

## 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 strive to 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: Environmental Agreements

Each Party shall adopt, maintain, and implement laws, regulations, and all other measures to fulfill its obligations under the multilateral environmental agreements listed in Annex 17.2 (“covered agreements”).<sup>1 2</sup>

#### Article 17.3: Enforcement of Environmental Laws

1. (a) A Party shall not fail to effectively enforce its environmental laws, and its laws, regulations, and other measures to fulfill its obligations under the covered agreements, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties, after the date of entry into force of this Agreement.
- (b) (i) The Parties recognize that each Party retains the right to exercise prosecutorial discretion and to make decisions regarding the allocation of environmental enforcement resources with respect to other environmental laws determined to have higher priorities. Accordingly, the Parties understand that with respect to the enforcement of environmental laws and all laws, regulations, and other measures to fulfill a Party’s obligations under the covered agreements, a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable, articulable, *bona fide* exercise of such discretion, or results from a reasonable, articulable, *bona fide* decision regarding the allocation of such resources.

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<sup>1</sup> To establish a violation of Article 17.2 a Party must demonstrate that the other Party has failed to adopt, maintain, or implement laws, regulations, or other measures to fulfill an obligation under a covered agreement in a manner affecting trade or investment between the Parties.

<sup>2</sup> For purposes of Article 17.2: (i) “covered agreements” shall encompass those existing or future protocols, amendments, annexes, and adjustments under the relevant agreement to which both Parties are party; and (ii) a Party’s “obligations” shall be interpreted to reflect, *inter alia*, existing and future reservations, exemptions, and exceptions applicable to it under the relevant agreement.

- (ii) The Parties recognize the importance of the covered agreements. Accordingly, where a course of action or inaction relates to laws, regulations, and other measures to fulfill its obligations under covered agreements, that shall be relevant to a determination under clause (i) regarding whether an allocation of resources is reasonable and *bona fide*.

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, neither Party shall 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 in a manner affecting trade or investment between the Parties.

3. Paragraph 2 shall not apply where a Party waives or derogates from an environmental law pursuant to a provision in its environmental law providing for waivers or derogations, provided that the waiver or derogation is not inconsistent with the Party's obligations under a covered agreement.

4. Nothing in this Chapter shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of the other Party.

#### **Article 17.4: Procedural Matters**

1. Each Party shall ensure that judicial, quasi-judicial, or administrative proceedings, in accordance with its law, are available to sanction or remedy 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) The parties to such proceedings shall be entitled to support or defend their respective positions, including by presenting 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, suspension of activities, and requirements to take remedial action 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 each Party's competent authorities shall 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 proceedings referred to in paragraph 1.
4. Each Party shall provide persons with a legally recognized interest under its law in a particular matter appropriate and effective access to sanctions or remedies, in accordance with its law, for violations of the Party's environmental laws, or for violations of a legal duty under the Party's law relating to human health or the environment, which may include rights such as:
  - (a) to sue another person under that Party's jurisdiction for damages under that Party's 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 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; 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.
5. Each Party shall ensure that tribunals that conduct or review proceedings referred to in paragraph 1 are impartial and independent and do not have any substantial interest in the outcome of the matter.
6. For greater certainty, decisions or pending decisions by each Party's tribunals, as well as related proceedings, shall not be subject to revision or be reopened under this Chapter.

#### **Article 17.5: Voluntary Mechanisms 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 out in Article 17.4. As appropriate and in accordance with its law, 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) 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, 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 indicators used in measuring environmental performance; and
  - (b) flexibility in the means to achieve such goals and meet such standards, including through mechanisms identified in paragraph 1.

#### **Article 17.6: 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 in its appropriate ministry that shall serve as a contact point for 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 Agreement Between the Government of the United States of America and the Government of the Republic of Panama on Environmental Cooperation (“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 views from 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 mutual agreement, except as provided in Article 17.9. All decisions of the Council shall be made public, unless otherwise provided in this Agreement, or unless the Council otherwise decides.

#### **Article 17.7: 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 Party 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 of that Party to exchange views with that Party regarding that Party's implementation of this Chapter.

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, to provide views on matters 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 17.10 and the ECA.

#### **Article 17.8: 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") that the Parties designate.<sup>3</sup>

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

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<sup>3</sup> The Parties shall designate the secretariat and provide for related arrangements through an exchange of letters or other form of agreement.

(f) is filed by a person of a Party.

3. The Parties recognize that the *North American Agreement on Environmental Cooperation* (“NAAEC”) provides that a person or organization residing or established in the territory of the United States may file a submission under that agreement with the Secretariat of the NAAEC Commission for Environmental Cooperation asserting that the United States is failing to effectively enforce its environmental laws.<sup>4</sup> In light of the availability of that procedure, a person of the United States who considers that the United States is failing to effectively enforce its environmental laws may not file a submission under this Article. For greater certainty, a person of Panama who considers that the United States is failing to effectively enforce its environmental laws may file a submission with the secretariat.

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 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:

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<sup>4</sup> Arrangements will be made for the United States to make available in a timely manner to Panama all such submissions, U.S. written responses, and factual records developed in connection with those submissions. Panama may provide comments to the United States about the submissions and at the request of either Party the Council shall discuss such documents.

- (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; or
- (iii) information concerning relevant capacity-building activities under the ECA.

### **Article 17.9: 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 either Party, instructs it to do so.
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. Each 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 either 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 mechanisms for monitoring its environmental enforcement.

#### **Article 17.10: Environmental Cooperation**

1. The Parties recognize the importance of strengthening capacity to protect the environment and to 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 set out in this Chapter.
3. The Parties recognize that strengthening their cooperative relationship on environmental matters can enhance environmental protection in their territories and may encourage increased trade and investment in environmental goods and services.
4. The Parties have concluded an ECA. The Parties have identified certain environmental cooperation activities that may be included in a work program, as reflected in Annex 17.10 and as set out in the ECA. The Parties also have established an Environmental Cooperation Commission ("ECC") through the ECA that is responsible for developing a work program that reflects each Party's priorities for cooperative environmental programs, projects, and activities.
5. The Parties also recognize the continuing importance of current and future environmental cooperation activities in other fora.

#### **Article 17.11: Collaborative Environmental Consultations and Panel Procedure**

1. A Party may request consultations with the other Party regarding any matter arising under this Chapter by delivering a written request to a contact point that the other Party has designated 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.
3. The Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter, taking into account opportunities for cooperation relating to the matter and information exchanged by the Parties, and may seek advice or assistance from any person or body they deem appropriate in order to fully examine the matter at issue. If the matter arises under Article 17.2, or under both that Article and another provision of this Chapter, and involves an issue related to a Party's obligations under a covered agreement, the Parties shall endeavor to address the matter through a mutually agreeable consultative or other procedure, if any, under the relevant agreement, unless the procedure could result in unreasonable delay.<sup>5</sup>

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<sup>5</sup> The Parties understand that for purposes of paragraph 3, where a covered agreement requires a decision to be taken by consensus, such a requirement could create an unreasonable delay.



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

5. (a) 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.
- (b) When the matter arises under Article 17.2, or under both that Article and another provision of this Chapter, and involves an issue relating to a Party's obligations under a covered agreement, the Council shall:
- (i) through a mechanism that the Council establishes, consult fully with any entity authorized to address the issue under the relevant agreement; and
  - (ii) defer to interpretative guidance on the issue under the agreement to the extent appropriate in light of its nature and status, including whether the Party's relevant laws, regulations, and other measures are in accordance with its obligations under the agreement.

6. If the 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 (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.

7. Neither Party may have recourse to dispute settlement under this Agreement for a matter arising under this Chapter without first pursuing resolution of the matter in accordance with paragraphs 1 through 5.

8. In a dispute arising under Article 17.2, or under both that Article and another provision of this Chapter, that involves an issue relating to a Party's obligations under a covered agreement, a panel convened under Chapter Twenty (Dispute Settlement) shall in making its findings and determination under Articles 20.12 (Initial Report) and 20.13 (Final Report):<sup>6</sup>

- (a) consult fully, through a mechanism that the Council establishes, concerning that issue with any entity authorized to address the issue under the relevant environmental agreement;
- (b) defer to any interpretative guidance on the issue under the agreement to the extent appropriate in light of its nature and status, including whether the Party's relevant

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<sup>6</sup> For greater certainty, the consultations and guidance in this paragraph are without prejudice to a panel's ability to seek information and technical guidance from any person or body consistent with Article 20.11 (Role of Experts).

laws, regulations, and other measures are in accordance with its obligations under the agreement; and

- (c) where the agreement admits of more than one permissible interpretation relevant to an issue in the dispute and the Party complained against relies on one such interpretation, accept that interpretation for purposes of its findings and determination under Articles 20.12 (Initial Report) and 20.13 (Final Report).<sup>7</sup>

#### **Article 17.12: Environmental Roster**

1. The Parties shall establish within six months after the date of entry into force of this Agreement and maintain a roster of up to ten individuals who are willing and able to serve as panelists in disputes arising under this Chapter. Unless the Parties otherwise agree, the roster shall include up to three individuals who are nationals of each Party and up to four individuals who are not nationals of either Party. Environment roster members shall be appointed by mutual agreement 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. The Parties may appoint a replacement where a roster member is no longer available to serve.

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 environmental 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, either Party; and
- (d) comply with a code of conduct to be established by the Commission.

3. Where a Party claims that a dispute arises under this Chapter, Article 20.9 (Panel Selection) shall apply, except that the panel shall be composed entirely of panelists meeting the qualifications in paragraph 2.

#### **Article 17.13: Relationship to Environmental Agreements**

1. The Parties recognize that multilateral environmental agreements to which they are both party play an important role in protecting the environment globally and domestically and that their respective implementation of these agreements 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 those agreements. Accordingly, the Parties shall continue to

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<sup>7</sup> The guidance in subparagraph (c) shall prevail over any other interpretative guidance.

seek means to enhance the mutual supportiveness of multilateral environmental agreements to which they are both party and trade agreements to which they are both party.

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

3. In the event of any inconsistency between a Party's obligations under this Agreement and a covered agreement, the Party shall seek to balance its obligations under both agreements, but this shall not preclude the Party from taking a particular measure to comply with its obligations under the covered agreement, provided that the primary purpose of the measure is not to impose a disguised restriction on trade.<sup>8</sup>

#### **Article 17.14: Definitions**

1. For 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 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;

**laws, regulations, and all other measures to fulfill its obligations** under a covered agreement means a Party's laws, regulations, and other measures at the central level of government; and

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<sup>8</sup> For greater certainty, paragraph 3 is without prejudice to multilateral environmental agreements other than covered agreements.

**statute or regulation** means:

- (a) for Panama, a law promulgated by its legislature or a regulation promulgated pursuant to such a law that is enforceable by the executive branch or regulations issued by the Panama Canal Authority.
- (b) for the United States, 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.

## Annex 17.2

### Covered Agreements

1. For purposes of this Chapter, **covered agreement** means a multilateral environmental agreement listed below to which both Parties are party:
  - (a) the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, done at Washington, March 3, 1973, as amended;
  - (b) the *Montreal Protocol on Substances that Deplete the Ozone Layer*, done at Montreal, September 16, 1987, as adjusted and amended;
  - (c) the *Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973*, done at London, February 17, 1978, as amended;
  - (d) the *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, done at Ramsar, February 2, 1971, as amended;
  - (e) the *Convention on the Conservation of Antarctic Marine Living Resources*, done at Canberra, May 20, 1980;
  - (f) the *International Convention for the Regulation of Whaling*, done at Washington, December 2, 1946; and
  - (g) the *Convention for the Establishment of an Inter-American Tropical Tuna Commission*, done at Washington, May 31, 1949.
2. The Parties may agree in writing to modify the list in paragraph 1 to include any other multilateral environmental agreement.

## **Annex 17.10**

### **Environmental Cooperation**

1. The Parties recognize the importance of protecting, improving, and conserving the environment, including natural resources, in their territories. 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 that would be derived from a framework to facilitate effective cooperation, the Parties concluded the 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 infrastructure capabilities.
3. Article IV of the ECA provides that the work program developed by the ECC shall reflect national priorities and may include environmental cooperation activities related to:
  - (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) developing and promoting 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) fostering partnerships to address current or emerging conservation and management issues, including personnel training and capacity building;
  - (d) conserving and managing species that are shared, migratory, endangered, or subject to international commercial trade, as well as marine and terrestrial parks and other protected areas;
  - (e) exchanging information on domestic implementation of multilateral environmental agreements to which both Parties are party;
  - (f) promoting best practices of environmental management leading to sustainable management;
  - (g) facilitating technology development and transfer and training to promote the use, proper operation, and maintenance of clean production technologies;
  - (h) developing and promoting environmentally beneficial goods and services;

- (i) building capacity to promote public participation in the process of environmental decision-making;
- (j) exchanging information and experiences between the Parties, including environmental reviews of trade agreements, at the national level; and
- (k) any other areas for environmental cooperation on which the Parties may agree.

4. Article VI of the ECA addresses funding mechanisms for environmental cooperation activities undertaken pursuant to the ECA.