

**TRADE AND AGRICULTURE DIRECTORATE
ENVIRONMENT DIRECTORATE**

Joint Working Party on Trade and Environment

**Report on the OECD Workshop on Regional Trade Agreements and the
Environment in Chile**

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This document provides a summary of the workshop on Regional Trade Agreements and the Environment co-organised by the OECD and the Government of Chile, held in Santiago, Chile on 23-24 January 2018.

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Background and objective of the workshop

1. Environmental objectives are increasingly being incorporated into Regional Trade Agreements (RTAs) to ensure a level playing field among the Parties to these agreements, to co-operate on environmental matters, and more broadly to contribute to the mutual supportiveness of trade and environment policies and thereby to promote sustainable development.
2. Since 2005, the OECD, under the auspices of the Joint Working Party on Trade and Environment (JWPTE), has been investigating the trends of environmental provisions in RTAs and their effects on the environment. A flagship publication on the “Environment and RTAs” was released in 2007 (OECD, 2007), followed by a series of annual updates from 2008 to 2014.¹ Analytical reports were developed in parallel including a checklist for negotiators (Tébar Less and Kim, 2008), a framework for evaluation (Gallagher and Serret, 2011); trends and policy drivers (George, 2014b); and assessing the implementation of environmental provisions in RTAs (George and Yamaguchi, 2018).
3. In a parallel effort, the JWPTE has organised a number of workshops on RTAs and the environment to create dialogue on this issue by inviting participants from both OECD members and non-OECD member countries. The first workshop was organised in Paris in 2006 and was followed by several other workshops hosted in: Tokyo, Japan (2007); Santiago, Chile (2008); Paris, France (2010, 2016); and Hanoi, Vietnam (2014).²
4. This seventh OECD workshop on RTAs and the environment was held on 23-24 January 2018 in Santiago, Chile, and was co-organised by the OECD’s JWPTE and the Chilean Ministry of Foreign Affairs, with financial support from the European Union.
5. The workshop gathered around 45 participants from OECD members and non-OECD member countries consisting of government officials from both trade and environment related ministries³, and relevant experts from international organisations and

¹ See: George (2014a; 2013), OECD (2012), George and Serret (2011), Gallagher and Serret (2010), Gigli (2009), Tébar Less and Gigli (2008).

² Workshop reports are available as follows: Tokyo, Japan 2007 (OECD, 2008a); Santiago, Chile 2008 (OECD, 2008b); Paris, France 2010 (George, 2011); Hanoi, Vietnam 2014 (OECD, 2015); Paris, France 2016 (OECD, 2017). See also: www.oecd.org/env/environment-and-regional-trade-agreements.htm

³ National (and supra-national) representatives were from: Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Mexico, New Zealand, Peru, United States, Uruguay, Switzerland, and the European Union.

the civil society⁴. It created a unique opportunity to engage with countries of Central and Latin America and beyond to update regional dialogue on this topic.

6. The objectives of the workshop were: (1) to disseminate recent work undertaken by the JWPTE on RTAs and the environment among relevant stakeholders within and beyond OECD member countries; (2) to highlight relevant issues on RTAs and the environment that are of particular interest to the region; and (3) to provide an occasion to establish a stakeholder dialogue on RTAs and the environment.

7. Five substantive sessions were covered by the workshop: session 1 provided an introduction to RTAs and the environment; session 2 focused on sharing international and regional experience; session 3 highlighted monitoring and evaluation of environmental impacts of RTAs; session 4 featured the role of public participation with regards to RTAs and the environment; and session 5 introduced the new and emerging topic of Greening RTAs in relation to investment provisions. See Annex A for the agenda of the workshop.

8. This report compiles the outcomes of this workshop. Further details including the presentations can be found in the website for the event.⁵

⁴ Participants from international organisations and the civil society included those from: the Commission for Environmental Cooperation (CEC); the International Institute for Sustainable Development (IISD); the Mexican Center for Environmental Law; the Organization of American States (OAS); the Organisation for Economic Co-operation and Development (OECD); CAFTA-DR Secretariat for Environment Matters (SEM); and the World Trade Organization (WTO), Economic Commission for Latin America and the Caribbean (ECLAC).

⁵ www.oecd.org/env/workshop-regional-trade-agreements-environment-dialogue-with-regional-stakeholders-2018.htm

Opening remarks and introduction

9. Mr. Pablo Urria, the Director of Bilateral Economic Relations, Ministry of Foreign Affairs, Chile, welcomed all participants and stated the environment is an issue that has become a regular part of the trade agreements and is increasingly requested by civil society. Ten years ago, an OECD workshop on RTAs and the Environment was hosted in Santiago, Chile in October 2008 to highlight the first steps to incorporate environment provisions in RTAs. Since then, Chile has increased its experience in negotiating and implementing environmental provisions in RTAs. At the same time, challenges still remain on how to monitor and evaluate the environmental impacts of such agreements and to enhance public participation to generate collaboration with different stakeholders. For these reasons, it was emphasised that this workshop provides an important opportunity to generate a network of common interests, to share relevant experiences and good practices, and to better inform decision making and address forthcoming challenges related to RTAs and the environment.

10. Mr. Shardul Agrawala, Head of the Environment and Economy Integration Division at the OECD Environment Directorate, traced the history of OECD's work on trade and environment. He explained that the work on RTAs and the environment has shifted from tracking and analysing the typology of environmental provisions in RTAs towards more analytical work on how governments actually implement these environmental commitments and whether they have had an impact on environmental endpoints. More recently the work has turned to the question of "Greening RTAs" which investigates in what ways environmental objectives could be incorporated into chapters and articles that are not environmentally specific in order to secure policy coherence throughout the agreements. He then turned to the objectives of the workshop and the five sessions that were covered.

Session 1: RTAs and the environment – setting the scene

11. Mr. Shardul Agrawala from the OECD continued on to facilitate this introductory session on RTAs and the Environment.

12. Mr. Shunta Yamaguchi, Policy Analyst of the Environment and Economy Integration Division at the OECD Environment Directorate, presented an overview of the issues around RTAs and the environment and policy messages that emerge from the analytical work by the JWPTE. He conveyed that governments are motivated to include environmental provisions for four main reasons: (i) to contribute to the overarching goal of sustainable development; (ii) to ensure a level playing field among parties to the agreement; (iii) to enhance environmental co-operation of shared interest; and (iv) to pursue international environmental objectives (George, 2014b). Furthermore, under the current global context, governments are increasingly encouraged to take these actions to ensure the public acceptability of trade and trade agreements, and to contribute to the international targets of the Sustainable Development Goals (SDGs) and the COP21 Paris Agreement (OECD, 2017).

13. Two basic provisions of general exceptions and preambular clauses remain to be the most common types of environmental provisions in RTAs. However, more substantive provisions have increased significantly in recent years such as commitments on environmental co-operation, specific environmental issues, upholding environmental laws, and implementation mechanisms. Furthermore, there are increasing signs of reference to Multilateral Environmental Agreements (MEAs), ex-ante impact assessments, public participation with regards to the environment, and dispute settlement mechanisms (George, 2014b). The implementation of environmental provisions remains largely unknown due to limited documentation however there is some anecdotal evidence in which these provisions have contributed to positive outcomes including the strengthening environmental regulations, introducing new institutional arrangements, promoting environmental co-operation and improving public awareness on environmental governance (George and Yamaguchi, 2018). The effectiveness of environmental provisions in providing environmental outcomes is also a scarcely researched area with mixed empirical results. Better information and data is required on the channels of effects, and the environmental indicators on both policy and output (OECD, 2018).

14. Mr. Jose-Antonio Monteiro, Research Economist of the Economic Research and Statistics Division at the World Trade Organization, presented a detailed typology of environmental provisions in RTAs based on his own research (Monteiro, 2016). The analysis is based on 284 RTAs that was notified to the WTO between 1957 and 2017 and identifies more than 60 types of environment-related provisions, including, provisions related to MEAs and specific environmental issues such as intellectual property and biodiversity, environmental goods and services, natural resources management, and climate change. The study highlights that environment-related provisions follow a dynamic process and remain very heterogeneous, and more importantly indicate that the

different scope, language and location of such environment related provisions have implications with respect to enforceability.

15. The first set of questions revolved around the effects and value added of including environmental provisions in RTAs. The presenters responded that there is some evidence that environmental provisions have contributed to positive environmental developments. One of the presenters provided a view that adopting new environmental frameworks and establishing new institutions could be of more relevance when assessing the effectiveness of these agreements. One participant suggested that the empirical analysis could focus on environmental indicators that are more related to trade issues, such as trade flows on environmental goods or developments in fossil-fuel subsidy reforms.

16. The second set of questions touched upon the trends of incorporating environmental provisions (e.g. updating emerging issues, trends on co-operation based provisions and legally-binding provisions, examples on public participation and corporate social responsibility). Updating environmental provisions in existing RTAs seems to be a rare case where the Singapore - Australia FTA (signed in 2003) was given as a unique example. The evolution of environmental provisions follow different paths where some are co-operation based and some are legally binding, however, convergence between the two approaches can be observed in recent agreements. Provisions on public participation can commit Parties to ensure public participation when applying or elaborating domestic environmental policies, while some others promote public participation in environmental co-operation activities under RTAs. It is a very wide concept and usually applies to the general public. Corporate Social Responsibility (CSR) provisions, when included, are frequently found in the investment or labour chapters or environment chapters and are generally non-binding commitments to promote CSR activities.

Session 2: International and regional experience on RTAs and the environment

17. Mr. John Bazill, Policy Officer of DG Trade at the European Commission moderated this session on international and regional experience in including environmental provisions in RTAs.

18. Nine panellists were invited to give updates and insights from their respective countries followed by a roundtable discussion. The following panellists contributed to the session:

- Ms. Miriam Chaves, National Director of American Economic Integration, Ministry of Foreign Affairs, Argentina
- Mr. Julio Baena, Head of the Office for International Affairs, Ministry of Environment, Brazil
- Ms. Angelica Romero, Head, Energy, Trade & Sustainable Development Department, Ministry of Foreign Relations, Chile
- Mr. José Alejandro Quintero, Advisor, Directorate of Commercial Relations, Ministry of Commerce, Industry and Tourism, Colombia
- Ms. Alejandra Aguilar, Environmental Coordinator, General Directorate of Foreign Trade, Ministry of Foreign Trade, Costa Rica
- Mr. Javier Latorre, Coordinator of Economic Integration, Ministry of Foreign Trade (Ecuador)
- Ms. Neydi Cruz García, Assistant Director General for International Cooperation, from the Ministry of Environment and Natural Resources (Mexico)
- Ms. Josefina Del Prado, Trade and Environment Coordinator, Ministry of Foreign Trade and Tourism (Peru)
- Mr. Marcelo Cousillas, Legal Advisor, National Directorate of the Environment, Ministry of Housing, Territorial Planning and the Environment (Uruguay)

19. The session revealed a broad diversity in the region where some countries are ahead of the curve in considering environmental objectives in RTAs such as Mexico in their pioneering experience with the North American Free Trade Agreement (NAFTA) and the parallel North American Agreement on Environmental Cooperation (NAAEC) since 1994, followed by others such as Costa Rica, Colombia, Chile, and Peru, while other countries of MERCOSUR (e.g. Argentina, Brazil, Uruguay) and Ecuador are relatively new to the subject and facing new opportunities and challenges under their recent trade negotiations. In overall, there is an increasing trend in Latin America to include environment provisions in RTA's.

20. Part of the debate focused on the rationale of including environmental provisions in RTAs. There was general consensus among the participants that the goal is to make trade more environmentally sustainable. However, many participants echoed that RTAs cannot solve all environmental issues and prioritisation is necessary in terms of including environmental commitments in RTAs. A number of participants emphasised that environmental issues are global and therefore multilateral approaches should not be disregarded and standardisation is possibly required.

21. Despite the diverging views on the prioritisation of different environmental commitments, some elements appeared to be common such as the importance of the enforcement of environmental law, environmental co-operation and public participation. One environment official stated that mutual learning from trading partners through the negotiations help ensure environmental governance within the Parties to the agreement. In a similar vein, one trade official conveyed that international trade has supported state policy to have high environmental standards.

22. Regarding the opportunities to include environmental commitments in RTAs, environmental co-operation was highlighted as a high priority for consideration. Typically, many participants gave preference to co-operation based approaches compared to legally binding approaches with commitments subject to dispute settlement mechanisms. One participant underscored that capacity building programmes for government officials associated with environmental co-operation programmes under RTAs has supported the institutional development of their Ministry of Environment.

23. Specific environmental issues were also raised as areas for consideration, such as Environmental Goods and Services that have implications to environmental standards and Global Value Chains (GVCs), biodiversity and genetic resources, climate change, and the Circular Economy. There was also interest to secure policy coherence across the different chapters and articles of the agreements such as those related to environment and investment (further discussed in session 5).

24. In terms of challenges, a few participants raised the issue of prioritisation; on how to prioritise and what to prioritise when considering the inclusion of environmental commitments in RTAs. Many panellists reiterated the need to take into account of the different country contexts and the different levels of development and priorities in such processes. One participant shared their practice of prioritisation where national priorities and political mandates are first screened and then reflected into their trade negotiations.

25. Monitoring and evaluation of the implementation of environmental provisions in RTAs were also identified as a challenge for many participants. Specifically, the issue of limited resources to follow-up was raised as a significant challenge for many Parties.

26. Public participation, typically with regards to the implementation of environmental commitments, was indicated as a challenge for a number of countries. While public participation was widely recognised as an important element to secure environmental governance in relation to RTAs with successful examples provided by Mexico and Costa Rica, some participants raised the question on how to go forward specifically; at what stage and to what extent should the public be consulted. It was highlighted for Chile that, it is important to include this type of provision since it has a leading role in the process for Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean. Argentina and Uruguay also explained the inclusion of this type of provision in their

recent RTAs. The importance of public participation before and during the negotiations on this type of provision was also highlighted, as well as, in the implementation phases.

27. Inter-governmental co-ordination and intra-governmental co-ordination were also raised as major challenges. In the event of new environmental commitments proposed during the negotiations, internal co-ordination among government ministries and agencies is often triggered to ensure policy coherence. While substantive environmental commitments are on the rise, co-ordination between different government bodies is highly required. It was also highlighted that not only the co-ordination between trade ministries and environment ministries is particularly crucial but also with other sectorial Ministries, as new disciplines (fishing, forestry, among others) are included on Environment Chapters in RTAs.

28. Furthermore, some Parties have regional co-ordination, such as in the case of MERCOSUR (Argentina, Brazil, Paraguay, and Uruguay) and the Central American Common Market (Costa Rica, El Salvador, Guatemala and Nicaragua), which requires further co-ordination in balancing different levels of development, addressing asymmetries and aligning different policy priorities among the Parties. While these issues were mentioned as potential challenges, they can also be seen as an opportunity in opening a new window for cross-sectoral dialogue, and to contribute to potential regulatory convergence between the Parties of mutual interest.

Session 3: Evaluation of environmental effects of RTAs

29. Ms. Lena MacCarthy, Senior Policy Analyst, Ministry for the Environment of New Zealand moderated this session on monitoring and evaluation of environmental effects of RTAs.

30. Mr. César Rafael Chávez, the Executive Director of the Commission for Environmental Cooperation (CEC), shared their experience in implementing the NAAEC for 23 years. Mandated by the Council, the CEC undertook three NAAEC evaluations so far mainly looking at institutional effectiveness. He conveyed that the CEC has helped create a level-playing field among the Parties by typically building Mexico's environmental management capacity to harmonize with Canada and the United States where feasible such as by supporting the ban on the use of DDT (Dichloro-Diphenyl-Trichloroethane) pesticides. Training and information programs were also conducted by the CEC to build regulatory enforcement capacities of government officials. The CEC contributed to better access to environmental information by establishing a Pollution Release and Transfer Registry (PRTR) in Mexico as part of an initiative to track industrial pollutants in North America. It also played a role in raising public awareness on the environment through the Joint Public Advisory Committee (JPAC) and other outreach events.

31. Mr. John Bazill, Policy Officer of DG Trade of the European Commission, shared EU's experience on Ex-ante Impact Assessments, Sustainability Impact Assessments (SIAs) and Ex-post Evaluation of RTAs. The two prior assessments are mainly based on modelling analysis and applied ex-ante during the preparation and negotiation phase of RTAs respectively. Both examine a range of potential impacts including those on the environment such as climate change, natural resources, waste, and biodiversity. Findings from SIAs frequently highlight potential environmental issues including the increase in transport emissions due to the increase in trade volumes, the potential shift in trading patterns that could entail additional pressures to the environment (e.g. agricultural exports and land use change), or alternatively provide environmental benefits through increased trade and investment in clean technologies. SIAs also offer policy recommendations in response to these potential challenges identified. Ex-post evaluation examines a variety of impacts including the effectiveness, efficiency, relevance, and coherence of the intervention, as well as comparisons with a non-FTA scenario and ex-ante analysis. Two ex-post evaluations have been finalised so far (EU - Chile in 2012 and EU - Mexico in 2017) and two others are under preparation (EU - Colombia - Peru in 2018 and EU - Central America in 2019). Since the exercise can be demanding in terms of time, capacity and resources, high-level leadership was indicated as a necessity to conduct such assessments.

32. Mr. Oscar Ceville, Sustainable Development Officer of the Organization of American States (OAS), presented the findings from ex-post analysis of environmental effects in the case of the Dominican Republic - Central America Free Trade Agreement (CAFTA-DR). The Parties to the CAFTA-DR established an Environmental Cooperation

Agreement (ECA) which aims to secure compliance with CAFTA-DR's environmental obligations such as improving environmental protection and ensuring transparency and public participation in environmental decision-making. Under this framework, seven monitoring and evaluation reports were produced so far to assess the relevance, effectiveness, efficiency and sustainability of its undertakings and the achievements of its long term goals. The evaluation methodology has evolved overtime with a confined set of indicators used in recent reviews. Some major achievements included the improvement of 150 environmental laws and regulations including those related to wildlife trafficking, air and water pollution, and solid waste management. It has also contributed to the capacity development of 120,800 individuals involved in environmental policy making and enforcement. While ex-post evaluation can provide a number of opportunities in highlighting recommendations and challenges, sharing best practices, shaping future environmental co-operation programmes, and fostering potential synergies with similar efforts, it can also be an ambitious exercise to undertake because of the co-ordination required between various implementing agencies and the limited time and availability of funding.

33. While these presentations highlighted a number different approaches in conducting monitoring and evaluation assessments such as the timing, the frequency, the scope and the methodology, common elements for successful follow-up were also identified including a clear mandate to conduct such activities, well defined overall objectives of the agreement and related co-operation activities, and the availability of resources.

Session 4: RTAs and the environment: the role of public participation

34. Ms. Miriam Chaves, National Director of American Economic Integration, Ministry of Foreign Affairs Argentina, chaired this session on the role of public participation with regards to the environment.

35. Mr. Jorge Guzmán, the General Coordinator of the CAFTA-DR Secretariat for Environment Matters (SEM) gave an overview of the public submission mechanisms for the environment made available by the CAFTA-DR. The SEM is an international organisation that was established under the CAFTA-DR to take charge of the submission mechanisms and factual records set forth under the agreement. Citizens and private entities can place submissions against a Party which fails to effectively enforce one or more of its environmental laws. The SEM may then request a response from the Party in question and issue a factual record when appropriate. It seeks to enhance public participation in environmental governance, to promote transparency and access to information, to facilitate dialogue between the governments and the submitters, and is meant to be a non-judicial process. During the 10 years of implementation, the SEM has received 38 submissions and issued 4 factual records. Concerned sectors of the submissions include urban pollution, coastal marine areas, forests and natural protected areas, water, biodiversity and risk management. Some submissions have successfully identified environmental issues at stake and led to a constructive dialogue between the submitters and the regulators, such as on deforestation concerns in the Bahuco Mountain Range in the Dominican Republic (submitted in 2016). It also triggered government action against poor environmental management in the Municipality of Puerto Barrios in Guatemala (submitted in 2015).

36. Ms. Alejandra Aguilar, Environmental Coordinator, General Directorate of Foreign Trade of Costa Rica, shared their unique experience on public participation through their negotiations on the Environmental Goods Agreements (EGAs) and the EU - Central America FTA. In both cases, specific institutional arrangements were established to facilitate public participation. In the EGA negotiations, a national team was first assembled from different ministries, and public consultations were then held to receive public opinions and to clarify any doubts about the negotiations. A process called “cuartos adjuntos (side room)” was used to specifically engage with the civil society, and sector specific consultations were also held to identify sector positions and specific requests. In the case of the EU - Central America FTA, which is a unique agreement between two regions, a Trade and Sustainable Development Board was first developed to bring the multiple national contact points together including those related to economy, environment, and labour. National advisory groups were then created for each of these sectors to pursue public participation in each country. Furthermore, a Civil Society Dialogue Forum was created to specifically engage with the civil society at a bi-regional level. In terms of opportunities and challenges, Ms. Aguilar emphasised that while trade negotiations will continue to generate a huge public debate due to transparency issues, public participation processes gives the legitimacy of the government to convey how and why a decision has been taken. While high transaction costs to facilitate these

mechanisms can be challenging, the cost of no consultation can equally be very high. The flexibility to adjust to specific country contexts and the involvement of different actors of interest into the process were also highlighted as important factors for success.

37. Mr. Julio Baena, Head of the Office for International Affairs, Ministry of Environment, Brazil, made an update on the Environmental Information System of MERCOSUR (SIAM). In MERCOSUR, there is a sub-group on the environment (SGT6) that aims to provide support and guidance to the members. Under this subgroup, an Environmental Information System of MERCOSUR (SIAM) has been established in 1995 and updated in 2015 to provide better access to environmental information to the economic block by sharing the records of the environment ministerial meeting and the sub-group (SGT6) meetings as well as disseminating specific environmental information for the region including: sustainable production and consumption; chemicals management, waste management, biodiversity, and climate change.

38. Mr. Gustavo Alanis, President, Mexican Center for Environmental Law, shared civil society perspectives on public participation based on their experience with NAFTA. Public participation mechanisms can provide positive means for the public to engage in environmental governance. While state-state dispute settlements mechanisms were never used by Parties to date, 90 public submissions on the environment were received in the case of NAFTA and NAAEC. These types of public participation mechanisms can serve as a model for other trade agreements at a regional level. They can highlight environmental issues that have not been successfully addressed domestically and bring them to the scrutiny of the international community. They can also provide an opportunity to create better linkages between the civil society and policy makers. However, he emphasised that these processes are not well known to the general public and more effort is needed to outreach and communicate these mechanisms.

39. A few officials raised concerns on the level and timing of information disclosure to the public and questioned how public participation could be strengthened. One official suggested that a clear justification of confidential information is the gateway to secure more transparency, and anything that falls beyond this criterion should be subject to public disclosure. Another participant emphasised that the key is to generate trust between the government authorities and the society by ensuring transparency during the negotiation and implementation phase.

40. Several participants asked how the CAFTA-DR SEM disseminates information about their public submission programme to the society. Mr. Guzman of the SEM responded that they co-operate with the Ministry of Environment in each country to inform the existence of the submission mechanism through different channels. They particularly aim to conduct outreach activities that are tailored to different country contexts and specific audiences, such as governmental organisations, private sectors organisations, civil society organisations, academies and universities, and the media to take account of the broad diversity in the CAFTA-DR region.

41. While the public submissions systems made available by NAFTA and the CAFTA-DR provide mechanisms to enhance public participation in environmental governance, one participant questioned about the creation of such systems as they run in parallel to domestic judicial processes.

Session 5: Greening RTAs on investment

42. Mr. Rodrigo Monardes, Counsellor for Trade and Investment at the Permanent Delegation of Chile to the OECD, moderated the session on Greening RTAs on Investment.

43. Ms. Ana Novik, Head of the Investment Division of the OECD Directorate for Financial and Enterprise Affairs made a remote presentation on the balance between investor protection and the right to regulate in International Investment Agreements (IIAs). IIAs which encompass Bilateral Investment Treaties (BITs), RTAs and other treaties with investment provisions have reached over 3300 agreements worldwide in the absence of multilateral rules. They aim to secure investor protection for a number of reasons such as attracting Foreign Direct Investment (FDI), giving an additional layer or assurance to investors against non-commercial and political risk, and ensuring a level playing field among the Parties to the agreement. While investor protection is promoted in these agreements, such frameworks can also have implications to domestic policies and the right to regulate in order to achieve certain public policy goals in key areas such as the environment. The current debate on the right to regulate focuses on a number of issues including the Investor State Dispute Settlement (ISDS) mechanisms, the monetary damages as remedy and potential dissuasion to policy making (i.e. chilling effect), inconsistent interpretation of provisions by panels that are not always aligned with negotiator's intentions, and some concern raised about the process of selection of arbitrators as a factor that could affect the legitimacy of the system. A number of possible approaches were presented to potentially improve the balance between investor protection and the right to regulate including better defining and delimiting core liability provisions such as Fair and Equitable Treatment (FET), National Treatment, Most Favoured Nation (MFN) treatment (e.g. exclude treaty shopping), and Indirect Expropriation. Other possible approaches included carve outs for specific sectors, incorporating general exceptions and right to regulate clauses, and establishing pre-conditions to access treaty benefits. Possible improvements for the ISDS mechanism were also discussed such as procedural aspects to dismiss frivolous claims, to better specify the role and appointment of arbitrators, to involve stakeholders in the process, and to increase transparency of the system. Finally, although such efforts towards improving new treaties are valuable, the issue of existing treaties remains unaddressed. For environmental experts, the focus is on how to better engage and provide inputs into the process with regards to model BITs, negotiation of investment provisions and the dispute settlement process.

44. Mr. Shunta Yamaguchi, Policy Analyst of the OECD Environment Directorate, presented preliminary results from their on-going project on Greening RTAs on investment which investigates in what ways RTAs can incorporate environmental objectives in chapters and articles that are related to investment in order to secure policy coherence within these agreements. Preliminary results show that 32 out of 191 ISDS cases brought under RTAs are related to the environment. Notably, all of them are brought under RTAs signed in the Americas. Main sectors of concern include: mining and quarrying; waste management; manufacturing (chemicals and pharmaceuticals);

electricity; agriculture and forestry; and real estate. Decisions on these cases mainly turn to core investor liability provisions such as Fair and Equitable Treatment (FET), Indirect Expropriation, and National Treatment. As the issue is part of broader discussions on the right to regulate, environmental policy makers need to be aware of these linkages. Key areas for improvement include delimiting the scope of substantive provisions such as Fair and Equitable Treatment (FET) and Indirect Expropriation. Other approaches to safeguard environmental concerns could include embedding environmental principles and installing procedural safeguards. ISDS cases related to the environment are emerging more broadly in International Investment Agreements (e.g. BITs, and the Energy Charter Treaty (ECT)) and requires further analysis. Promoting green investment in RTAs is a less explored area with a few possible options identified such as introducing clauses in the preamble, and installing investor and home country obligations.

45. Mr. Aaron Cosbey, Senior Associate of the International Institute for Sustainable Development (IISD) remotely presented opportunities to incorporate environmental objectives in RTAs related to investment. Most notably, his presentation showed that in order to achieve the two-degree target of the Paris accord, about 1/3 of proved oil reserves, 1/2 of proved gas reserves, and 80% of proven coal reserves should not be extracted. This may necessarily require policy measures that would risk violating investor protection obligations under these trade and investment agreements.

46. The presentations attracted great interest from the participants as the session offered different views from an investment policy perspective, an environmental policy perspective, and a broader civil society perspective. One participant raised a question on whether to prioritise ISDS reforms or to improve provisions in order to strike the right balance between investor protection and the right to regulate. One panellist responded that while ISDS reform efforts are currently underway, this would not be enough to guide consistent decisions and improvement of provisions would also be necessary.

47. Further questions turned to possible solutions. One participant questioned the extent to which general exception clauses have been installed and make any difference on the outcomes. The panel responded that while all RTAs with investment provisions have general exception clauses based on WTO and GATT agreements, many BITs that were signed in the 1990's do not have these clauses. Furthermore, while some RTAs include general exception clauses, they are not specific exceptions incorporated in the investment chapter such as the rare examples given in the Comprehensive Economic and Trade Agreement (CETA) agreement (signed in 2016) and the Argentina-Chile FTA (signed in 2017). For these reasons, general exception clauses have not been applied so far to place a decision on the balance between investor protection and the right to regulate for the environment.

48. With regards to the question on the modification of denial of benefits clauses as a possible way to achieve better balance between investor protection and the right to regulate, one panellist responded that these clauses do not vary so much across different agreements in the past, and has less likely been subject to modification for this purpose.

49. Another participant raised the question whether specific carve outs (such as the reference to tobacco control measures in the Trans-Pacific Partnership (TPP) Agreement) impose a risk to securing a level playing field by giving precedence to a particular sector to achieve a specific public policy objective. One panel member responded that having annexes that carve out specific sectors is imperfect and challenging but this is the way that trade and investment laws are established as in the case of the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS).

While the approach can be demanding, these carve outs should not pose a fundamental challenge to the integrity to the body of law.

50. Other participants asked to what extent is corporate due diligence and investor obligations considered in IIAs. The panel answered that investor protection has been the main focus of BITs signed and the 1990's and investor obligations are a rather new concept for consideration. This is because IIAs are expected to facilitate international investment flows between countries and to protect the issue of investment rather than imposing obligations. The Morocco-Nigeria BIT (signed in 2016) was highlighted as one of the rare examples that include provisions on corporate governance and practices.⁶ Nevertheless the extent to which state-state treaties can encourage third parties to comply with such obligations is complex and remains to be explored.

⁶ Morocco-Nigeria BIT (signed in 2016), Article 19 Corporate Governance and Practices: "Investments shall meet or exceed national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices."

Summing up and next steps

51. The workshop was closed by concluding remarks given from Mr. Shardul Agrawala (OECD), Mr. Bojan Grlas (Policy Officer, DG Environment, European Commission), and Ms. Angelica Romero (Ministry of Foreign Relations, Chile), as well as reflections shared from other participants including Ms. Miriam Chaves (Ministry of Foreign Affairs, Argentina), Mr. Julio Baena (Ministry of Environment, Brazil), and Ms. Alejandra Aguilar, (Ministry of Foreign Trade, Costa Rica).

52. In overall, dialogue between OECD members and non-OECD member countries on the topic of RTAs and the environment appeared to be extremely useful. There was general interest from the region to have some kind of forum or ability for trade negotiators to exchange views on this topic.

53. In terms of substance, there was general consensus among the participants that trade should contribute to sustainable development. While trade cannot solve all environmental problems, the aim is to make trade more environmentally sustainable. In terms of prioritisation of different environmental commitments, some elements appeared to be common such as the central role of environmental co-operation and the importance of public participation. Mutual learning between participants was also a very important aspect such as on how to undertake environmental assessments and to secure public participation related to environmental concerns. Prioritisation is also necessary by focusing on the balance between trade and environment policies and to aim for better policy coherence.

54. OECD's work on RTAs and the environment proved to be relevant not only for OECD member countries but also for non-OECD members in the region to inform the basis for current and future trade negotiations. This includes past work on the coding of environmental provisions, analytical work on the implementation and effectiveness of environmental provisions in RTAs, and more recent work on Greening RTAs.

55. The workshop highlighted a number of further opportunities and knowledge gaps on the issue of RTAs and the environment. First, the impact of specific environmental provisions in RTAs remains to be an issue of great interest. However, the experience on how these commitments lead to different outcomes is not well documented or quantified and often resides within the context of these agreements. Possible future work on the implementation of environmental provisions in RTAs could seek to further outreach to stakeholders for instance through direct interviews to better document such insights. Possible linkages with the work on trade and environment indicators currently undertaken by the OECD can also be explored more broadly.

56. Second, a few participants were keen to explore the inclusion of emerging topics of interest such as the Circular Economy in RTAs. Trade and the Circular Economy, could potentially become one of the pillars of OECD's future work programme on trade and environment and therefore further work on RTAs and the Circular Economy could be explored in this context.

57. Third, the issue of public participation in trade agreements is gaining political attention due to the current backlash against globalisation, as seen in the OECD Ministerial Council Meeting in June 2017⁷ and the OECD’s work on “Making Trade Work for All”⁸. Enhancing public participation and communication is one way to address environmental concerns in these trade agreements. However, it is necessary to acknowledge that the debate is a part of a broader discussion on inclusiveness of social and labour issues and is not only specific to the environment. As one potential way forward, a roundtable discussion on the role of public participation with regards to the environment in RTAs could be considered as a part of future JWPTE meetings should there be interest.

58. Fourth, there was a broad notion from participants that trade policies need to contribute to sustainable development and for this reason there is a strong need to secure policy coherence within these agreements. To support government’s effort to secure policy coherence and to facilitate inter-governmental co-ordination on RTAs and the environment, the OECD is currently pursuing work on Greening RTAs to investigate in what ways environmental objectives can be incorporated in chapters and articles that are not environmentally specific in RTAs. While current work focusses on investment and subsidies, further work on other areas can also be explored.

59. The workshop was concluded by thanking all the participants for their substantive inputs as well as the contributions from the EU and the co-organisers for hosting this event.

7 www.oecd.org/mcm/documents/2017-ministerial-council-statement.htm

8 www.oecd.org/trade/making-trade-work-for-all.pdf

Annex A. Workshop agenda

**OECD Workshop on Regional Trade Agreements and the Environment
Establishing Dialogue with Regional Stakeholders
23 – 24, January, 2018 - Hotel Plaza San Francisco,
Av. Libertador Bernardo O’Higgins 816, Santiago, Chile
Danubio Room**

Day 1: Tuesday 23 January, 2018	
09:00	<i>REGISTRATION</i>
09:30	<p>OPENING REMARKS AND INTRODUCTION</p> <p>Master of Ceremony: MOFA Chile</p> <ul style="list-style-type: none"> • Opening Remarks, Pablo Urria, Director of Bilateral Economic Relations, Ministry of Foreign Affairs, Chile • Opening Remarks and Introduction: Shardul Agrawala, Head of Environment and Economy Integration Division, Environment Directorate, OECD
09:50	<p>Session 1: RTAS AND THE ENVIRONMENT – SETTING THE SCENE</p> <p>The purpose of this session is to explore how environmental provisions are included in RTAs and how they can better support environmental objectives.</p> <p>Moderator:</p> <p>Shardul Agrawala, Head of Environment and Economy Integration Division, Environment Directorate, OECD</p> <p>Keynote speakers</p> <ul style="list-style-type: none"> • Analysis of RTAs and the environment by the Joint Working Party of Trade and Environment (JWPTE), Shunta Yamaguchi, Policy Analyst, Environment and Economy Integration Division, Environment Directorate, OECD • Environmental provisions in RTAs: the current state of play: Jose-Antonio Monteiro Research Economist, Economic Research and Statistics Division, World Trade Organization (WTO) <p>Discussion</p>
10:45	<i>BREAK</i>
11:15	Session 2: INTERNATIONAL AND REGIONAL EXPERIENCE ON RTAS AND THE ENVIRONMENT

	<p>The purpose of this session is to share experiences on the different approaches on how to incorporate the environment provisions in the region.</p> <p>Moderator: John Bazill, Policy Officer, DG Trade, European Commission</p> <p>Roundtable</p> <ul style="list-style-type: none"> • Regional practices in incorporating environmental provisions <p>Miriam Chaves, National Director of American Economic Integration, Ministry of Foreign Affairs (Argentina)</p> <p>Julio Baena, Head of the Office for International Affairs, Ministry of Environment (Brazil)</p> <p>Angelica Romero, Head, Energy, Trade & Sustainable Development Department, Ministry of Foreign Relations (Chile)</p> <p>José Alejandro Quintero, Advisor, Directorate of Commercial Relations, Ministry of Commerce, Industry and Tourism (Colombia)</p> <p>Alejandra Aguilar, Environmental Coordinator, General Directorate of Foreign Trade, Ministry of Foreign Trade (Costa Rica)</p> <p>Javier Latorre, Coordinator of Economic Integration, Ministry of Foreign Trade (Ecuador)</p> <p>Neydi Cruz García, Assistant Director General for International Cooperation, from the Ministry of Environment and Natural Resources (Mexico)</p> <p>Josefina Del Prado, Trade and Environment Coordinator, Ministry of Foreign Trade and Tourism (Peru)</p> <p>Marcelo Cousillas, Legal Advisor, National Directorate of the Environment, Ministry of Housing, Territorial Planning and the Environment (Uruguay)</p> <p>Discussion</p>
12:45	<i>LUNCH</i>
14:45	Session 2: CONTINUED
15:45	<i>BREAK</i>
16:15	<p>Session 3: EVALUATION OF THE ENVIRONMENTAL EFFECTS OF RTAS</p> <p>This session aims to explore the possible ways to evaluate the effects of environmental provisions in RTAs on an ex-ante and ex-post basis, and how such evaluation can help environmental provisions to evolve over time.</p> <p>Moderator: Lena MacCarthy, Senior Policy Analyst, Ministry for the Environment, New Zealand</p> <p>Keynote speakers</p> <ul style="list-style-type: none"> • NAFTA's experience in assessing the implementation of environmental provisions, César Rafael Chávez, Executive Director, Commission for Environmental Cooperation (CEC) • Experience on ex-ante and ex-post evaluation of environmental provisions in RTAs of the European Union; John Bazill, Policy Officer, DG Trade, European Commission • Regional efforts on ex-post analysis of environmental provisions in RTAs, Oscar

	Ceville, Sustainable Development Officer, Department of Sustainable Development, Organization of American States (OAS) Discussion
18:00	<i>CLOSING OF DAY 1</i>

COCKTAIL RECEPTION

Day 2: Wednesday 24 January, 2018

09:30	<p>Session 4: RTAS AND THE ENVIRONMENT: THE ROLE OF PUBLIC PARTICIPATION</p> <p>The aim of this session is to explore how public participation is addressed in RTA negotiations and implementation, and how it could be further strengthened</p> <p>Moderator: Miriam Chaves, National Director of American Economic Integration, Ministry of Foreign Affairs, Argentina</p> <p>Keynote speakers</p> <ul style="list-style-type: none"> • Public submissions related to the environmental under CAFTA-DR: Jorge Guzmán, General Coordinator, CAFTA-DR Secretariat for Environment Matters, Guatemala • Experience on public participation from the EU-Costa Rica FTA: Alejandra Aguilar, Environmental Coordinator, General Directorate of Foreign Trade, Costa Rica • Public access to information and data collection related to environmental aspects - Environmental Information System of MERCOSUR (SIAM): Julio Baena, Head of the Office for International Affairs, Ministry of Environment, Brazil • Public participation on environmental aspects of RTAs, perspectives from the Civil Society: Gustavo Alanis, President, Mexican Center for Environmental Law • Private Sector Participation in RTAs and the environment: Manuel José Prieto, Foreign Trade Manager, Federation of Chilean Industry - SOFOFA <p>Discussion</p>
11:00	<i>BREAK</i>
11:30	Session 4 continued
12:30	<i>LUNCH</i>
14:30	<p>Session 5: GREENING RTAS ON INVESTMENT</p> <p>This session will focus on greening RTAs in chapters and articles related to investment and highlight emerging issues on the right to regulate for the environment as well the interactions between the environmental and investment provisions in RTAs</p> <p>Moderator: Rodrigo Monardes, Counsellor, Trade and Investment, Directorate for International Economic Relations, Permanent Delegation of Chile to the OECD</p>

	<p>Keynote speakers</p> <ul style="list-style-type: none"> • Investor protection and the right to regulate, Ana Novik, Head of Investment Division, Directorate for Financial and Enterprise Affairs, OECD • Investor protection and the right to regulate for the environment - lessons learnt from NAFTA, CAFTA and other RTAs or BITs, Shunta Yamaguchi, Policy Analyst Environment Directorate, OECD • Opportunities to incorporate environmental objectives in RTAs related to investment, Aaron Cosbey, Senior Associate, International Institute for Sustainable Development (IISD) <p>Discussion</p>
17:00	<i>BREAK</i>
17:30	<p>SUMMING UP AND NEXT STEPS</p> <ul style="list-style-type: none"> • Summing up and next steps for the JWPTE work, Shardul Agrawala, Head of Environment and Economy Integration Division, Environment Directorate OECD • Concluding remarks on behalf of the JWPTE, Bojan Grlas, Policy Officer, DG Environment, European Commission • Concluding remarks on behalf of the Government of Chile, Paulina Nazal, General Director of International Economic Relations, Ministry of Foreign Affairs Chile (tbc)
18:00	<i>END OF WORKSHOP</i>

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