

CHAPTER TWENTY ENVIRONMENT

ARTICLE 20.1: LEVELS OF PROTECTION

Recognizing the right of each Party to establish its own levels of environmental protection and its own environmental development priorities, and to adopt or modify accordingly its environmental laws and policies, each Party shall strive to 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, including through such environmental laws and policies.

ARTICLE 20.2: ENVIRONMENTAL AGREEMENTS

A Party shall adopt, maintain, and implement laws, regulations, and all other measures to fulfill its obligations under the multilateral environmental agreements listed in Annex 20-A (“covered agreements”).^{1 2}

ARTICLE 20.3: APPLICATION AND ENFORCEMENT OF ENVIRONMENTAL LAWS

1. (a) Neither Party shall 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 this Agreement enters into force.
- (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.

¹ To establish a violation of Article 20.2 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.

² For purposes of Article 20.2: (1) “covered agreements” shall encompass those existing or future protocols, amendments, annexes, and adjustments under the relevant agreement to which both Parties are party; and (2) 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 its 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. For greater certainty, 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 20.4: 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 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 and that persons with a recognized interest under its law in a particular matter have appropriate access to such proceedings.

(a) Each Party shall ensure in accordance with its law that such proceedings:

(i) are fair, equitable, and transparent and, to this end, comply with due process of law; and

(ii) are open to the public, except where the administration of justice otherwise requires.

(b) 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.

3. Each Party shall provide persons with a recognized interest under its law in a particular matter effective access to sanctions or remedies for violations of its environmental laws, or for

violations of a legal duty under its law relating to human health or the environment, which may include rights such as to:

- (a) sue another person subject to its jurisdiction for damages;
- (b) seek injunctive relief where a person suffers, or may suffer, loss, damage, or injury as a result of conduct by another person subject to its jurisdiction;
- (c) 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) request, or where applicable 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.

4. Each Party shall provide appropriate and effective sanctions or remedies for violations of its 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
- (b) may include administrative, civil, and criminal sanctions and remedies, such as compliance agreements, penalties, fines, imprisonment, injunctions, closure of facilities, and requirements to take remedial action or pay for damage to the environment including the cost of containing or cleaning up pollution.

ARTICLE 20.5: MECHANISMS TO ENHANCE ENVIRONMENTAL PERFORMANCE

1. The Parties recognize that flexible, voluntary, and incentive-based mechanisms can contribute to the achievement and maintenance of high levels of environmental protection, complementing the procedures set out in Article 20.4. 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) 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, and protection of natural resources and the environment, such as public recognition of facilities or enterprises that are superior environmental performers, or programs for trading 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 those goals and meet those standards, including through mechanisms identified in paragraph 1.

ARTICLE 20.6: INSTITUTIONAL ARRANGEMENTS

1. The Parties hereby establish an Environmental Affairs Council. The Council shall comprise appropriate senior officials from each Party, including officials with environmental responsibilities.
2. The Council shall meet within one year after the date this Agreement enters into force, and thereafter as necessary, to oversee the implementation of this Chapter. 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 related to the implementation of this Chapter, including views received from the national advisory committees referred to in Article 20.7.3. The Council shall make public a written summary of discussions held during the public session.
3. The Council shall promote public participation in its work, including by seeking advice from the public in developing agendas for Council meetings and by engaging in a dialogue with the public on environmental issues of interest to the public.
4. The Council shall seek appropriate opportunities for the public to participate in the development and implementation of cooperative environmental activities, including through the environmental cooperation mechanism established by the Parties.
5. Formal decisions of the Council shall be made public, unless the Council decides otherwise.

ARTICLE 20.7: 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 and environmental law

enforcement and compliance procedures, including procedures for its interested persons to request the Party's competent authorities to investigate alleged violations of its environmental laws.

2. Recognizing that opportunities for public participation can facilitate the sharing of best practices and the development of innovative approaches to issues of interest to the public, each Party shall:

- (a) seek to accommodate requests from persons of either Party for information or to exchange views regarding either Party's implementation of this Chapter; and
- (b) provide for the receipt of written submissions from persons of either Party that concern matters related to the implementation of specific provisions of this Chapter. Each Party shall respond to these submissions in accordance with domestic procedures and make the submissions and its responses easily accessible to the public in a timely manner.

3. Each Party shall convene a new, or consult an existing, national advisory committee, comprising persons of the Party with relevant experience, which may include experience in business or environmental matters, to solicit its views on matters related to the implementation of this Chapter. Each time it meets, the Council shall consider views that each Party has received from its national advisory committee on matters related to the implementation of this Chapter.

4. The Parties recognize the importance of public participation in the implementation of this Chapter and that effectively implementing this Article will assist the Parties in implementing the other provisions of this Chapter. Accordingly, the Council shall review the implementation of this Article and prepare and submit to the Joint Committee a written report on the results of that review no later than 180 days after the first anniversary date of entry into force of this Agreement, and thereafter on the request of either Party. The Council shall make each such report public at the time the Council submits the report to the Joint Committee.

ARTICLE 20.8: 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 in bilateral, regional, and multilateral fora on environmental matters, recognizing that such cooperation will help them achieve their shared environmental 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 *Agreement between the Government of the United States of America and the Government of the Republic of Korea on Environmental Cooperation (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 implementation body established under the ECA. The Parties also acknowledge the importance of cooperative environmental activities in other fora.

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

5. Each Party shall, as appropriate, share information with the other Party and the public regarding its experiences in assessing and addressing the positive and negative environmental effects of trade agreements and policies.

ARTICLE 20.9: 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 the contact point that the other Party has designated for purposes of this Article. The request shall contain information that is specific and sufficient to enable the Party receiving the request to respond. Unless the Parties otherwise agree, consultations shall commence promptly after a Party delivers a request for consultations to the other Party's contact point.

2. The 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. If the matter arises under Article 20.2 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.³

3. If the consultations fail to resolve the matter, either Party may request that the Council be convened to consider the matter by delivering a written request to the other Party's contact point referred to in paragraph 1. The Council shall convene promptly and endeavor to resolve the matter expeditiously, including, where appropriate, by consulting governmental or other experts and having recourse to such procedures as good offices, conciliation, or mediation. When the matter arises under Article 20.2 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:

- (a) through a mechanism that the Council establishes, consult fully with any entity authorized to address the issue under the relevant agreement; and
- (b) 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.

³ The Parties understand that for purposes of paragraph 2, where a covered agreement requires a decision to be taken by consensus, such a requirement could create an unreasonable delay.

4. If the Parties have failed to resolve the matter within 60 days of the delivery of a request for consultations under paragraph 1, the complaining Party may request consultations under Article 22.7 (Consultations) or refer the matter to the Joint Committee pursuant to Article 22.8 (Referral to the Joint Committee) and, as provided in Chapter Twenty-Two (Institutional Provisions and Dispute Settlement), thereafter have recourse to the other provisions of that Chapter.

5. Neither Party may have recourse to dispute settlement under this Agreement for a matter arising under this Chapter without first seeking to resolve the matter in accordance with paragraphs 1 through 3.

6. In a dispute arising under Article 20.2, 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-Two (Dispute Settlement) shall in making its findings and determination under Article 22.11 (Panel Report):⁴

- (a) consult fully, through a mechanism that the Environmental Affairs 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 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 Article 22.11.⁵

ARTICLE 20.10: RELATION TO MULTILATERAL ENVIRONMENTAL AGREEMENTS

1. The Parties recognize that certain multilateral environmental agreements play an important role globally and domestically in protecting the environment. The Parties further recognize that this Chapter and the ECA can contribute to realizing the goals of such agreements. Accordingly, the Parties shall continue to 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. To this end, the Parties shall consult, as appropriate, with respect to negotiations on environmental issues of mutual interest.

⁴ 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 22.10.4 (Rules of Procedure).

⁵ The guidance in subparagraph (c) shall prevail over any other interpretative guidance.

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.⁶

ARTICLE 20.11: DEFINITIONS

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 or 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;

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

statute or regulation means:

- (a) for Korea, an act of the National Assembly or a regulation promulgated pursuant to an act of the National Assembly that is enforceable by action of the central level of government; and
- (b) for the United States, an act of Congress or a regulation promulgated pursuant to an act of Congress that is enforceable by action of the central level of government.

⁶ For greater certainty, paragraph 3 is without prejudice to multilateral environmental agreements other than covered agreements.

ANNEX 20-A
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.

June 30, 2007

The Honorable Hyun Chong Kim
Minister for Trade
Seoul, Republic of Korea

Dear Minister Kim:

I have the honor to confirm the following understanding reached between the delegations of the United States of America and the Republic of Korea during the course of negotiations regarding Article 20.7.2(b) (Opportunities for Public Participation) of the Free Trade Agreement between our two Governments signed this day:

For greater certainty:

With respect to providing for the receipt of submissions from persons of either Party, Article 20.7.2(b) shall not be construed to require a Party to establish procedures that duplicate existing channels for the receipt of submissions from persons of a Party.

With respect to providing for the receipt of submissions from persons of the other Party, a Party may establish appropriate criteria, consistent with Article 20.7.2(b), for accepting such submissions. These criteria may include that such a submission shall be transmitted to it by the other Party and that the other Party shall transmit such a submission only if it has reason to believe that the submission is submitted by a person of the other Party and the submission concerns matters related to the implementation of specific provisions of Chapter Twenty (Environment). If a Party receives a submission that has been transmitted to it by the other Party, it shall provide its response directly to the person of the other Party.

I have the honor to propose that this letter and your letter in reply confirming that your Government shares this understanding shall constitute an integral part of the Free Trade Agreement.

Sincerely,

Susan C. Schwab

[TRANSLATION]

June 30, 2007

The Honorable Susan C. Schwab
United States Trade Representative
Washington, D.C.

Dear Ambassador Schwab:

I have the honor to acknowledge receipt of your letter of this date, which reads as follows:

I have the honor to confirm the following understanding reached between the delegations of the United States of America and the Republic of Korea during the course of negotiations regarding Article 20.7.2(b) (Opportunities for Public Participation) of the Free Trade Agreement between our two Governments signed this day:

For greater certainty:

With respect to providing for the receipt of submissions from persons of either Party, Article 20.7.2(b) shall not be construed to require a Party to establish procedures that duplicate existing channels for the receipt of submissions from persons of a Party.

With respect to providing for the receipt of submissions from persons of the other Party, a Party may establish appropriate criteria, consistent with Article 20.7.2(b), for accepting such submissions. These criteria may include that such a submission shall be transmitted to it by the other Party and that the other Party shall transmit such a submission only if it has reason to believe that the submission is submitted by a person of the other Party and the submission concerns matters related to the implementation of specific provisions of Chapter Twenty (Environment). If a Party receives a submission that has been transmitted to it by the other Party, it shall provide its response directly to the person of the other Party.

I have the honor to propose that this letter and your letter in reply confirming that your Government shares this understanding shall constitute an integral part of the Free Trade Agreement.

I have the further honor to confirm that my Government shares this understanding and that your letter and this letter in reply shall constitute an integral part of the Free Trade Agreement.

Sincerely,

[SGN/]
Hyun Chong Kim

[TRANSLATION]

June 30, 2007

The Honorable Susan C. Schwab
United States Trade Representative
Washington, D.C.

Dear Ambassador Schwab:

I have the honor to confirm the following understanding reached between the delegations of the Republic of Korea and the United States of America during the course of negotiations regarding Chapter Twenty (Environment) of the Free Trade Agreement between our two Governments signed this day:

Before initiating dispute settlement under the Agreement for a matter arising under Article 20.3.1(a), a Party should consider whether it maintains environmental laws that are substantially equivalent in scope to those that would be the subject of the dispute.

I have the honor to propose that this letter and your letter in reply confirming that your Government shares this understanding shall constitute an integral part of the Free Trade Agreement.

Sincerely,

[SGN/]
Hyun Chong Kim

June 30, 2007

The Honorable Hyun Chong Kim
Minister for Trade
Seoul, Republic of Korea

Dear Minister Kim:

I have the honor to acknowledge receipt of your letter of this date, which reads as follows:

I have the honor to confirm the following understanding reached between the delegations of the Republic of Korea and the United States of America during the course of negotiations regarding Chapter Twenty (Environment) of the Free Trade Agreement between our two Governments signed this day:

Before initiating dispute settlement under the Agreement for a matter arising under Article 20.3.1(a), a Party should consider whether it maintains environmental laws that are substantially equivalent in scope to those that would be the subject of the dispute.

I have the honor to propose that this letter and your letter in reply confirming that your Government shares this understanding shall constitute an integral part of the Free Trade Agreement.

I have the further honor to confirm that my Government shares this understanding and that your letter and this letter in reply shall constitute an integral part of the Free Trade Agreement.

Sincerely,

Susan C. Schwab