

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 6 January 2006

Chapter Eighteen

Environment

Objectives

Recognizing that each Party has sovereign rights and responsibilities with respect to its natural resources, the objectives of this Chapter are to contribute to the Parties' efforts to ensure that trade and environmental policies are mutually supportive, to promote the optimal use of resources in accordance with the objective of sustainable development, and to strive to strengthen the links between the Parties' trade and environmental policies and practices, which may take place through environmental cooperation and collaboration.

Article 18.1 Levels of Protection

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

Article 18.2 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 their respective 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.

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 6 January 2006

Article 18.3 Procedural Matters

1. Each Party shall ensure that interested persons may request the Party's competent authorities to investigate alleged violations of its environmental laws, and that each Party's competent authorities shall give such requests due consideration in accordance with its law.
2. Each Party shall ensure that judicial, quasi-judicial, or administrative proceedings are available under its law to provide sanctions or remedies for violations of its environmental laws.
 - (a) Such proceedings shall be fair, equitable, and transparent 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.
 - (b) Tribunals that conduct or review such proceedings shall be impartial and independent and shall not have any substantial interest in the outcome of the matter.
3. Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter shall have appropriate access to such proceedings.
4. Each Party shall provide persons with a legally recognized interest under its law in a particular matter effective access to remedies for violations of that Party's environmental laws or for violations of a legal duty under that Party's law relating to the environment or environmental conditions affecting human health which may include rights such as:
 - (a) to sue another person under that Party's jurisdiction and laws for damages;
 - (b) to seek injunctive relief 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;
 - (c) to seek sanctions or remedies such as monetary penalties, emergency closures, temporary suspension of activities, or orders to mitigate the consequences of such violations; or
 - (d) to request a tribunal to order that Party's competent authorities to take appropriate action to enforce its environmental laws in order to protect the environment or to avoid environmental harm.
5. Each Party shall provide appropriate and effective sanctions or remedies for violations of that Party's environmental laws that:
 - (a) 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

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 6 January 2006

- (b) may include administrative, civil and criminal remedies and sanctions, such as compliance agreements, penalties, fines, imprisonment, injunctions, closure of facilities, remedial actions, and the cost of containing or cleaning up pollution.

Article 18.4 Mechanisms to Enhance Environmental Performance

1. The Parties recognize that flexible, voluntary and incentive-based mechanisms can contribute to the achievement and maintenance of environmental protection, complementing the procedures set out in Article 18.3, as appropriate, and in accordance with its law and policy, each Party shall encourage the development and use of such mechanisms, which may include:

- (a) mechanisms that facilitate voluntary action to protect or enhance the environment, such as:
 - (i) partnerships involving businesses, local communities, non-governmental organizations, government agencies, or scientific organizations;
 - (ii) voluntary guidelines for environmental performance; or
 - (iii) voluntary sharing of information and expertise among authorities, interested parties, and the public concerning: methods for achieving high levels of environmental protection, voluntary environmental auditing and reporting, ways to use resources more efficiently or reduce environmental impacts, environmental monitoring, and collection of baseline data; or
- (b) incentives, including market-based incentives where appropriate, to encourage conservation, restoration, sustainable use and protection of natural resources and the environment, such as public recognition of facilities or enterprises that are superior environmental performers, or programs for exchanging permits or other instruments to help achieve environmental goals.

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 standards used in measuring environmental performance; and
- (b) flexible means to achieve such goals and meet such standards.

Article 18.5 Environmental Affairs Council

1. The Parties hereby establish an Environmental Affairs Council. Each Party shall designate a senior level official with environmental responsibilities to serve on the Council and an office in its appropriate ministry or government entity that shall serve as a contact point for carrying out the work of the Council.

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 6 January 2006

2. The Council shall:
 - (a) consider and discuss progress in the implementation of this Chapter;
 - (b) provide periodical reports to the Free Trade Commission regarding the implementation of this Chapter;
 - (c) establish modalities and procedures for public participation in its works, including, but not limited to, the following:
 - (i) establish mechanisms to exchange information with the public and to discuss matters related to the implementation of this Chapter;
 - (ii) receive and consider input in setting the Council agenda for its meetings; and
 - (iii) receive public views and comments on the issues the public considers relevant and request public views and comments in the issues the Council considers relevant;
 - (d) consider and discuss progress in the implementation of the Environmental Cooperation Agreement, including its Work Program and cooperative activities, and submit to the Parties and to the Environmental Cooperation Commission its comments and recommendations, including comments and recommendations received from the public;
 - (e) in accordance with the procedures set out in Articles 18.9.4 and 18.9.5, strive to resolve any controversies that may arise under this Chapter which could not be settled through environmental consultations; and
 - (f) perform any other function that the Free Trade Commission may assign.
3. 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.
4. All decisions of the Council shall be taken by consensus and shall be made public, unless the Council decides otherwise, or unless otherwise provided in this Agreement.
5. Unless the Parties otherwise agree each meeting of the Council shall include a session in which members have an opportunity to meet with the public to discuss matters related to the implementation of this Chapter.

Article 18.6 Opportunities for Public Participation

1. Each Party shall promote public awareness of its environmental laws by ensuring that information is available to the public regarding its environmental laws, enforcement, and compliance procedures, including procedures for interested persons to request a Party's competent authorities to investigate alleged violations of its environmental laws.

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 6 January 2006

2. Each Party shall seek to accommodate requests from persons of that Party for information or to exchange views regarding the Party's implementation of this Chapter.
3. Each Party shall provide for the receipt of written submissions from persons of that Party that concern matters related to the implementation of specific provisions of this Chapter. A Party shall respond in writing, except for good cause, to each such submission that states that it is made pursuant to this Article. Each Party shall make such submissions and responses available to the public in a timely and easily accessible manner.
4. Each Party shall seek to accommodate requests from persons of another Party for information or to exchange views regarding the Party's implementation of this Chapter.
5. Each Party shall convene a new, or consult an existing, national consultative or advisory committee, comprising persons of the Party with relevant experience, including experience in business and environmental matters. Each Party shall solicit the committee's views on matters related to the implementation of this Chapter including, as appropriate, on issues raised in submissions the Party receives pursuant to this Article. The committee shall meet at least semi-annually for this purpose.
6. Each Party shall solicit public views on matters related to the implementation of this Chapter including, as appropriate, on issues raised in submissions it receives and shall make such views it receives in writing available to the public in a timely and easily accessible manner
7. Each time it meets, the Council shall consider any submissions the Parties have received since its last meeting, together with any responses from the Parties and views expressed by the Parties' consultative or advisory committees. After each meeting, the Council shall provide to the public a written summary of its discussions on these matters. The Council also shall provide recommendations, as appropriate, to the Environmental Cooperation Commission on matters raised in the submissions.
8. The Council shall establish a roster of independent experts with relevant experience, such as sustainable development and resources management, with whom the Council may consult when considering submissions. If the Council consults an expert, the Council shall ensure that the submitter and the public have an opportunity to provide information to the expert.

The Parties shall further develop provisions to provide for the receipt and consideration of public submissions.

Article 18.7 Environmental Cooperation

1. The Parties recognize the importance of strengthening their capacity to protect the environment and of promoting sustainable development in concert with strengthening their trade and investment relations.
2. The Parties are committed to expanding their cooperative relationship on environmental matters, recognizing it will help them achieve their shared environmental

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 6 January 2006

goals and objectives, including the development and improvement of environmental protection, practices and technologies.

3. The Parties are committed to undertaking cooperative environmental activities pursuant to the Environmental Cooperation Agreement Between the United States and Peru (“ECA”), including activities related to implementation of this Chapter. Activities that the Parties undertake pursuant to the ECA will be coordinated and reviewed by the Environmental Cooperation Commission established under the ECA. The Parties also acknowledge the importance of environmental cooperation activities in other fora.

4. Each Party shall take into account public comments and recommendations it receives regarding cooperative environmental activities undertaken pursuant to this Chapter and the ECA.

5. The Parties shall, as appropriate, share information on their experiences in assessing and taking into account environmental effects of trade agreements and policies.

Article 18.8 Biological Diversity

1. The Parties recognize the importance of the conservation and sustainable use of biological diversity and their role in achieving sustainable development.

2. Accordingly, the Parties remain committed to promoting and encouraging the conservation and sustainable use of biological diversity and all its components and levels, including plants, animals and habitat, and reiterate their commitments in Article 18.1 of this Chapter.

3. The Parties recognize the importance of respecting and preserving traditional knowledge and practices of indigenous and other communities that contribute to the conservation and sustainable use of biological diversity.

4. The Parties also recognize the importance of public participation and consultations, as provided by domestic law, on matters concerning the conservation and sustainable use of biological diversity. The Parties may make information publicly available about programs and activities, including cooperative programs, it undertakes related to the conservation and sustainable use of biological diversity.

5. To this end, the Parties will enhance their cooperative efforts on these matters, including through the ECA.

Article 18.9 Environmental Consultations

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

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.

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 6 January 2006

3. The consulting Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter, 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 the 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 contact point of each of the other consulting Parties.¹

5. The Council shall promptly convene and shall endeavor to resolve the matter expeditiously, including, where appropriate, by consulting governmental or 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 18.2.1(a) of this Chapter, 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 21.4 (Consultations) or a meeting of the Commission under Article 21.5 (Intervention of the Commission) and, as provided in Chapter Twenty-One (Dispute Settlement), thereafter have recourse to the other provisions of that Chapter. The Council may inform the Commission of how the Council has addressed the matter through consultations.

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 18.2.1(a).

8. No Party may have recourse to dispute settlement under this Agreement for a matter arising under Article 18.2.1(a) without first seeking to resolve the matter in accordance with this Article.

9. In cases where the consulting Parties agree that a matter arising under this Chapter would 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 18.10 Relationship to Environmental Agreements

1. The Parties recognize that multilateral agreements to which they are all party, play an important role globally and domestically in protecting the environment and that their respective implementation of these agreements is critical to achieving the environmental objectives thereof. The Parties further recognize that this Chapter and the ECA can contribute to realizing the goals of those agreements. Accordingly, the Parties shall continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements to which they are all party and trade agreements to which they are all party.

2. To this end, the Parties shall consult, as appropriate, with respect to negotiations on

¹ For purposes of paragraphs 4, 5, and 6, the Council shall consist of senior level officials with environmental responsibilities of the consulting Parties or their designees.

Subject to Legal Review for Accuracy, Clarity, and Consistency
Subject to Authentication of English and Spanish Versions
Draft 6 January 2006

environmental issues of mutual interest.

3. Each Party recognizes the importance to it of the multilateral environmental agreements to which it is a party.

Article 18.11 Definitions

For the purposes of this Chapter:

environmental law means any statute or regulation 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 or fauna, including endangered species, their habitat, and specially protected natural areas,²

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 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.

For Perú, **statute or regulation** means laws of Congress or Decrees or Resolutions promulgated by the central level of government to implement laws of Congress, which are enforceable by the central level of government.

For Peru, **indigenous and other communities** means those communities which are defined in Article 1 of Andean Decision 391.

² The Parties recognize that such protection or conservation may include the protection or conservation of biological diversity.