on the interpretation or implementation of this Protocol shall be resolved in accordance with the procedure for settlement of disputes as laid down in Article 56 of the Treaty.

Article 15

1. Any Member State may submit proposals for amendment or revision of this Protocol.
2. All proposals shall be forwarded to the Executive Secretary who shall communicate them to Member States within thirty (30) days of receiving them. Amendments or revisions shall be considered by the Authority at the expiration of the thirty- (30) days-period of notice granted to Member States.

CHAPTER VIII

DEPOSIT AND ENTRY INTO FORCE

Article 16

1. This Supplementary Protocol shall enter into force, provisionally, upon signature by the Heads of State and Government and definitively, upon ratification by at least seven signatory States in accordance with the constitutional procedures of each signatory State.
2. This Supplementary Protocol and all instruments of ratification shall be deposited with the Executive Secretariat, which shall forward certified copies of the instruments of ratification to all Member States and shall notify them of the dates of deposit of the instruments of ratification. This Protocol shall be registered with the Organisation of African Unity, the United Nations Organisation and such Organisations as may be determined by the Authority of Heads of State and Government.
3. This Supplementary Protocol shall be annexed to the Treaty of which it shall form an integral part.

IN FAITH WHEREOF, WE, HEADS OF STATE AND GOVERNMENT OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES, HAVE SIGNED THIS PROTOCOL.

DONE AT BANJUL, THIS 30TH DAY OF MAY, 1990 IN ONE SINGLE ORIGINAL IN THE FRENCH AND ENGLISH LANGUAGES, BOTH TEXTS BEING EQUALLY AUTHENTIC.