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SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY, AND CONSISTENCY
MARCH 1, 2004

CHAPTER ELEVEN
INVESTMENT

ARTICLE 11.1 : SCOPE AND COVERAGE

1. This Chapter applies to measures adopted or maintained by a Party relating to:
 - (a) investors of the other Party;
 - (b) covered investments; and
 - (c) with respect to Articles 11.9 (Performance Requirements) and 11.11 (Investment and Environment), all investments in the territory of the Party.
2. For greater certainty, nothing in this Chapter imposes an obligation on a Party to privatise.

ARTICLE 11.2 : RELATION TO OTHER CHAPTERS

1. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.
2. A requirement by a Party that a service supplier of the other Party post a bond or other form of financial security as a condition of the cross-border supply of services does not of itself make this Chapter applicable to that cross-border supply of services. This Chapter may apply to that Party's treatment of the posted bond or financial security.
3. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Thirteen (Financial Services).

ARTICLE 11.3 : NATIONAL TREATMENT

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

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ARTICLE 11.4 : MOST-FAVOURED NATION TREATMENT

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

ARTICLE 11.5 : MINIMUM STANDARD OF TREATMENT ¹¹⁻¹

1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.
2. For greater certainty, the concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
 - (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
 - (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.
3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

ARTICLE 11.6 : TREATMENT IN CASE OF STRIFE

1. Notwithstanding Article 11.13 (Non-Conforming Measures) subparagraph 5(b)(Subsidies and Grants), each Party shall accord to investors of the other Party, and to covered investments, with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife, treatment no less favourable than that it accords, in like circumstances, to:

¹¹⁻¹ Article 11.5 is to be interpreted in accordance with Annex 11-A.

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- (a) its own investors and their investments; and
- (b) investors of any non-Party and their investments.

2. Notwithstanding the preceding paragraph, if an investor of a Party, in the situations referred to in that paragraph, suffers a loss in the territory of the other Party resulting from:

- (a) requisitioning of its covered investment or part thereof by the latter's forces or authorities; or
- (b) destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

the latter Party shall provide the investor with restitution, compensation, or both, as appropriate, for such loss. Any compensation shall be prompt, adequate and effective in accordance with paragraphs 2, 3 and 4 of Article 11.7 (Expropriation and Compensation), *mutatis mutandis*.

3. Paragraph 1 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 11.3, but for Article 11.13.5(b).

ARTICLE 11.7 : EXPROPRIATION AND COMPENSATION ¹¹⁻²

1. Neither Party may expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation ("expropriation"), except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation; and
- (d) in accordance with due process of law.

2. The compensation referred to in subparagraph 1(c) shall:

- (a) be paid without delay;
- (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation");

¹¹⁻² Article 11.7 is to be interpreted in accordance with Annex 11-A and Annex 11-B.

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- (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
 - (d) be fully realisable and freely transferable.
3. If the fair market value is denominated in a freely usable currency or the Australian dollar, the compensation referred to in subparagraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment
4. However, if the fair market value is denominated in the Australian dollar and the Australian dollar is not transferable on the date of payment at the market rate of exchange, or if it is denominated in another currency that is not freely usable, the compensation referred to in subparagraph 1(c) – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:
- (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus
 - (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.
5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter 17 (Intellectual Property Rights).

ARTICLE 11.8 : TRANSFERS

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:
- (a) contributions to capital, including the initial contribution;
 - (b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the covered investment;
 - (c) interest, royalty payments, management fees, and technical assistance and other fees;
 - (d) payments made under a contract, including a loan agreement;

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- (e) payments made pursuant to Article 11.7 and paragraphs 1 and 2 of Article 11.6; and
 - (f) payments arising out of a dispute.
2. Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.
3. Each Party shall permit returns in kind relating to a covered investment to be made as authorised or specified in a written agreement between the Party and a covered investment or an investor of the other Party that takes effect on or after the date of entry into force of this Agreement.
4. Notwithstanding paragraphs 1, 2 and 3, a Party may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to:
- (a) bankruptcy, insolvency, or the protection of the rights of creditors;
 - (b) issuing, trading, or dealing in securities, futures, options, or derivatives;
 - (c) criminal or penal offences;
 - (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or
 - (e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

ARTICLE 11.9 : PERFORMANCE REQUIREMENTS

1. Neither Party may, in connection with, the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any of the following requirements, or enforce any commitment or undertaking¹¹⁻³:
- (a) to export a given level or percentage of goods or services;
 - (b) to achieve a given level or percentage of domestic content;

¹¹⁻³ For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a “commitment or undertaking” for the purposes of paragraph 1.

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- (c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
 - (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
 - (e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
 - (f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory; or
 - (g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that such investment supplies to a specific regional market or to the world market.
2. Neither Party may condition the receipt or continued receipt of an advantage in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:
- (a) to achieve a given level or percentage of domestic content;
 - (b) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
 - (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
 - (d) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earning.
3. (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.
- (b) Subparagraph 1(f) does not apply:

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- (i) when a Party authorizes use of an intellectual property right in accordance with the provisions of Article 17.9.7, and to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or
 - (ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws.⁴
- (c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on investment or international trade, subparagraphs 1(b), (c), and (f), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:
- (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement;
 - (ii) necessary to protect human, animal, or plant life or health; or
 - (iii) related to the conservation of living or non-living exhaustible natural resources.
- (d) subparagraphs 1(a), (b), and (c), and 2(a) and (b), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.
- (e) subparagraphs 1(b), (c), (f), and (g), and 2(a) and(b), do not apply to government procurement.
- (f) subparagraphs 2(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

4. For greater certainty, paragraphs 1 and 2 do not apply to any requirement other than the requirements set out in those paragraphs.

¹¹⁻⁴ The Parties recognize that a patent does not necessarily confer market power.

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5. This Article does not preclude enforcement of any commitment, undertaking, or requirement between private parties, where a Party did not impose or require the commitment, undertaking, or requirement.

ARTICLE 11.10 : SENIOR MANAGEMENT AND BOARDS OF DIRECTORS

1. Neither Party may require that an enterprise of that Party that is a covered investment appoint to senior management positions individuals of any particular nationality.

2. A Party may require that a majority or less of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

ARTICLE 11.11 : INVESTMENT AND ENVIRONMENT

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

ARTICLE 11.12 : DENIAL OF BENEFITS

1. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if investors of a non-Party own or control the enterprise and the denying Party:

- (a) does not maintain diplomatic relations with the non-Party; or
- (b) adopts or maintains measures with respect to the non-Party or an investor of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or its investments.

2. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and investors of a non-Party, or of the denying Party, own or control the enterprise.

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ARTICLE 11.13 : NON-CONFORMING MEASURES

1. Articles 11.3 (National Treatment), 11.4 (Most Favoured Nation Treatment), 11.9 (Performance Requirements), and 11.10 (Senior Management and Boards of Directors) do not apply to:

- (a) any existing non-conforming measure that is maintained by a Party at
 - (i) the central level of government, as set out by that Party in its Schedule to Annex .I;
 - (ii) a regional level of government, as set out by that Party in its Schedule to Annex I; and
 - (iii) a local level of government;
- (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
- (c) an amendment to any measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 11.3 (National Treatment), 11.4 (Most-Favoured-Nation Treatment), 11.9 (Performance Requirements), and 11.10 (Senior Management and Boards of Directors).

2. Articles 11.3 (National Treatment), 11.4 (Most Favoured Nation Treatment), 11.9 (Performance Requirements), and 11.10 (Senior Management and Boards of Directors) do not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors or activities as set out in its Schedule to Annex II.

3. Neither Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex II, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Articles 11.3 (National Treatment) and 11.4 (Most-Favored-Nation Treatment) do not apply to any measure that is an exception to, or derogation from, the obligations under Article 17.1.6 (National Treatment) as specifically provided for in that Article.

5. Article 11.3 (National Treatment), 11.4 (Most-Favoured-Nation Treatment), and 11.10 (Senior Management and Boards of Directors) do not apply to:

- (a) government procurement; or

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- (b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.

ARTICLE 11.14 : SPECIAL FORMALITIES AND INFORMATION REQUIREMENTS

1. Nothing in Article 11.3 (National Treatment) shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that investors be residents of the Party or covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of the other Party and covered investments pursuant to this Chapter.

2. Notwithstanding Articles 11.3 (National Treatment) and 11.4 (Most-Favoured-Nation Treatment)), a Party may require an investor of the other Party, or a covered investment, to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect any business information that is confidential from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

ARTICLE 11.15 : IMPLEMENTATION

The Parties shall meet annually, or as agreed otherwise, to discuss the implementation of this Chapter, and other issues of mutual interest, including the operation of their respective investment regimes.

ARTICLE 11.16: CONSULTATIONS ON INVESTOR-STATE DISPUTE SETTLEMENT

1. If a Party considers that there has been a change in circumstances affecting the settlement of disputes on matters within the scope of this Chapter and that, in light of such change, the Parties should consider allowing an investor of a Party to submit to arbitration with the other Party a claim regarding a matter within the scope of this Chapter, the Party may request consultations with the other Party on the subject, including the development of procedures that may be appropriate. Upon such a request, the Parties shall promptly enter into consultations with a view towards allowing such a claim and establishing such procedures.

2. For greater certainty, nothing in this Article prevents a Party from raising any matter arising under this Chapter pursuant to the procedures set out in Chapter 21 (Institutional Arrangements and Dispute Settlement). Nor does anything in this Article prevent an investor

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of a Party from submitting to arbitration a claim against the other Party to the extent permitted under that Party's law.

ARTICLE 11.17 : DEFINITIONS

For the purposes of this Chapter:

1. **enterprise** means any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise;
2. **enterprise of a Party** means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there;
3. **freely usable currency** means a currency determined by the International Monetary Fund under its *Articles of Agreement* to be a currency that is, in fact, widely used to make payments for international transactions and is widely traded in the principal exchange markets;
4. **investment** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
 - (a) an enterprise;
 - (b) shares, stock, and other forms of equity participation in an enterprise;
 - (c) bonds, debentures, other debt instruments, and loans;¹¹⁻⁵
 - (d) futures, options, and other derivatives;
 - (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
 - (f) intellectual property rights;

¹¹⁻⁵ Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

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- (g) licenses, authorizations, permits, and similar rights conferred pursuant to applicable domestic law;^{11-6 11-7} and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges;

5. **investor of a non-Party** means, with respect to a Party, an investor that seeks to make, is making, or has made an investment in the territory of that Party, that is not an investor of either Party;

6. **investor of a Party** means a Party, or a national or an enterprise of a Party, that seeks to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual citizen shall be deemed to be exclusively a citizen of the State of his/her dominant and effective nationality.

¹¹⁻⁶ Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the domestic law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.

¹¹⁻⁷ The term “investment” does not include an order or judgment entered in a judicial or administrative action.

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ANNEX 11-A
CUSTOMARY INTERNATIONAL LAW

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Articles 11.5 (Minimum Standard of Treatment) and 11.7 (Expropriation and Compensation) results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 11.5 (Minimum Standard of Treatment), the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

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ANNEX 11-B
EXPROPRIATION

1. The Parties confirm their shared understanding that Article 11.7.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation.
2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
3. Article 11.7.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
4. The second situation addressed by Article 11.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
 - (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
 - (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
 - (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
 - (iii) the character of the government action.
 - (b) Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment, do not constitute indirect expropriations.