

DRAFT
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January 28, 2004

Chapter Seventeen

Environment

Article 17.1: Levels of Protection

Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and policies, each Party shall ensure that its laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve those laws and policies.

Article 17.2: Enforcement of Environmental Laws

1. (a) A Party shall not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.
 - (b) The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.
2. The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for trade with another Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.
 3. Nothing in this Chapter shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of another Party.

Article 17.3: Procedural Matters

1. Each Party shall ensure that judicial, quasi-judicial, or administrative proceedings in accordance with its domestic law are available under its law to sanction or remedy violations of its environmental laws.
 - (a) Such proceedings shall be fair, open, and equitable, and to this end shall comply with due process of law, and be open to the public except where the administration of justice otherwise requires.

DRAFT
Subject to Legal Review for Accuracy, Clarity, and Consistency
January 28, 2004

- (b) The Parties to such proceedings shall be entitled to support or defend their respective positions and to present information or evidence.
 - (c) Each Party shall provide appropriate and effective remedies or sanctions for a violation of its environmental laws that:
 - (i) take into consideration, as appropriate, the nature and gravity of the violation, any economic benefit the violator has derived from the violation, the economic condition of the violator, and other relevant factors; and
 - (ii) may include criminal and civil remedies and sanctions such as compliance agreements, penalties, fines, injunctions, the suspension of activities, and requirements to take remedial actions or pay for damage to the environment.
2. Each Party shall ensure that interested persons may request the Party's competent authorities to investigate alleged violations of its environmental laws and that the competent authorities give such requests due consideration in accordance with its law.
3. Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to such proceedings for the enforcement of the Party's environmental laws.
4. Each Party shall provide appropriate and effective rights of access to remedies, in accordance with its laws, which may include rights such as:
- (a) to sue another person under that Party's jurisdiction for damages under that Party's domestic laws;
 - (b) to seek sanctions or remedies such as monetary penalties, emergency closures or temporary suspension of activities, or orders to mitigate the consequences of violations of its environmental laws;
 - (c) to request the competent authorities to take appropriate action to enforce that Party's environmental laws in order to protect the environment or to avoid environmental harm; or
 - (d) to seek injunctions where a person suffers, or may suffer, loss, damage or injury as a result of conduct by another person subject to that Party's jurisdiction contrary to that Party's environmental laws, or from conduct that violates a legal duty under that Party's domestic law relating to human health or the environment.

DRAFT
Subject to Legal Review for Accuracy, Clarity, and Consistency
January 28, 2004

5. Each Party shall ensure that tribunals that conduct or review such proceedings are impartial and independent and do not have any substantial interest in the outcome of the matter.
6. For greater certainty, decisions by each Party's judicial, quasi-judicial, or administrative tribunals, or pending decisions, as well as related proceedings, shall not be subject to revision or reopened under the provisions of this Chapter.¹
7. No Party may provide for a right of action under its law against another Party on the ground that the other Party has acted in a manner inconsistent with this Chapter.²

Article 17.4: Measures to Enhance Environmental Performance

1. The Parties recognize that incentives and other flexible and voluntary mechanisms can contribute to the achievement and maintenance of environmental protection, complementing the procedures set forth in Article 17.3. As appropriate and in accordance with its law, each Party shall encourage the development and use of incentives and voluntary mechanisms, which may include:
 - (a) Mechanisms that facilitate voluntary action to protect or enhance the environment, such as partnerships involving businesses, local communities, non-governmental organizations, government agencies, or scientific organizations, or voluntary guidelines for environmental performance;
 - (b) Sharing of information and expertise among authorities, interested parties, and the public concerning: methods for achieving high levels of environmental protection; measures such as voluntary environmental auditing and reporting; methods for improving efficiency of resource use or reducing environmental impacts; environmental monitoring; and collection of baseline data; or
 - (c) Incentives to encourage protection of natural resources and the environment, including market-based mechanisms where appropriate, such as incentives for conserving or restoring the environment, incentives for the exchange of environment-related permits or other instruments that facilitate achievement of environmental goals, or public recognition of facilities or companies that are superior environmental performers.
2. As appropriate and feasible and in accordance with its law, each Party shall encourage:
 - (a) the maintenance, development or improvement of performance goals and indicators used in measuring environmental performance; and

¹ Negotiators' Note: This paragraph will be eliminated if it is determined that it is unnecessary based on the provisions of Chapter Twenty (Dispute Settlement), subject to legal scrub.

² Negotiators' Note: This paragraph will be eliminated if it is redundant with an article in Chapter Twenty (Dispute Settlement), subject to legal scrub.

DRAFT
Subject to Legal Review for Accuracy, Clarity, and Consistency
January 28, 2004

- (b) flexibility in the means by which such goals are achieved and standards are met, including through measures identified in paragraph 1.

Article 17.5: Environmental Affairs Council

1. The Parties hereby establish an Environmental Affairs Council comprising cabinet-level or equivalent representatives of the Parties, or their designees. Each Party shall designate an office within the appropriate ministry that shall serve as a contact point for the purpose of carrying out the work of the Council.

2. The Council shall meet within the first year after the date of entry into force of this Agreement and annually thereafter unless the Parties otherwise agree, to oversee the implementation of and review progress under this Chapter and to consider the status of cooperation activities developed under the United States – Central America Environmental Cooperation Agreement (“ECA”). Unless the Parties otherwise agree, each meeting of the Council shall include a session in which members of the Council have an opportunity to meet with the public to discuss matters relating to the implementation of this Chapter.

3. The Council shall set its own agenda. In setting the agenda, each Party shall seek the views of its public concerning possible issues for discussion.

4. In order to share innovative approaches for addressing environmental issues of interest to the public, the Council shall ensure a process for promoting public participation in its work, including by engaging in a dialogue with the public on those issues.

5. The Council shall seek appropriate opportunities for the public to participate in the development and implementation of cooperative environmental activities, including through the ECA.

6. All decisions of the Council shall be taken by consensus of the Parties, except as provided in Articles 17.8 and 17.10. All Council decisions shall be made public, unless otherwise provided in this Agreement, or unless the Council decides otherwise.

Article 17.6: Opportunities for Public Participation

1. Each Party shall provide for the receipt and consideration of public communications on matters related to this Chapter. Each Party shall promptly make available to the other Parties and to its public all communications it receives and shall review and respond to them in accordance with its domestic procedures.

2. Each Party shall make best efforts to accommodate requests by persons residing or established in its territory to exchange views regarding the Party’s implementation of this Chapter.

DRAFT
Subject to Legal Review for Accuracy, Clarity, and Consistency
January 28, 2004

3. Each Party shall convene a new, or consult an existing, national consultative or advisory committee, comprising members of its public, including representatives of business and environmental organizations, and other persons, to provide views on any issues related to the implementation of this Chapter.

4. The Parties shall take into account public comments and recommendations regarding cooperative environmental activities undertaken pursuant to Article 17.9 and the ECA.

Article 17.7: Submissions on Enforcement Matters

1. Any person of a Party may file a submission asserting that a Party is failing to effectively enforce its environmental laws. Such submissions shall be filed with a secretariat or other appropriate body (“secretariat”), as designated by the Parties.³

2. The secretariat may consider a submission under this Article, if the secretariat finds that the submission:

- (a) is in writing in either English or Spanish;
- (b) clearly identifies the person making the submission;
- (c) provides sufficient information to allow the secretariat to review the submission, including any documentary evidence on which the submission may be based;
- (d) appears to be aimed at promoting enforcement rather than at harassing industry;
- (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party’s response, if any; and
- (f) is filed by a person residing or established in the territory of a Party.

3. Submissions filed by a person residing or established in the territory of the United States asserting that the United States is failing to effectively enforce its environmental laws shall be submitted solely to the Secretariat of the Commission for Environmental Cooperation pursuant to the *North American Agreement on Environmental Cooperation* and may not be submitted pursuant to this Article.⁴

4. Where the secretariat determines that a submission meets the criteria set out in paragraph 2, the secretariat shall determine whether the submission merits requesting a

³ An exchange of letters among the Parties will designate the secretariat and related arrangements.

⁴ Arrangements will be made for the United States to make available in a timely manner to the other Parties all such submissions, U.S. responses, and factual records developed. The Council will be provided an opportunity to consider such documents.

DRAFT
Subject to Legal Review for Accuracy, Clarity, and Consistency
January 28, 2004

response from the Party. In deciding whether to request a response, the secretariat shall be guided by whether:

- (a) the submission is not frivolous and alleges harm to the person making the submission;
- (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Chapter and the ECA, taking into account guidance regarding those goals provided by the Council and the Environmental Cooperation Commission established under the ECA;
- (c) private remedies available under the Party's law have been pursued; and
- (d) the submission is drawn exclusively from mass media reports.

Where the secretariat makes such a request, it shall forward to the Party a copy of the submission and any supporting information provided with the submission.

5. The Party shall advise the secretariat within 45 days or, in exceptional circumstances and on notification to the Secretariat, within 60 days of delivery of the request:

- (a) whether the precise matter at issue is the subject of a pending judicial or administrative proceeding, in which case the secretariat shall proceed no further; and
- (b) of any other information the Party wishes to submit, such as:
 - (i) whether the matter was previously the subject of a judicial or administrative proceeding;
 - (ii) whether private remedies in connection with the matter are available to the person making the submission and whether they have been pursued;
 - (iii) information concerning relevant capacity-building activities under the ECA.

Article 17.8: Factual Records and Related Cooperation

1. If the secretariat considers that the submission, in light of any response provided by the Party, warrants developing a factual record, the secretariat shall so inform the Council and provide its reasons.

2. The secretariat shall prepare a factual record if the Council, by a vote of any Party, instructs it to do so.

DRAFT
Subject to Legal Review for Accuracy, Clarity, and Consistency
January 28, 2004

3. The preparation of a factual record by the secretariat pursuant to this Article shall be without prejudice to any further steps that may be taken with respect to any submission.

4. In preparing a factual record, the secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information:

- (a) that is publicly available;
- (b) submitted by interested persons;
- (c) submitted by national advisory or consultative committees;
- (d) developed by independent experts; or
- (e) developed under the ECA.

5. The secretariat shall submit a draft factual record to the Council. Any Party may provide comments on the accuracy of the draft within 45 days thereafter.

6. The secretariat shall incorporate, as appropriate, any such comments in the final factual record and submit it to the Council.

7. The Council may, by a vote of any Party, make the final factual record publicly available, normally within 60 days following its submission.

8. The Council shall consider the final factual record in light of the objectives of this Chapter and the ECA. The Council shall, as appropriate, provide recommendations to the Environmental Cooperation Commission related to matters addressed in the factual record, including recommendations related to the further development of the Party's domestic mechanisms for monitoring its environmental enforcement.

Article 17.9: Environmental Cooperation

1. The Parties recognize the importance of strengthening capacity to protect the environment and promote sustainable development in concert with strengthening trade and investment relations.

2. The Parties are committed to expanding their cooperative relationship, recognizing that cooperation is important for achieving their shared environmental goals and objectives, including the development and improvement of environmental protection, as outlined in this Chapter.

3. The Parties recognize that strengthening their cooperative relationship on environmental matters can enhance environmental protection in their countries and may encourage increased trade and investment in environmental goods and services.

DRAFT
Subject to Legal Review for Accuracy, Clarity, and Consistency
January 28, 2004

4. The Parties have negotiated an ECA. The Parties have identified certain priority areas of cooperation for environmental activities as reflected in Annex 17.1 and set forth in the ECA. The Parties have also established an Environmental Cooperation Commission that is responsible for developing, and periodically revising and updating, a program of work that reflects national priorities for cooperative programs, projects, and activities.

5. The Parties also recognize the ongoing importance of current and future environment cooperation activities that may be undertaken in other fora.

Article 17.10: Collaborative Environmental Consultations

1. A Party may request consultations with another Party regarding any matter arising under this Chapter by delivering a written request to the contact point that the other Party has designated under Article 17.5.1.

2. The consultations shall begin promptly after delivery of the request. The request shall contain information that is specific and sufficient to enable the Party receiving the request to respond.

3. The consulting Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter, taking into account opportunities for cooperation relative to the matter and information exchanged, and may seek advice or assistance from any person or body they deem appropriate in order to fully examine the matter at issue.

4. If the consulting Parties fail to resolve a matter pursuant to paragraph 3, a consulting Party may request that the Council be convened to consider the matter by delivering a written request to the appropriate contact point.⁵

5. The Council shall promptly convene and shall endeavor to resolve the matter, including, where appropriate, by consulting outside experts and having recourse to such procedures as good offices, conciliation, or mediation.

6. If the matter concerns whether a Party is conforming to its obligations under Article 17.2.1(a), and the consulting Parties have failed to resolve the matter within 60 days of a request under paragraph 1, the complaining Party may request consultations under Article 20.4 (Consultations) or a meeting of the Commission under Article 20.5 (Referral to Commission – Good Offices, Conciliation, and Mediation) and, as provided in Chapter Twenty (Dispute Settlement), thereafter have recourse to the other provisions of that Chapter. The Council may, as appropriate, provide information to the Commission regarding any consultations held on the matter.

⁵ For purposes of paragraphs 4, 5, and 6, the Council shall consist of cabinet-level representatives of the consulting Parties or their designees. For these purposes, “consensus of the Parties,” as that term is used in Article 17.5.6, means consensus of the consulting Parties.

DRAFT
Subject to Legal Review for Accuracy, Clarity, and Consistency
January 28, 2004

7. No Party may have recourse to dispute settlement under this Agreement for any matter arising under any provision of this Chapter other than Article 17.2.1(a).
8. No Party may have recourse to dispute settlement under this Agreement for a matter arising under Article 17.2.1(a) without first pursuing resolution of the matter in accordance with this Article.
9. In cases where the consulting Parties agree that a matter arising under this Chapter can be more appropriately addressed under another agreement to which the consulting Parties are party, they shall refer the matter for appropriate action in accordance with that agreement.

Article 17.11: Environmental Roster⁶

1. The Parties shall establish within six months after the date of entry into force of this Agreement and maintain a roster of [] individuals who are willing and able to serve as panelists in disputes arising under Article 17.2.1(a). Unless the Parties otherwise agree, [] members of the roster shall be nationals of each Party, and [] members of the roster shall be selected from among individuals who are non-Party nationals. Environment roster members shall be appointed by consensus of the Parties and may be reappointed. Once established, a roster shall remain in effect for a minimum of three years, and shall remain in effect thereafter until the Parties constitute a new roster.
2. Environment roster members shall:
 - (a) have expertise or experience in environmental law or its enforcement, international trade, or the resolution of disputes arising under international trade or environment agreements;
 - (b) be chosen strictly on the basis of objectivity, reliability and sound judgment;
 - (c) be independent of, and not affiliated with or take instructions from, any Party; and
 - (d) comply with a code of conduct to be established by the Free Trade Commission.
3. Where a Party claims that a dispute arises under Article 17.2.1(a), Article 20.9 (Panel Selection) shall apply, except that the panel shall be composed entirely of panelists meeting the qualifications in paragraph 2.

⁶ Negotiators' Note: The language of this Article should conform to the language for rosters in Chapter Twenty (Dispute Settlement).

DRAFT
Subject to Legal Review for Accuracy, Clarity, and Consistency
January 28, 2004

Article 17.12: Relationship to Environmental Agreements

1. The Parties recognize that multilateral environmental agreements to which they are all parties play an important role in protecting the environment globally and domestically and that implementation of these agreements at the national level is critical to achieving the environmental objectives of these agreements. The Parties further recognize that this Chapter and the ECA can contribute to realizing the goals of such agreements. Having regard to this, the Parties shall continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements to which they are all parties and international trade agreements to which they are all parties.

2. In particular, the Parties may consult regularly, as appropriate, with respect to ongoing negotiations in the WTO regarding multilateral environmental agreements.

Article 17.13: Definitions

1. For purposes of this Chapter:

environmental law means any statutes or regulations of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through:

- (a) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants;
- (b) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto; or
- (c) the protection or conservation of wild flora and fauna, including endangered species, their habitat, and specially protected natural areas,

in areas with respect to which a Party exercises sovereignty, sovereign rights, or jurisdiction, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.

For greater certainty, **environmental law** does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.

For purposes of the definition of “environmental law,” the primary purpose of a particular statutory or regulatory provision shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part.

For Costa Rica, **statute or regulation** means laws of Congress or regulations promulgated pursuant to acts of Congress that are enforceable by the executive branch.

DRAFT
Subject to Legal Review for Accuracy, Clarity, and Consistency
January 28, 2004

For El Salvador, **statute or regulation** means laws of Congress or regulations promulgated pursuant to acts of Congress that are enforceable by the executive branch.

For Guatemala, **statute or regulation** means laws of Congress or regulations promulgated pursuant to acts of Congress that are enforceable by the executive branch.

For Honduras, **statute or regulation** means laws of Congress or regulations promulgated pursuant to acts of Congress that are enforceable by the executive branch.

For Nicaragua, **statute or regulation** means laws of Congress or regulations promulgated pursuant to acts of Congress that are enforceable by the executive branch.

For the United States, **statute or regulation** means an act of Congress or regulation promulgated pursuant to an act of Congress that is enforceable by action of the federal government.

2. For purposes of Article 17.7.5, **judicial or administrative proceeding** means:
- (a) a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order; and
 - (b) an international dispute resolution proceeding to which the Party is a party.

DRAFT
Subject to Legal Review for Accuracy, Clarity, and Consistency
January 28, 2004

Annex 17.1

Environment Cooperation

1. The Parties recognize the importance of protecting, improving and conserving the environment, including natural resources, in their countries. The Parties underscore the importance of promoting all possible forms of cooperation and reaffirm that cooperation on environmental matters provides enhanced opportunities to advance common commitments to achieve sustainable development for the well being of present and future generations.

2. Recognizing the benefits to be derived from a framework to facilitate effective cooperation, the Parties negotiated the United States – Central America Environmental Cooperation Agreement (ECA). The Parties expect that the ECA will enhance their cooperative relationship, noting the existence of differences in the Parties' respective natural endowments, climatic and geographical conditions, and economic, technological and infrastructural capabilities.

3. As set forth in Article V of the ECA, the Parties identified the following priorities for cooperative activities:

- (a) strengthening each Party's environmental management systems, including reinforcing institutional and legal frameworks and the capacity to develop, implement, administer and enforce environmental laws, regulations, standards and policies;
- (b) the development and promotion of incentives and other flexible and voluntary mechanisms in order to encourage environmental protection, including the development of market-based initiatives and economic incentives for environmental management;
- (c) the fostering of partnerships to address current or emerging conservation and management issues, including personnel training and capacity building;
- (d) the conservation and management of shared, migratory, and endangered species in international commercial trade and management of marine parks and other protected areas;
- (e) the exchange of information on the domestic implementation of multilateral environmental agreements which all the Parties have ratified;
- (f) the promotion of best practices leading to sustainable management of the environment;

DRAFT
Subject to Legal Review for Accuracy, Clarity, and Consistency
January 28, 2004

- (g) facilitating technology development and transfer and training to promote the use, proper operation and maintenance of clean production technologies;
 - (h) the development and promotion of environmentally beneficial goods and services; building capacity to promote public participation in the process of environmental decision-making;
 - (j) the exchange of information and experiences among Parties wishing to perform environmental reviews, including reviews of trade agreements, at the national level; and
 - (k) any other environmental cooperation areas that may be agreed by the Parties.
4. Funding mechanisms for environmental cooperation activities under the ECA are addressed in Article VIII of the ECA.