Sustainable Development and Regional Trade Agreements: Toward Better Practices in Impact Assessments

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This article examines the environmental impact assessments used by Canada and the United States, and the sustainability impact assessments used by the European Union, in the context of regional trade agreement negotiations. The purpose of this article is to analyze and compare impact assessment methodologies, the quality of the analysis contained in impact assessments as well as the influence of the impact assessments on the trade negotiations themselves in order to determine which impact assessment process is most effective in terms of integrating sustainable development and regional trade agreements.

The sustainability impact assessment used by the European Union has a more rigorous methodology, is more successful at identifying impacts and opportunities, and has a greater influence on the trade negotiations than the Canadian and American environmental impact assessments. As such, the European process is currently a better practice in terms of identifying and mitigating potential negative impacts of regional trade agreements on sustainable development, and also in terms of identifying opportunities through which regional trade agreements can promote sustainable development.

Cet article examine les évaluations d'impact environnemental utilisées par le Canada et les États-Unis en parallèle avec les évaluations d'impact sur le développement durable mises en place par l'Union européenne, et ce dans le cadre de négociations commerciales régionales. Suivant une approche basée sur l'étude de cas, cet article a pour objectif d'évaluer et de comparer les méthodologies de ces études d'impact, la qualité des analyses effectuées dans ce cadre, ainsi que l'influence de ces études d'impact sur les négociations commerciales elles-mêmes. Cela permettra de déterminer quel processus d'étude d'impact parvient le mieux à incorporer le développement durable aux accords commerciaux régionaux.

Les évaluations d'impact sur le développement durable mises en place par l'Union européenne présentent une méthodologie plus rigoureuse, elles permettent de mieux identifier les incidences et solutions, et enfin elles ont un plus grand effet sur les négociations commerciales que n'en ont les évaluations d'impact environnemental canadiennes et américaines. Ainsi, les méthodes européennes sont présentement plus efficaces pour identifier et minimiser les incidences négatives possibles des accords commerciaux régionaux sur le développement durable, et pour distinguer les occasions par lesquelles ces accords commerciaux peuvent promouvoir le développement durable.

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Impact assessments form part of the preparatory works for the regional trade agreements ("RTA"s) concluded by the European Union ("EU"), the United States, and Canada. The EU, pursuant to a 2002 communication of the European Commission and related guidelines, employs a sustainability impact assessment procedure ("SIA"). The SIAs take place both before and during the trade negotiation process and aim to identify the potential economic, social, and environmental impacts of the RTA. The SIA process explicitly examines impacts not only in the EU, but also in the counterpart state. The United States (as introduced by Executive Order 13141 in 1999 and reaffirmed by Executive Order 13277 and the Trade Act of 2002) and Canada (as per a cabinet directive) carry out an environmental review or environmental impact assessment ("EIA") prior to concluding RTAs. The EIAs are meant to cover domestic effects and focus on environmental issues.

This article aims at examining in a comparative manner the SIAs and EIAs conducted by the EU, the United States, and Canada in order to assess their effectiveness in promoting the integration of sustainable development into RTAs. This article will argue that the SIA process

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results in a more effective identification of the impacts of RTAs in comparison to the EIA process, and has a greater influence on trade negotiations. States, starting with the United States and Canada, should therefore shift to an SIA methodology.

1.1 Research Methodology and Outline

Two aspects are important in terms of research methodology. First, the essay adopts a case study approach, focusing on the impact assessments of the separate RTAs between South Korea ("Korea") and the EU, the United States, and Canada, respectively. Korea was chosen as a focus point as it is an important trading partner for the three countries and the impact assessment processes are all relatively recent. The US-South Korea Free Trade Agreement ("KORUS") was signed on 30 June 2007 with new agreements on 3 December 2010. The EU-South Korea Free Trade Agreement ("EU-Korea FTA") was signed on 6 October 2010 and has been provisionally applied since 1 July 2011. The Canada-Korea Free Trade Agreement ("CKFTA") is still under negotiation, though an interim EIA process has been completed. Where relevant this paper will also reference impact assessments from other RTAs. Second, this paper will adopt an analytical framework based on three key tensions for sustainable development identified in RTAs: 1) RTAs can constrain domestic law and policy initiatives aimed at promoting sustainable development and/or can conflict with international commitments to promote sustainable development (regulatory effects); 2) RTAs can exacerbate pre-existing social, environmental or economic problems at the domestic level (material effects); or 3) RTAs can promote growth in unsustainable economic sectors (integration effects).

In applying this analytical framework, this essay does not seek to compare the analyzed impact assessment processes to an abstract, "ideal" benchmark, but rather seeks to compare the analyzed impact assessment processes between themselves in an effort to determine which current process might constitute a best practice and why. The conclusion of the essay presents a typology drawn from these case studies that could form part of an "ideal" SIA.

The first part of this essay will set out the background for the study including: an overview of sustainable development in international law; the relation between trade, the environment, and social well-being; and the practice of impact assessments. The second part will focus on the SIAs and EIAs; identifying and assessing the regulatory, material, and integration effects noted in the assessments. The third part will assess the impact of the SIA and EIAs on the trade negotiations and RTAs themselves in order to determine which impact assessment process best identifies and addresses key tensions in terms of sustainable development.

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7 See Marie-Claire Cordonnier Segger, Sustainable Development in Regional Trade Agreements (Cambridge: Cambridge University Press, forthcoming 2013).
2. BACKGROUND: SUSTAINABLE DEVELOPMENT IN REGIONAL TRADE AGREEMENTS AND THE RISE OF THE IMPACT ASSESSMENT

This section briefly outlines the context of the essay in order to emphasize the significance of the issues. It reviews the meaning of commitments to sustainable development in international law, the relationship between trade and sustainable development, as well as the recent rise of RTAs and impact assessments.

2.1 International Law on Sustainable Development

Over the past two decades, states have enhanced the integration of sustainable development into international treaty making. Numerous multilateral environmental agreements (“MEAs”) aim at addressing global challenges by applying sustainable development principles. States have also included sustainable development provisions in international trade treaties, including the preamble to the World Trade Organization (“WTO”) agreement. In the US-Shrimp dispute, the WTO Appellate Body agreed that the “preamble of the WTO—which informs not only the GATT [General Agreement on Tariffs and Trade] 1994 but also the other covered agreements—explicitly acknowledges the objective of sustainable development.” Indeed, sustainable development is well represented and acknowledged in international law and international trade law in particular.

Yet the meaning of a commitment to sustainable development remains unclear in international law. Jurists are divided on this topic. Some affirm that sustainable development is an emerging principle of customary law. Others suggest that it could be conceived of as a right of states, an obligation erga omnes, or a commitment of an “interstitial” nature. However, there appears to be an emerging consensus among jurists to view sustainable development as an

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objective of international law—part of the object and purpose of international treaties.\textsuperscript{15} From this perspective, there is not only one unique principle of sustainable development. Rather, there is a growing corpus of international law on sustainable development that is integrated into a variety of fields, including international trade law and RTAs. This essay adopts the view of sustainable development as an objective and focuses on the integration of sustainable development into RTAs by states.

2.2 Free Trade and its Impacts: The Decline of the Kuznets Curve?

The relationship between trade and sustainable development is complex and nonlinear. There is no guarantee of free trade in international law. Every state has the right to enter into trade relations with other states and to set the terms of this trade.\textsuperscript{16} National authorities regulate trade in accordance with disciplines set out by the WTO. Matthew Stilwell notes that the WTO “is both a set of legal agreements, and an institutional framework to administer the implementation of these agreements, settle trade disputes, and provide an ongoing forum for trade negotiations.”\textsuperscript{17} Parallel to the WTO, there is an emerging web of bilateral and multilateral RTAs. As of 15 May 2011, states had notified 489 RTAs to the WTO.\textsuperscript{18} As now evident from the demise of the Doha Round of negotiations under the WTO, states have not reached a consensus on the utility of negotiating development and environmental issues in this forum.\textsuperscript{19} Negotiations that could have led to a greater integration of trade and environment at the WTO, for instance by promoting trade liberalization in environmental goods and services, have been inconclusive. For over ten years, WTO member states have been circulating a list of environmental goods and services without reaching an agreement.\textsuperscript{20} As such, RTAs appear to be a more promising forum than the WTO for the purpose of integrating trade and sustainable development.


\textsuperscript{18} WTO, Regional Trade Agreements, online: World Trade Organization <http://www.wto.org/english/tratop_e/region_e/region_e.htm>.

\textsuperscript{19} See e.g. Sungjoon Cho, “The Demise of Development in the Doha Round Negotiations” (2010) 45 Tex Int’l LJ 573. The Doha Round was launched in November 2001 in Doha, Qatar. The Doha agenda was an ambitious one, and mandated negotiations on agricultural tariffs and subsidies and non-agricultural market access, as well as second generation trade issues such as rules on industrial subsidies, anti-dumping, intellectual property rights, environmental goods, fisheries subsidies, trade facilitation and trade in services. The Doha Round ran into many challenges, including the breakdown of the 1999 WTO Ministerial Conference in Seattle amid widespread protests, and a shifting geopolitical landscape. For more details on the WTO Doha Round, see also David Kleimann and Joe Guinan, “The Doha Round: An Obituary” (2011) Global Governance Program Policy Brief, Issue 2011/1.

A widespread perspective in terms of trade and sustainable development posits that trade liberalization, by promoting economic development, has automatic environmental benefits. This theory is consistent with an "environmental Kuznets curve." Here, increases in trade volumes in sectors of comparative advantage lead to economic development. Over time, as individuals become wealthier, they will demand better environmental standards. By extension, the same would apply to labour standards and social well-being. However, compelling evidence appears to contradict this theory. For instance, the economic benefits of trade do not always accrue to those suffering the environmental pollution and the wealthiest societies continue to produce higher levels of waste and pollution. Also, some environmental impacts are irreversible. As noted by van den Bergh and Nijkamp, if the economic process that leads to economic growth causes irreversible environmental degradation, then the economic growth that is supposed to generate demand for improved environmental quality in the future may, paradoxically, prevent the ecosystem from satisfying such demand.

Nevertheless, the view that trade is always good for the environment still finds supporters, and emerges, surprisingly, in SIAs and EIAs. For instance, the US-Peru EIA appears to draw reassurance from a direct connection between enhanced economic development in Peru and environmental protection. The EU-Korea SIA notes that the economic development of the EU and Korea will lead to "a greater commonality in societal concerns about protection of the environment." Despite a lack of clear and convincing evidence, the beneficial environmental effects of trade posited under the environmental Kuznets curve still finds support.

Other scholars have suggested that trade has very little effect on sustainable development, as trade disciplines have little to no impact on measures aimed at promoting sustainable development. Still, other researchers affirm that trade always has negative effects on sustainability. For instance, some ecological economists fear that free trade will result in a "race to the

21 David Stern, “The Rise and Fall of the Environmental Kuznets Curve” (2004) 32 World Development 8 at 1419 (David Stern defines the Environmental Kuznets Curve as “a hypothesized relationship between various indicators of environmental degradation and income per capita”).


23 Stern, supra note 21.


bottom” of environmental and labour standards in order to maintain comparative advantage.\textsuperscript{29} It is more likely that trade has neither automatically positive nor automatically negative effects on sustainable development. Trade simply has the potential to affect the economy, society, or the environment in a positive or negative manner. Controlled and intelligent trade liberalization will foster sustainable development if states implement the right trade disciplines, policies, and initiatives. EIAs and SIAs offer an opportunity for states to be aware of challenges and opportunities and, hopefully, to make informed and sustainable decisions.

2.3 The Rise of the Impact Assessments

EIAs and SIAs are now a part of the preparatory works in the negotiation process for the RTAs of the EU, the United States, Canada, and other states. The earliest EIA procedures were adopted in the 1960s in the state of Michigan and in the 1970 US National Environmental Protection Act for federal government projects.\textsuperscript{30} The EIA is now a well-accepted national instrument, and project-level EIA regulations exist in over 197 countries.\textsuperscript{31} At the international level, EIA obligations first arose to address the transboundary impacts of specific projects “and were largely the cumulative corollary of a state’s international environmental law obligations.”\textsuperscript{32} The International Court of Justice has recognized the obligation to conduct EIAs prior to engaging in large-scale transboundary projects as a principle of customary international law.\textsuperscript{33} Further, although originally meant to include chiefly environmental criteria, the scope of EIAs has tended to widen and encompass social concerns. The institutionalization of EIAs, with the accompanying public disclosure and consultation processes, allowed NGOs and other groups to voice concerns about social impacts and ensure their inclusion in the analysis.\textsuperscript{34}

As mentioned, both the United States and Canada employ an EIA methodology for their RTAs, based on the first NAFTA Effects study carried out by the North American Commission for Environmental Cooperation.\textsuperscript{35} This methodology focuses on the anticipated environmental effects of the economic changes resulting from a trade treaty. Through the public participation mechanisms it can also incorporate social effects. EIAs in the United States and Canada generally involve an open investigation by an inter-agency task force within the government, with opportunities provided for public participation. These reviews tend to have a limited scope, taking into account solely the environmental impacts within Canada or the US, although environmental impacts in the counterpart state or even global impacts may be considered

\textsuperscript{29} Daly, \textit{ibid}.
\textsuperscript{32} \textit{Ibid}.
\textsuperscript{33} \textit{Case Concerning the Gabčíkovo-Nagymaros Project (n 8), Majority Opinion of Judge Schwebel, [1997] ICJ Rep} 206.
\textsuperscript{34} Gehring & Cordonier Segger 2005, supra note 31 at 197-99.
from time to time. The SIA methodology employed by the EU, on the other hand, analyzes the potential economic, environmental and social impacts. This approach tends to focus on key sectors in the trade liberalization scenario to assess the impact within these sectors on a selection of indicators. SIAs are carried out by independent consultants. Generally, an SIA will anticipate scenarios of outcomes and then survey a series of economic and scientific studies to analyze the potential economic, social, and environmental effects. SIAs examine impacts both in Europe and counterpart states, as well as global considerations.

3. ASSESSING EXISTING PRACTICES: SUSTAINABLE AND ENVIRONMENTAL IMPACT ASSESSMENTS COMPARED

This section aims at analysing the quality and breadth of the review process under the EIA and SIA methodologies. I will employ a case study approach, focusing on the impact assessments of the separate trade agreements between Korea and the EU, the United States, and Canada, respectively. As mentioned, these impact assessments are quite recent and involve Korea, which is an important and emerging trading partner for the EU, the United States, and Canada. As such, we can assume that these assessments reflect current best efforts at impact assessments of trade agreements.

Research conducted by the Centre for International Sustainable Development Law ("CISDL") has identified three main categories of impacts regarding trade agreements and sustainable development. Regulatory impacts refer to direct or indirect constraints of trade disciplines on legitimate domestic environmental and social development laws. The provisions of a trade agreement may disallow, constrain or render ineffective domestic measures aimed at promoting sustainable development. Material impacts refer to the aggravation of pre-existing domestic economic, social, or environmental impacts by the effect of the new


38 The CISDL is an international research centre that conducts research on law relating to sustainable development. CISDL members include jurists and scholars from all regions of the world, and a diversity of legal traditions. As a result of its ongoing legal scholarship and research, the CISDL publishes books, articles, working papers and legal briefs in English, Spanish and French. The CISDL hosts academic workshops, dialogue sessions, legal expert panels parallel to international negotiations, law courses and seminar series, and conferences to further its legal research agenda. It provides instructors, lecturers and capacity-building materials for developing country governments and international organisations in national and international law in the field of sustainable development, and works with countries to develop national laws to implement international treaties in these areas.

trade treaty.\textsuperscript{40} Potential negative impacts of trade can be linked to a lack of domestic capacity to enact and enforce domestic environmental and social regulations, insufficient human or financial resources to address these problems, or other institutional or regulatory challenges. Economic growth or de-growth linked to a trade treaty may exacerbate pre-existing challenges. Finally, integration impacts refer to trade agreements encouraging growth in unsustainable industries.\textsuperscript{41} For example, a trade agreement may encourage the unsustainable exploitation of natural resources or strong growth in the automotive sector causing increased greenhouse gas emissions. Sometimes trade agreements encourage growth in sectors in which certain states have multilaterally agreed to reduce growth, such as fossil fuels. The following study is based on this analytical structure.\textsuperscript{42}

\section{3.1 Background and Context}

\subsection{3.1.1 CKFTA Environmental Impact Assessment}

Negotiations for the CKFTA were launched on 15 July 2005.\textsuperscript{43} Although negotiations have been stalled since 2008,\textsuperscript{44} Canada has completed an initial EIA.\textsuperscript{45} At the outset, the EIA notes that the CKFTA’s impact on the Canadian economy “will be modest, and therefore [Canada] expect[s] a correspondingly modest impact on the environment.”\textsuperscript{46} The EIA goes on to affirm that there “is a strong correlation between open markets, economic development and enhanced environmental protection.”\textsuperscript{47} This perspective reflects the environmental Kuznets curve concept, which, as noted above, lacks a clear and convincing evidentiary basis. Nonetheless, the Canadian EIA draws reassurance from the seemingly contradictory ideas that 1) the impact on the economy will be small and therefore the impact on the environment will also be negligible, and 2) economic impacts are always good for the environment. The EIA process is premised on the recognition that trade can harm the environment. It is puzzling to find such language in the first pages of an EIA.

The EIA notes that Korea is the twelfth-largest merchandise-trading nation in the world, which recovered rapidly from the 1997 Asian financial crisis.\textsuperscript{48} In 2005, trade in merchandise

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\textsuperscript{42} Fully elaborated in Cordonier Segger, supra note 7.

\textsuperscript{43} CKFTA, supra note 6.


\textsuperscript{45} Department of Foreign Affairs and International Trade Canada, Canada-Korea Free Trade Agreement: Initial Environmental Assessment Report, (Ottawa: DFAIT, September 2007) [CKFTA EIA].

\textsuperscript{46} Ibid at 3.

\textsuperscript{47} Ibid.

\textsuperscript{48} Ibid at 9.
between the two states was valued at nearly CAD $8.2 billion, with Canada registering a negative balance of trade. Trade in investment and services were valued at CAD $1.1 billion each, again with Canada registering a negative balance of trade.\textsuperscript{49} Selling raw materials is one of Canada's three objectives in the CKFTA process, along with benefiting from value chains of competitive production and supply from Korean corporations and establishing an export and manufacturing base in Northeast Asia.\textsuperscript{50} The EIA notes potential export growth for Canada in "wood pulp, mineral fuels, metals, electrical machinery, shellfish and a wide variety of agricultural products."\textsuperscript{51} Imports from Korea would involve vehicles.

### 3.1.2 KORUS Environmental Impact Assessment

Negotiations for the KORUS\textsuperscript{52} began in 2006. An agreement was signed on 30 June 2007 and it entered into force on 15 March 2012. The United States produced an interim EIA report in December 2006.\textsuperscript{53} This is the second-largest RTA to which the United States is a party, after NAFTA.\textsuperscript{54} The EIA emphasizes that Korea is a highly developed country with one of the highest population densities in the world (483 per square km), with high literacy rates and life expectancy.\textsuperscript{55} The United States is Korea's third-largest trading partner. In 2005, total trade in goods between the two countries amounted to USD$72 billion, with a trade balance deficit for the United States. Figures for trade in services and investment are not included in the EIA, but other sources point to approximately USD$25 billion in trade in services in 2008\textsuperscript{56} and USD$27 billion of foreign direct investment in 2007.\textsuperscript{57} The United States had a host of objectives related to KORUS, which are detailed in the EIA.\textsuperscript{58} The main objectives for the United States appear to be facilitating exports of industrial and agricultural goods by removing tariffs, reducing Korean sanitary and phytosanitary ("SPS") measures, as well as licensing procedures.\textsuperscript{59}

\textsuperscript{49} Ibid.
\textsuperscript{50} Ibid.
\textsuperscript{51} Ibid.
\textsuperscript{52} KORUS, supra note 4.
\textsuperscript{55} KORUS EIA, supra note 53 at 3.
\textsuperscript{56} Cooper et al, supra note 54 at 30.
\textsuperscript{58} KORUS EIA, supra note 53 at 7-10.
\textsuperscript{59} Ibid at 7.
3.1.3 EU-Korea FTA Sustainability Impact Assessment

Negotiations for the EU-Korea FTA were launched in May 2007, and the states came to an agreement on 6 October 2010. The EU-Korea SIA was completed by IBM Belgium in June 2008.60 The SIA notes the high level of development achieved by Korea, which has a higher GDP than some EU member states.61 The SIA presents a very positive summary of the economic, social, and environmental situation of both the EU and Korea, noting few challenges. It emphasizes the “strong affinity for the natural environment in Korean culture” and the “strong commitment to improving environmental management” in the EU.62 As noted in the SIA, the EU is a significant trade partner for Korea, representing exports and almost 11 percent of imports in 2005.63 The EU is the second largest destination for Korean exports. Figures on the EU side are less significant, representing approximately 2 percent of exports and 3 percent of imports in 2005.64 In 2008, trade in goods between the two states was in excess of €65 billion, while trade in services exceeded €13 billion, and foreign direct investment surpassed €25 billion.65 The European Commissioner (“EC”) for Trade has called this FTA “the most ambitious trade agreement ever negotiated by the EU”.66 The EC noted that the FTA innovates by breaking “new ground in tackling significant non-tariff barriers to trade.”67 The EU appears to have aimed at improving market access for the European automobile, pharmaceutical, and electronics industries in particular.68

3.2 Regulatory Impacts

Regulatory impacts are a legitimate concern of states and other stakeholders in the RTA negotiation process, and a reason for the creation of the EIA and SIA processes. Trade commitments can infringe on the ability of states to pursue sustainable development directly by explicitly requiring the state to not implement some types of laws or regulations.69 Alternatively, trade agreements may allow certain stakeholders to prevent or negotiate changes to domestic laws.70 Two main types of regulatory impacts can arise in the RTA context. The first type refers to conflict between obligations under the RTA and other international commitments, especially MEA commitments. Indeed, states sometimes agree within MEAs to specific trade obligations

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60 EU-Korea SIA, supra note 26.
61 Ibid at 15-16.
62 Ibid at 17.
63 Ibid at 49.
64 Ibid.
66 EC, The EU-Korea Free Trade Agreement in Practice (Brussels: EU, 2011) at 1.
67 Ibid.
68 Ibid at 3.
in order to achieve sustainable development objectives. For example, the Montreal Protocol contains measures restricting trade with non-parties to the Protocol in goods that contain or were produced using prohibited ozone-depleting substances.\(^7\) Unfortunately, the relationship between MEAs and WTO or RTA trade obligations is far from clear. The second type of regulatory constraint refers to direct impact on domestic legal and policy initiatives for sustainable development. Impact assessments play an important role in preventing these regulatory problems.

3.2.1 Regulatory Impacts of the CKFTA

The CKFTA EIA notes few regulatory impacts, though it does mention environmental provisions planned for the CKFTA, as well as bilateral co-operation schemes that would address regulatory impacts. The main concerns noted are related to trade in services and investment. The EIA acknowledges that "[s]ervices sectors tend to be heavily regulated."\(^7\) The EIA emphasizes that the CKFTA only seeks to improve the transparency and predictability of business environments in Korea, based on NAFTA standards. However, the EIA pledges that these measures will "not infringe upon a government's ability to regulate within its own territory."\(^7\) Regulating services, including for environmental protection purposes, will remain possible for both states. For investment, the EIA notes concerns with regard to the "relationship between investors and States that are parties to the agreements."\(^7\) The EIA simply brushes aside these issues by noting that in all cases foreign investors in Canada are bound by the same environmental regulations as domestic investors.

There is no mention of potential conflicts with Canada's obligations under any MEAs, despite some obvious issues. For instance, increased exports of bituminous coal from Canada to Korea might increase greenhouse gas emissions in Korea. This might complicate Korea's commitments under the Kyoto Protocol.\(^7\) Increased imports of motor vehicles could lead to an increase in Canadian greenhouse gas emissions and the RTA could result in increased Korean investment in Canada's oil sands. Since Canada is no longer a party to the Kyoto Protocol this will have less of an effect on Canada's international obligations than it would have had previously.\(^7\) Overall, potential regulatory impacts are treated casually in the EIA. The invariable answer to the few expressed concerns consists in reaffirming that Canada "fully intends to maintain its right to regulate in the public interest in sectors such as health, public education, social services and culture, and its right to protect the Canadian environment."\(^7\)

\(^7\) Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 1522 UNTS 3 Can TS 1989 No 42 (entered into force 1 January 1989).

\(^7\) OECD, Joint Working Party on Trade and Environment, Trade Measures in Multilateral Environmental Agreements, Doc No COM/ENV/TD(98)127/FINAL (Paris: OECD, 1999); Birnie et al, supra note 15 at 754.

\(^7\) CKFTA EIA, supra note 45 at 29.

\(^7\) Ibid at 30.

\(^7\) Ibid at 36.

\(^7\) Ibid at 33.
Canada does propose provisions for the CKFTA to respond to regulatory concerns. For example, the objectives section will “make reference to the relation to multilateral environmental and conservation agreements.” The chapter on trade facilitation will “not impact the Government of Canada’s ability to implement measures or regulations to protect the environment.” The SPS chapter will correspond to the WTO SPS Agreement and ensure that “any SPS measures are applied only to the extent necessary to protect human, animal or plant life or health, and are based on scientific principles.” The scientific risk assessment definitions asserted at the WTO, however, have constrained the ability of states to legislate. For instance, in the EC-Biotech case, the WTO Panel found that the EU’s ban on genetically modified organisms (“GMOs”) was not based on adequate scientific risk assessment and violated articles 5.1 and 2.2 of the SPS Agreement. Interestingly, the EU position in this case was partly based on its obligations under the Cartagena Protocol. The CKFTA EIA does not question the adequacy of the WTO standards, however.

Finally, the EIA does take note of the Memorandum of Understanding (“MOU”) signed by Canada and Korea on climate change, which focuses on the “deployment of cleaner Canadian technologies in Korea.” This agreement could help to mitigate the negative effects of the CKFTA on Korea’s international obligations related to climate change. However, the degree of depth and innovation reflected in the EIA is disappointing. Trade between Canada and Korea does have serious regulatory impacts in terms of both countries’ international obligations related to climate change. The carbon-intensive industries of wood and wood products represent Canada’s second largest export to Korea. The largest is bituminous coal. Instead of proposing innovative measures that might promote compliance with MEA regimes, the EIA affirms that current legislative standards are sufficient and that the effect of the CKFTA will, in any case, be minimal. Overall, the assessment of regulatory impacts under this EIA is inadequate.

3.2.2 Regulatory Impacts of the KORUS

The KORUS EIA contains a section specifically devoted to analysing the regulatory impacts of a trade relationship that is worth USD$72 billion in goods alone. The section is three paragraphs long and focuses exclusively on regulatory impacts within the US. The EIA notes that “KORUS negotiators are aware of the need to preserve the US government’s ability to maintain

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79 Ibid at 14.
80 Ibid.
82 CKFTA EIA, supra note 45 at 15.
85 CKFTA EIA, supra note 45 at 8-9.
86 Ibid at 4, 22.
87 KORUS EIA, supra note 53 at 16-17.
strong environmental laws and regulations and an effective process for enforcing them." The EIA then simply notes that concerns “related to services, SPS measures and TBT [Technical Barriers to Trade], government procurement and investment can have particular significance for domestic regulatory practices concerning the environment, health and safety.”

However, the drafters reach the surprising conclusion that, since previous EIAs have already considered regulatory impacts of trade, they do not require analysis here. Potential regulatory chilling effects from the planned investor-state dispute settlement mechanism are similarly not mentioned. Therefore, the EIA contains no contextualized analysis of regulatory impacts in the United States and does not even mention potential regulatory impacts in Korea. It is worth noting that the section describing the US objectives includes a commitment to ensure that Korea will not “weaken or reduce the protections provided for in its environmental laws,” as an encouragement for trade and investment. A similar provision is included for labour laws.

The EIA does mention some concerns regarding potential conflicts with MEA obligations. The EIA considers the problems linked to trade and invasive species, noting international efforts to prevent and combat invasive species, for example through the International Convention for the Protection of New Varieties of Plants. However, the EIA only takes note of the international efforts and encourages further co-operation. A detailed examination of the MEA obligations and potential conflicts with the trade agreement is not forthcoming. The EIA does engage in a more thorough review in terms of concerns related to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”). Korean authorities face difficulties in enforcing CITES and public comments “raised concerns with illegal shipments of wildlife entering Korea in connection with traditional medicine.” The EIA notes that the future trade agreement will likely have little effect as tariffs for imports from Korea to the United States of wild plants and animals were already close to nil. The EIA does not mention imports of endangered species from the United States into Korea, however. This appears to be an odd oversight, considering that the EIA itself notes the demand for materials linked to endangered species, such as bears and horned mammals in Korea. Bears being more common in the United States than in Korea, export figures may have been more pertinent. The EIA does express hope that the RTA process will represent an opportunity for increased bilateral co-operation to prevent trade in endangered species.

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88 Ibid.
89 Ibid.
90 Ibid.
91 Ibid.
92 Ibid at 10.
93 Ibid.
96 KORUS EIA, supra note 53 at 14.
97 Ibid at 15.
Overall, the analysis of regulatory impacts in the KORUS EIA appears to skim a very selective surface. Domestic regulatory impacts are not analyzed in a contextualized manner. The EIA refers to the analysis conducted under other EIA processes. Nonetheless, the regulatory impacts linked to the KORUS FTA may not be exactly similar to regulatory impacts observed in EIA processes involving Jordan or Chile. The impacts on MEA commitments only mention CITES and invasive species. For instance, the EIA fails to analyze the effects of increased trade and the resulting amplified carbon emissions on Korea’s obligations under the Kyoto Protocol and other international agreements. Similar to the Canadian EIA process, the KORUS EIA’s examination of regulatory effects is disappointing.

3.2.3 Regulatory Impacts of the EU-Korea FTA

The EU-Korea SIA does not include a coherent analysis of potential regulatory impacts. Instead, regulatory concerns are dispersed throughout the SIA itself. The SIA extensively documents all of the MEAs to which Korea is a party and analyzes compliance efforts to date. For instance, the SIA notes that Korea met its initial obligations under the Montreal Protocol. In terms of the Kyoto Protocol, it comments that “the absence of specific targets in Korea’s three-year national action plans on climate change weakens pressures and incentives for reducing greenhouse gas emissions meaningfully in the foreseeable future.” The SIA further indicates that the EU and Korea share concerns about the development and future of the United Nations Framework Convention on Climate Change (“UNFCCC”). Emissions are likely to increase modestly due to the RTA, because of increased energy use in transportation linked to the trade agreement as well as trade liberalization in the automotive sector (although in its conclusion the SIA deems the CO₂ impact of increased automotive trade to be negligible). The SIA calls especially for greater environmental co-operation to mitigate environmental impacts and notes that tariff reductions on automobiles could be phased in more slowly.

Considerations of regulatory impacts on domestic legislation are also dispersed throughout the SIA. After a general consideration of economic, social, and environmental impacts, the SIA focuses on key sectors in the trade liberalization process. Regulatory aspects naturally emerge in a prominent manner in the sections on financial services, technical regulations and standards, intellectual property rights, as well as investment. For example, the SIA notes that Korea’s regulatory framework in terms of intellectual property rights (“IPR”) has largely been brought into compliance with WTO requirements under the Agreement on Trade-
Related Investment Measures\textsuperscript{107} ("TRIPS").\textsuperscript{108} However, although the status of IPR legislation has improved in Korea, its enforcement and implementation remains problematic and was a point of tension between the EU and Korea during the negotiation of the FTA.\textsuperscript{109} Issues linked to counterfeits of foreign products and copyright privacy are widespread in Korea. The SIA notes that the current IPR situation has economic and social impacts in the EU for luxury goods, audiovisual products, pharmaceuticals and other sectors.\textsuperscript{110} The SIA further indicates that previous EU bilateral FTAs have included commitments for the protection of IPRs and proposes a series of strong recommendations for stronger IPR legislation implementation and enforcement in Korea.\textsuperscript{111}

Another example of regulatory impacts could relate to financial services. The SIA recognizes that regulation “is a critical point in financial services, with major implications for the trade issues.”\textsuperscript{112} Financial authorities everywhere face the burden of attempting to prevent excessive risk-taking by financial institutions without “extending implicit blanket insurance for all banking operations.”\textsuperscript{113} This involves the regulation of banks, insurance companies, and non-bank financial institutions. The EU specifically is a large exporter of financial services, comprising many of the world’s leading banks and insurance companies. Liberalization of financial services would involve modification and harmonization of rules to encourage greater access to the domestic financial services sector by foreign entities, thereby promoting foreign direct investment (“FDI”). The SIA examines social impacts and suggests that an increase in FDI to Korea may heighten the demand for skilled labour in financial services. As the financial sector tends to be a large employer of women, this would increase opportunities for the employment and social mobility of women in Korea, provided that opportunities to upgrade skills are offered.\textsuperscript{114} The SIA further includes an unequivocal recommendation that the EU and Korea should, within the trade agreement, commit not to “use the relaxation of environmental regulations or labour standards as an investment incentive.”\textsuperscript{115}

Overall, this SIA does highlight and present in detail a variety of potential regulatory impacts in multiple economic sectors that might be affected by the FTA. Further, it attempts to assess the potential economic, social, and environmental consequences of these regulatory impacts in both the EU and Korea. Although many interesting elements do arise from the environmental and social analyses here, they tend not to be as elaborate and detailed as the economic sections. For instance, the analysis of environmental impacts in the IPR section is only two paragraphs long. This is in spite of the growing significance of IPRs to the environment,

\textsuperscript{108} EU-Korea SIA, supra note 26 at 219.
\textsuperscript{109} Ibid at 222.
\textsuperscript{110} Ibid at 227.
\textsuperscript{111} Ibid at 25.
\textsuperscript{112} Ibid at 173.
\textsuperscript{113} Ibid.
\textsuperscript{114} Ibid at 195.
\textsuperscript{115} Ibid at 25.
especially through the link to technology transfer. Overall, however, the EU-Korea SIA presents a broad overview of key sectors where regulatory impacts are likely to arise. Its analysis of the connections between the FTA and MEA obligations is particularly detailed and insightful.

3.3 Material Impacts

As mentioned above, trade liberalization may have positive, negative, or no impacts on sustainable development depending on its context and focus. However, it appears that areas with pre-existing economic, social, or environmental vulnerabilities may be particularly at risk in the trade liberalization process if flanking or mitigating measures are not implemented concurrently. For example, the EU-Chile SIA of the EU-Chile Association Agreement\(^ {117} \) emphasized that pollution from chemical and non-ferrous metal industries already posed a significant environmental and health hazard in Chile.\(^ {118} \) Increased trade, through 'scale effects,' would aggravate challenges in this problematic sector. The EU-Chile SIA also expressed concerns about employment in the fruit sector, where 70 percent of temporary workers in fruit-packing plants are women exposed to significant health risks due to the use of chemical fertilizers, pesticides, and herbicides.\(^ {119} \) An increase in fruit exports from Chile, absent an improvement in working conditions, would significantly aggravate the scale of this problem. As such, it appears that an important task of impact assessments is to identify pre-existing vulnerabilities and suggest measures in the context of trade liberalization. Material impacts are especially important to identify and address as they often refer to direct harm to vulnerable people that are directly linked to the trade agreement.

3.3.1 Material Impacts of the CKFTA

Due to the limited mandate of the Cabinet Directive, the material impacts identified in the CKFTA EIA are largely environmental and situated in Canada. The language employed is reassuring and tends to minimize potential problems through an emphasis on Canada's regulation of its natural resources. For instance, the EIA notes that Korean tariffs on Canadian fish are high, and liberalization could therefore result in a boom in exports. However, it adds that "fish management systems have been put into place to ensure the sustainability of Canada's fisheries and the environmental integrity of its aquaculture operations so that any increased trade from an FTA will have minimal environmental impact."\(^ {120} \) There does not appear to be a wide consensus for such optimism concerning regulatory frameworks in Canada. For example, a 2010 petition to the office of the Auditor General of Canada attracted attention to the nega-

\(^{116} \) Ibid at 227.

\(^{117} \) Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, 18 November 2002, OJ L352/3 (entered into force 1 February 2003).

\(^{118} \) Planistat, Commission of the European Communities, Sustainable Impact Assessment (SIA) of the trade aspects of negotiations for an Association Agreement between the European Communities and Chile (Final Report), revised ed (Luxembourg: Planistat, 2002) at 206 [EU-Chile SIA].

\(^{119} \) Ibid at 188.

\(^{120} \) CKFTA EIA, supra note 45 at 11.
tive environmental impacts of salmon aquaculture in Passamaquoddy Bay, New Brunswick.\textsuperscript{121} Canada notes that it will preserve its ability to enact and enforce regulations in the fisheries sector, as in all other sectors, but the EIA proposes no specific mitigating or flanking measures.

The greatest unmitigated environmental impact linked to this trade liberalization process likely relates to minerals, as well as wood and wood products. The EIA notes that bituminous coal, a significant source of \( \text{CO}_2 \) and other pollutant emissions, is Canada's largest export to Korea.\textsuperscript{122} Although tariffs are currently low, a reduction or elimination of tariffs may result in an increase of trade. The EIA recognizes that export growth in raw material exports such as mineral fuels is a Canadian objective through the \textit{CKFTA} process.\textsuperscript{123} It states that mining "is an intensive type of land use with potential for environmental impact over a limited area."\textsuperscript{124} New mining projects in Canada do require the submission of an EIA; however the social and environmental impacts of mining remain a significant public concern and a source of tension with aboriginal communities.\textsuperscript{125} Increased extraction and export of mineral fuels, especially coal, also raises concerns with regard to \( \text{CO}_2 \) emissions, which are not addressed in the \textit{CKFTA} EIA. Further, Korean investment in Canada has largely focused on mineral resources and the oil and gas sector, including the Albertan tar sands.\textsuperscript{126} An increase in FDI linked to trade liberalization might therefore lead to direct environmental impacts in Canada.

The \textit{CKFTA} EIA also remarks that the "elimination of restrictive tariff barriers currently facing forestry products" will allow improved market access for Canadian producers exporting to Korea. Again, the EIA reassuringly notes that "Canadian governments at the federal, provincial and territorial levels have taken steps to ensure that our forests are managed in accordance with sustainable development principles."\textsuperscript{127} By law, all forests harvested in Canada on public lands must be regenerated.\textsuperscript{128} Recently, however, pine beetles decimated over 50 percent of pine forests in British Columbia and are currently spreading to Alberta. This proliferation may be linked to more mild winters caused by climate change, which enhance the reproductive capacity of the beetles.\textsuperscript{129} Loss of biodiversity linked to replanting policies and procedures are also a

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\textsuperscript{121} "Petition 300" (3 June 2010), online: Office of the Auditor General of Canada <http://www.oag-bvg.gc.ca/internet/English/pet_300_e_34331.html>.
\textsuperscript{122} \textit{CKFTA EIA}, supra note 45 at 23.
\textsuperscript{123} \textit{Ibid} at 9.
\textsuperscript{124} \textit{Ibid} at 23.
\textsuperscript{126} \textit{CKFTA EIA}, supra note 45 at 23.
\textsuperscript{127} \textit{Ibid} at 24.
\textsuperscript{129} \textit{Ibid} at 24.
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concern in the Canadian context.\textsuperscript{130} In a context of enhanced trade, Canadian forests integrate a number of pre-existing vulnerabilities, which are not mentioned in the \textit{CKFTA EIA}.

Overall, the \textit{CKFTA EIA} does identify a number of relevant environmental impacts that might occur as a result of an eventual \textit{CKFTA} in Canada. However, the analysis of these potential impacts lacks detail and at times appears overly reassuring. The reader is sometimes confronted with the impression that the EIA drafters have a blind faith in the current Canadian regulatory system to prevent all harm and heal all wounds. Notably, social impacts and impacts affecting Korea are not mentioned, as they are not within the ambit of the Cabinet Directive. Yet, even as an assessment meant to present possible impacts solely for the environment in Canada, this document is inadequate.

3.3.2 Material Impacts of the \textit{KORUS}

Although the \textit{KORUS EIA} is meant to focus on environmental impacts within the US, it seems to focus more on environmental trends in Korea. The EIA notably highlights pre-existing Korean environmental challenges in air and water quality management, management of water resources, solid waste management, wildlife trade, marine fisheries, and enforcement of environmental laws.\textsuperscript{131} Presumably, these concerns are listed because the United States Trade Representative (“USTR”) negotiators should take them into account in the trade negotiation process. The EIA chooses to further focus on the potential impact of trade liberalization in a few of these highlighted areas. As noted above, the EIA notes concerns linked to increased trade in endangered species, as well as the spread of invasive species.\textsuperscript{132} Korean traditional medicine can apparently involve harvesting various parts of endangered species such as bears or tigers, and US customs officials have intercepted illegal imports from Korea in the past. Several US invasive species were spreading in Korea at the time of the EIA, such as red-eared sliders and black bass, and the EIA noted the necessity of enhanced co-operation in order to reverse this trend.

The EIA also highlights marine fisheries as a potential area for material impacts. The high demand for seafood in Korea is significant in the context of the reduction in tariffs contemplated in the negotiation process. Aquaculture reduces the pressure on wild stocks but it “has also been associated with environmental damage such as nutrient loading and the loss of genetic diversity of natural fish stocks, resulting in greater risk from diseases, parasites or invasive species.”\textsuperscript{133} The EIA encourages further collaboration in the context of trade liberalization to develop “less damaging and more productive off-shore aquaculture techniques.”\textsuperscript{134} Further, the EIA notes the need for stricter enforcement and greater collaboration to counter illegal, unreported, and unregulated fishing by Korean vessels flying flags of convenience. The EIA also denounces the legality in Korea of ‘accidental by-catch’ sale, which for whales is the largest


\textsuperscript{131} \textit{KORUS EIA}, supra note 53 at 4-6.

\textsuperscript{132} \textit{Ibid} at 14-15.

\textsuperscript{133} \textit{Ibid} at 16.

\textsuperscript{134} \textit{Ibid}. 
in the world. Marine fisheries involve seemingly contentious and problematic pre-existing environmental issues, which require attention in the trade negotiation process.

The section concerning the US objectives in the negotiation process include some provisions that would seek to address material impacts on both the environment as well as labour issues. Notably, the United States indicates that it will "seek to promote trade and environment policies that are mutually supportive." This could encourage negotiators to elaborate a trade agreement that, at the very least, would not aggravate areas of pre-existing vulnerability. As a note, labour standards are not a significant issue in Korea, and therefore the commitment to seek enforcement of high labour standards does not seem to address a relevant material impact.

Overall, despite its mandate to focus on effects within the United States, this EIA appears to pay much closer attention to potential environmental material impacts in Korea. The EIA provides a good summary of Korean environmental challenges, but oddly it does not mention environmental challenges in the United States. The analysis of potential aggravation of pre-existing environmental vulnerabilities through the trade agreement is restrictive and limits its analysis of trade to that of endangered species, the problem of invasive species, and issues linked to marine fisheries. Social impacts are not considered, apart from a few commitments to ensure enforcement of labour standards in Korea. Taken as a whole, the analysis unfortunately lacks depth when it comes to linking trade to environmental vulnerabilities and assessing social impacts.

3.3.3 Material Impacts of the EU-Korea FTA

The analysis of material impacts in the EU-Korea SIA appears comprehensive. As noted above, after a general review of the economic, social, and environmental context in both the EU and Korea, the SIA analyzes sector-specific impacts in the context of the FTA process. It is worth noting the methodology used in the SIA in order to determine which sectors will benefit from a detailed study. The SIA follows the methodology outlined in the EU Handbook for SIA. Important criteria for selection involve sectors that are most likely to be affected by trade liberalization, namely those sectors with higher levels of tariff and non-tariff protections. For instance, the EU-Korea SIA notes a high level of tariff protection in agricultural products for both Korea and the EU (though it is less in the EU). At the time of the SIA's publication, the grains and horticulture sector in Korea benefited from a tariff protection of 61-67 percent. Non-tariff protections involve special taxes on vehicles, or pricing and reimbursement of pharmaceuticals, for example. The SIA also looks at current levels of bilateral trade to determine the selection of sectors. For example, the SIA notes a high level of motor vehicle exports from Korea to the EU. In the end, the sectors selected were the automotive sector, the agriculture, food and beverages sector, the environmental goods and services sector, and

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135 Ibid.
136 Ibid at 10.
137 Handbook, supra note 1.
138 EU-Korea SIA, supra note 26 at 111.
139 Ibid.
140 Ibid at 112.
141 Ibid.
the financial services sector.\textsuperscript{142} The methodology used in the SIA is based on sound empirical data. However, it does appear to lack an assessment of pre-existing vulnerability to economic, social, and environmental impacts. Conceivably, a sector with lower tariffs and a lower trade volume could still suffer negative impacts from trade liberalization if it already suffered from a high level of vulnerability. Nevertheless, the reasons given for the exclusion of certain proposed sectors (such as pharmaceuticals and legal services) are compelling.\textsuperscript{145}

The SIA engages in a detailed analysis of likely economic, social, and environmental impacts associated with the automotive sector. The main economic impact is projected to be an increased competition from Korean cars in Europe linked to the phased elimination of the 10 percent tariff on Korean car imports.\textsuperscript{144} Nonetheless, the SIA expects a strong response by EU automobile manufacturers to maintain their edge in an intensely competitive industry.\textsuperscript{145} One key concern in the SIA relates to the automotive sector were social impacts linked to job loss, which could be as high as 4,450 jobs in the EU. The SIA places hope in the strong institutional context within the EU to “help better anticipate and manage change in the EU’s automotive industry.”\textsuperscript{146} In terms of environmental impacts, the SIA clearly indicates that, due to the good fuel efficiency of Korean car models, “the net environmental impact of an FTA would appear to be negligible on balance.”\textsuperscript{144} While EU automakers were stagnating in terms of fuel efficiency progress, Korean manufacturers committed to developing high fuel efficiency standards.\textsuperscript{148} As such, replacement of EU models with Korean ones might actually reduce CO\textsubscript{2} emissions. As mentioned, the FTA recommends a gradual phasing-in of tariff reductions in the automotive sector in order to mitigate potential economic and social impacts.\textsuperscript{149}

Other sectors with significant pre-existing social and environmental vulnerabilities in both countries are agriculture, and food and beverages. The FTA process is predicted to result in an increase in EU food exports to Korea in alcoholic beverages, processed and prepared foods, and primary products.\textsuperscript{150} The EU has an active and expanding export market in these areas. The only expansion envisaged for Korean exports is in specialty products such as instant noodles and kimchi.\textsuperscript{151} The SIA states that “[f]arming and food processing are vital sectors in the EU in terms of employment and social impacts, which are regionally dispersed and nation wide.”\textsuperscript{152} The impacts in the EU are expected to be largely positive in terms of increased employment and productivity of labour.\textsuperscript{153} In Korea, however, the FTA will have a negative impact on the

\textsuperscript{142} Ibid at 114-15.
\textsuperscript{143} Ibid at 115.
\textsuperscript{144} Ibid at 128.
\textsuperscript{145} Ibid at 129-30.
\textsuperscript{146} Ibid at 133.
\textsuperscript{147} Ibid at 134.
\textsuperscript{148} Ibid.
\textsuperscript{149} Ibid at 23.
\textsuperscript{150} Ibid at 151-53.
\textsuperscript{151} Ibid.
\textsuperscript{152} Ibid at 154.
\textsuperscript{153} Ibid.
rural economy, where the affected workforce is elderly and low-income.\textsuperscript{154} Further, agriculture in Korea “is a highly politically sensitive sector, and food security concerns are a priority.”\textsuperscript{155} Negotiators present at the 2003 WTO Ministerial Meeting in Cancun will certainly have a vivid memory of protests by Korean farmers, which even involved a public suicide.\textsuperscript{156} Korea has introduced some special legislation to support agricultural adjustment in a previous FTA with Chile to function as a partial safety net. This initiative could help mitigate potential negative impacts.\textsuperscript{157} In terms of environmental effects, the SIA mentions possible impacts in the EU, where “rural areas account for 90 percent of the territory.”\textsuperscript{158} The extent and type of farming has large impacts on environmental quality. The SIA does not come to any definitive conclusions in terms of environmental impacts, however, as the responses of the EU farming sector to the FTA were uncertain. The SIA does not mention any negative environmental impacts for Korea in the context of agriculture.

The financial sector is also vulnerable to some significant potential material impacts. A volatile financial sector has especially strong economic impacts, which could be aggravated if financial service liberalization increases the vulnerability of this sector. Liberalization can have “negative effects in relation with the increased sophistication and complexity and the deeper inter-relations between various segments of the financial intermediation.”\textsuperscript{159} The SIA emphasizes the need for strong prudential regulation of financial services in the context of liberalization, in order to counter the vulnerability of financial markets to crises. Financial crises evidently have strong social impacts, due to the central role played by the financial sector in practically every aspect of modern economies. The SIA also notes potential environmental impacts of the financial sector, “When financial liberalization leads to higher economic growth and employment, it may have negative impacts on the environment.”\textsuperscript{160} The SIA suggests encouraging the emergence of financial products that encourage green technologies, for example.\textsuperscript{161} This discussion, as well as the section on environmental goods and services, is directly relevant to integration effects of trade agreements, which will be discussed below.

Overall, the EU-Korea SIA presents a detailed analysis of several sectors presenting potential material impacts in the context of the FTA. The methodology employed for the selection of some sectors over others is transparently described and compelling. Further, the analysis transparently presents potential problems and suggests mitigating measures often based on best practices from previous treaties, but applied in a contextualized manner here. Again, however, the economic analysis unfortunately tends to be more detailed than the social and environmental sections.

\textsuperscript{154} \textit{Ibid} at 155.
\textsuperscript{155} \textit{Ibid}.
\textsuperscript{156} OneWorld, “Suicide at WTO Meeting Highlights Farmers’ Plight” \textit{Common Dreams} (12 September 2003), online: Common Dreams <http://www.commondreams.org/headlines03/0912-04.htm>.
\textsuperscript{157} EU-Korea SIA, supra note 26 at 156.
\textsuperscript{158} \textit{Ibid}.
\textsuperscript{159} \textit{Ibid} at 191.
\textsuperscript{160} \textit{Ibid} at 196.
\textsuperscript{161} \textit{Ibid}.
3.4 Integration Impacts

Despite state commitments, both in the trade treaty context and in MEAs, to promote sustainable development, trade liberalization can sometimes promote the wrong kind of growth. Integration here refers to the co-dependence of the economic, social and environmental pillars of sustainable development. Integration impacts occur when trade treaties promote growth in unsustainable sectors of the economy, at the expense of social well-being and/or the environment. These unsustainable sectors may be areas that states have multilaterally agreed to phase out,\textsuperscript{162} that are particularly harmful to the environment or social well-being,\textsuperscript{163} or that are simply illegal.\textsuperscript{164} Integration impacts can involve mitigating or flanking solutions that are among the most innovative and promising sustainable development aspects of an RTA. For instance, ever since their unsuccessful negotiation attempt in the WTO Doha Round, environmental goods and services ("EGS") have routinely been integrated as an area of trade liberalization in RTAs. As we will see, EGS are mentioned in two of the impact assessments analyzed in the context of this project. The promotion of EGS is presented by states as a strategy to replace sectors of the economy that create more environmental and social harm with a cleaner, greener economy. A prominent example is the promotion of renewable energy technology to replace traditional fossil fuels. The analysis of integration impacts and the implementation of innovative solutions to these impacts constitute the main and most promising means to ensure that free trade promotes sustainable development.

3.4.1 Integration Impacts of the CKFTA

Due to Canada's high exports in natural resources and raw materials, the integration impacts of the CKFTA are potentially high. The CKFTA EIA noted a plausible scenario of a 56 percent increase in Canada's total exports to Korea linked to the FTA.\textsuperscript{165} As noted above, minerals represent Canada's largest export to Korea, with Korea purchasing 17 percent of all the bituminous coal that Canada exported worldwide in 2005.\textsuperscript{166} Considering Korea's Kyoto Protocol commitments to reduce CO$_2$ emissions, growth in this unsustainable sector of the economy is problematic. The EIA appears to express support for Canadian export growth in mineral fuels as well as wood pulp, which are arguably unsustainable economic sectors with significant environmental consequences.

Unfortunately, the CKFTA EIA contains very little analysis of mitigating or flanking measures when it comes to growth in unsustainable sectors. Surprisingly, there is no analysis of opportunities in the EGS sector. The EIA only contains a general statement noting that open "markets also help to foster the development of new, more environmentally friendly technologies, and liberalized trade and investment help to create the conditions for technology

\textsuperscript{162} Such as CO$_2$ emissions under the Kyoto Protocol, supra note 76 or trade in endangered species under CITES, supra note 95.

\textsuperscript{163} Such as Canadian asbestos exports, see e.g. WTO, Appellate Body, European Communities: Measures Affecting Asbestos and Asbestos-Containing Products, WTO Doc WT/DS135/AB/R (2001), online: WTO <http://docsonline.wto.org>.

\textsuperscript{164} See e.g. KORUS EIA, supra note 53 at 16 (illegal fishing).

\textsuperscript{165} CKFTA EIA, supra note 45 at 5.

\textsuperscript{166} Ibid at 23.
The EIA does recognize a recent MOU on climate change between Canada and Korea, “which allows the two countries to promote the deployment of cleaner Canadian technologies in Korea.” Such an initiative may contribute to a decreased need for Canadian coal to produce energy in Korea but lacks vigour in the CKFTA process, considering the magnitude of mineral fuel exports involved. The overview of the potential impacts linked to the intellectual property (“IP”) section of the CKFTA mentions that improved IP protection could encourage investment and innovation in environmental technology, which may lead to the development of new products, technologies, or processes that could have a positive environmental impact. Again, however, the EIA only deals in vague generalities instead of engaging in a detailed discussion of how the CKFTA could be designed to promote trade in EGS.

Overall, the lack of effective measures to counter integration impacts in the CKFTA EIA is worrisome. Despite the known potential for trade liberalization to promote the development of EGS, this EIA does not engage in any contextual analysis on this topic. Rather, the EIA paradoxically appears to hail an increase in trade in unsustainable sectors such as mineral fuels and wood pulp. In this regard, the Canadian EIA process is out of date and does not promote sustainable development through RTAs.

3.4.2 Integration Impacts of the KORUS

The KORUS EIA contains a better analysis of integration impacts. This EIA contains detailed trade figures from 2005 for the US-Korea trade relationship. More recent figures from the US Census Bureau show that major US exports in 2010 involved corn (over US$1.4 billion), petroleum products (over US$1.1 billion), steelmaking products (over US$1 billion), organic chemicals (over US$1.8 billion), industrial machines (over US$3.8 billion), and semiconductors (over US$2.6 billion, in decline from US$4.5 billion in 2004). In a concerning trend, coal exports appear to have jumped from over US$200 million to over US$500 million from 2009 to 2010. US imports from Korea in 2010 involved passenger vehicles (over US$6 billion), automobile parts (over US$4 billion), petroleum products (nearly US$3 billion), computer accessories and semiconductors (over US$3 billion each), and household appliances and goods (approximately US$9 billion). As such, KORUS possesses significant opportunities to promote trade in EGS and thereby contribute to phasing out unsustainable sectors such as coal, which is especially relevant when one considers the increase in coal exports from the United States to Korea in 2010.

The KORUS EIA does contain a section specifically devoted to opportunities linked to increased trade in EGS. According to this EIA, Korea represented “the eighth largest export
destination for US environmental goods in 2005, with nearly US$1.2 billion in imports.\textsuperscript{173} The EIA defines EGS as including “a wide variety of services and technologies relevant to, for example, pollution control and waste management and natural resource protection.”\textsuperscript{174} Regrettably, especially considering the debates within the WTO on defining EGS, the EIA does not appear to give further precisions as to which goods and services fall in this category. The EIA does note the high tariffs imposed by Korea on a range of EGS. As such, trade liberalization could enhance sustainable development by lowering these tariffs. The EIA also analyzes the specific example of Korean shipbuilding. In 2004, Korean shipyards were the top world producers of merchant cargo vessels. The EIA emphasizes that “KORUS may provide opportunities to promote to Korean shipbuilders the use of advanced, more environmentally friendly technologies that are produced by U.S. companies.”\textsuperscript{175} Based on the list of top imports and exports listed above, KORUS would certainly also be an opportunity for technology transfer with regard to automobiles, computers, household appliances, organic chemicals, and a number of other sectors where innovations can lead to significant social and environmental benefits, such as greater energy efficiency.

Overall, the KORUS EIA does identify EGS as a growth sector in the context of trade liberalization, which could mitigate and potentially deter growth in unsustainable industries. The level of analysis of EGS lacks depth, however. EGS remains too vaguely defined as a category and the EIA only delves into one specific example. Nonetheless, the EIA attempts to analyze how trade can promote sustainable development, as opposed to simply considering which strategies can ensure that trade does not lead to unsustainable development.

### 3.4.3 Integration Impacts of the EU-Korea FTA

Integration impacts are a key aspect of the EU-Korea SIA and are considered in depth. Indeed, trade liberalization between EU and Korea presents many opportunities to promote sustainable development and discourage unsustainable sectors of the economy. The largest trade sectors between EU and Korea are machinery and transport equipment, which in 2006 represented 78.8 percent of EU imports from Korea and 44.2 percent of exports.\textsuperscript{176} Miscellaneous manufactured articles and chemicals both ranged over 16 percent of EU exports, while manufactured articles represented around 16 percent of EU imports.\textsuperscript{177} As noted in the SIA and evident through these figures, the EU-Korea trade relationship involves a high degree of intra-industry trade, and this trend is likely to expand with trade liberalization.\textsuperscript{178} Opportunities for promoting cleaner, greener and more efficient machinery and goods/appliances are striking in this situation.

In this spirit, the SIA analyzes trade liberalization in the context of EGS. The SIA takes note of the controversies linked to defining EGS in the WTO.\textsuperscript{179} Environmental goods can

\textsuperscript{173} KORUS EIA, supra note 53 at 15.
\textsuperscript{174} Ibid.
\textsuperscript{175} Ibid.
\textsuperscript{176} EU-Korea SIA, supra note 26 at 51.
\textsuperscript{177} Ibid.
\textsuperscript{178} Ibid at 200.
\textsuperscript{179} Ibid at 197-98.
be distinguished between those involving an environmental “end-use” and “environmentally preferable products” that simply cause less environmental harm than other comparable products.\textsuperscript{180} Both categories were incorporated into the WTO negotiation process and the EU and Korea were key players in a group of states that proposed a list of environmental goods. They were also among a group of states circulating proposals for the promotion of environmental services.\textsuperscript{181} As such, definitional issues such as those encountered in the WTO forum were unlikely to arise in this FTA. The parties, through past negotiations, have already shown a substantial amount of agreement on these issues. The SIA emphasizes that EGS “do not correspond to a strict sector or sub-sector of the economy. Instead environmental goods and services encompass a relatively diverse array of industrial and service activities.”\textsuperscript{182} The SIA is based on the list of EGS proposed by the EU, Korea, and other States in the WTO for the purpose of its analysis.

The impact of liberalization in EGS according to the SIA analysis was contingent on the outcome of the Doha round. Now that Doha has failed, bilateral trade liberalization in EGS has gained significance in terms of its impact, as it will have greater effects than just adding to liberalization commitments under the WTO.\textsuperscript{183} The SIA broadly anticipates that trade liberalization in EGS would have positive economic, social, and environmental impacts in the EU and Korea. Specifically, the SIA anticipates growth in intra-industry trade specialized in EGS, with technology transfers from the EU to Korea. Since much of this growth would occur in the machinery sector, employment is expected to rise in both the EU and Korea, especially for more vulnerable unskilled labour, which addresses long-term unemployment issues.\textsuperscript{184} In turn, positive environmental impacts are expected to result. The SIA notes the significance of EGS in terms of the international commitments of the EU and Korea to low-carbon growth.\textsuperscript{185} It states that since “both the EU and Korea are substantial importers of fossil fuels, investment and innovation are critical in clean technologies and renewable energy such as solar and wind power generation.”\textsuperscript{186} Overall, the SIA points to a growth in EGS through the trade agreement as playing a significant role in phasing out unsustainable sectors of the economy while having strong economic, social, and environmental benefits.

The SIA also engages in a detailed discussion of IPRs, which are directly relevant in terms of the integration impacts of trade. The SIA deplores the weak enforcement of IPR legislation in Korea, which has evidently been a strong concern of the EU in the negotiation process.\textsuperscript{187} The SIA notes a lack of capacity combined with deficiencies in political and judicial will to pursue even egregious copyright offenders. The lack of protection in terms of IPR inhibits the diffusion of technologies by EU companies to Korea. The response of EU companies has been to “transfer little knowledge with the product or to engage only in a limited range of

\textsuperscript{180} Ibid at 197.
\textsuperscript{181} Ibid.
\textsuperscript{182} Ibid at 199.
\textsuperscript{183} Ibid at 200.
\textsuperscript{184} Ibid at 201-202.
\textsuperscript{185} Ibid at 199.
\textsuperscript{186} Ibid.
\textsuperscript{187} Ibid at 221.
manufacturing or processing activities." Korean IPR practices could be unsustainable insofar as they inhibit the creation and diffusion of new and potentially cleaner and more efficient technologies. The SIA suggests that the EU-Korea FTA should contain “detailed measures for strengthening the enforcement process” of IPRs, using KORUS as a model. The SIA indicates that stronger enforcement of IPR legislation could have short-term negative social impacts in Korea, especially for loss of employment in companies that would have to change their branding and potentially lose market share due to geographical indication issues. Overall, however, stronger IPR enforcement in the context of this treaty could promote sustainable development through the diffusion of newer technologies. IPR enforcement would entail directly phasing out current illegal and unsustainable IP practices.

Overall, the EU-Korea SIA strongly emphasizes the integration of economic development, social well-being, and environmental protection in the context of trade liberalization. This orientation emerges through the analysis of key sectors and especially the focus on developing trade in EGS. Through the SIA, it becomes apparent that an important objective of the EU in its trade liberalization agenda is to promote sustainable development as an objective through concrete measures. This can involve discouraging unsustainable practices, such as IPR violations, and also liberalizing and monitoring sustainable trade, for example in EGS. The EU-Korea SIA is certainly a model in this regard.

3.5 Summary of Korean Impact Assessments

The breadth and quality of impact assessments conducted by Canada, the United States and the EU differ widely. The analysis above indicates that the EU SIA process allows for a more comprehensive and detailed analysis of the regulatory, material, and integration impacts of trade agreements, as compared to the Canadian and US methods. The EU advantage is partly one of methodology. The EU mandates impact assessments that analyze economic, social, and environmental impacts both in the EU and in the counterpart state. Furthermore, the EU process employs an analytical framework to identify key sectors. The Canadian and US assessments are limited to environmental and national concerns, and lack a rigorous analytical framework to guide the elaboration of their content. Nonetheless, economic and social issues have found their way into these assessments from time to time, and effects on counterpart states seem to be a focus of at least some US impact assessments.

Overall, the procedure underlying the impact assessment may also be important to the greater quality of EU SIAs. The external consultants that prepare the SIAs operate at arm’s length from the government, and are more likely to express independent analysis and judgments. Furthermore, consultants tend to have more expertise in technical fields than the government officials conducting the Canadian and US assessments. Altogether, the EU SIA process is a model to follow in terms of impact assessments of trade agreements.

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188 Ibid at 226.
189 Ibid at 223.
190 Ibid at 227.
4. LEARNING FROM IMPACT ASSESSMENTS: EFFECTS ON TRADE AGREEMENTS

The best impact assessments are of limited use if they are not taken into account by decision-makers in the trade negotiation process. This section aims to assess the influence of impact assessments on trade negotiations. We will again focus on the three case studies identified above, involving the CKFTA, KORUS, and the EU-Korea FTA. The section will delve into the integration of impact assessment recommendations into trade agreements in the FTA negotiation process. Further, for the two case studies where a trade agreement was signed (KORUS and EU-Korea), we will analyze innovative measures incorporated directly into the treaty that respond to challenges identified in the impact assessments.

4.1 Sustainable Development in the CKFTA

Canadian impact assessments of trade agreements are conducted directly by the Department of Foreign Affairs and International Trade (DFAIT). The results of EIAs in Canada are not binding. They are meant to inform and assist negotiators in the trade negotiation process.\(^{191}\) The Interim Environmental Assessment is made available to trade negotiators during negotiations, so that they can “further develop and refine Canada’s negotiating position.”\(^ {192}\) The Final Environmental Assessment in the Canadian impact assessment process then documents how the concerns highlighted in the interim EIA were taken into account and hopefully resolved through mitigating, flanking or enhancement measures.\(^ {193}\) As noted in the Canadian impact assessment handbook, the Final Environmental Assessment documents “how the Draft EA [environmental assessment] informed the negotiations, and any pertinent information regarding the relationship between the EA process and the negotiations.”\(^ {194}\) As such, pertinent information as to the integration into the negotiation process of concerns highlighted in the interim EIA to the CKFTA as described above should be found in the final EIA.

The CKFTA process is not yet complete, and as such DFAIT has not yet produced a final EIA outlining the possible influence of the EIA on negotiations. Other existing final EIAs are brief and do not give many useful details as to the weight of sustainable development concerns in negotiations. For example, the final EIA of the Canada-Colombia and Canada-Peru FTA negotiations provided some revised environmental impacts based on consultations with the Environmental Assessment Advisory Group (“EAAG”) and the Federal/Provincial/Territorial Committee on Trade following the completion of the interim EIA.\(^ {195}\) These updates involved greenhouse gas (“GHG”) emissions and nutrient loads in rural watersheds. This final EIA then describes a few of the measures taken in the treaty and in parallel agreements to the treaty in order to “maintain environmental standards and not to encourage trade or investment by weakening or reducing the levels of protection afforded in their respective environmental

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191 Trade Framework, supra note 36.
193 Ibid at 1.1.
194 Ibid at 4.9.2.
laws.” It mentions the parallel agreement on the environment and the annex permitting good faith, non-discriminatory measures to advance public welfare. This description is cursory
to say the least. The final EIA reassures the reader that the results of the final EIA “confirm the
findings of the [initial] EA. The environmental impacts in Canada, as a result of the Canada-
Colombia and Canada-Peru FTA negotiations, are not expected to be significant.” As such,
the final EIA, despite the indications of the EIA handbook, does not give a clear sense of how
environmental concerns were handled by negotiators.

The interim EIA to the CKFTA does contain a helpful summary of the potential environ-
mental implications and provisions expected within the text of the trade agreement itself. This
summary can be analyzed in light of the regulatory, material, and integration impacts to the
CKFTA noted above. As a note, the EIA indicates that the preamble to the agreement
“is expected to reference the parties’ ongoing commitment to sustainable development and
cooperation on environmental matters.” Such declarations are the norm in Canadian trade
treaties. For example, the preamble to the Canada-Peru FTA refers to commitments regarding
the environment, labour, sustainable development, and corporate social responsibility.

Most of the measures suggested in the interim EIA summary are linked to regulatory
impacts. Regarding both countries’ obligations under MEAs, the EIA suggests that the
“Objectives” section of the agreement “makes reference to the relation to multilateral environ-
mental and conservation agreements.” The EIA also refers to the Convention on Biological
Diversity (“CBD”) in its comments on the “Intellectual Property” section of the future agree-
ment, noting that it forms part of Canada’s international IP obligations. Regarding the
impact of the trade agreement on domestic laws and regulations, the EIA contains reassurances
that Canada will maintain its ability to regulate in the “Transparency,” “Trade Facilitation,”
“Sanitary and phyto-sanitary measures,” and “Government Procurement” sections. The SPS
section should contain an explicit clarification that aligns Canada and Korea SPS regulations
on WTO standards. It is unclear whether other sections will contain explicit safeguards regard-
ing the countries’ ability to regulate for social well-being or the environment.

The EIA also mentions some co-operation and coordination measures that are relevant
to dealing with material impacts. In the context of the CKFTA, Canada and Korea are also
negotiating an environmental co-operation agreement to promote high levels of environ-
mental protection and open exchange of information. The interim EIA also mentions other
parallel agreements relevant to bilateral environmental relations, such as the MOU on climate
change and collaboration between government meteorological services. As discussed, Canadian
exports to Korea are mainly in natural resources such as fossil fuels, and as such it is unclear to

196 Ibid.
197 Ibid.
198 CKFTA EIA, supra note 45 at 14-18.
199 Ibid at 14.
200 Free Trade Agreement between Canada and the Republic of Peru, 29 May 2008, Can TS 2009 No 15
(entered into force 1 August 2009) (Canada-Peru FTA).
201 CKFTA EIA, supra note 45 at 14.
202 Ibid at 17.
203 Ibid at 10-11.
what extent collaboration of this kind will truly mitigate the material impacts of trade in this context.

The EIA contains very little in terms of measures related to integration impacts. The only measure suggested here is contained in the “Intellectual Property” section, which notes that “IP protection could encourage investment and innovation in environmental technology, which may lead to the development of new products, technologies or processes that could have a positive environmental impact.”204 This suggestion does not reflect a strong measure to promote sustainable development-oriented trade through IP. For instance, a strong IP measure here might suggest IPR provisions that support the protection of biodiversity and the recognition of traditional knowledge.

The influence of the EIA process on the CKFTA can only be assessed once the trade agreement is concluded. Nevertheless, the preliminary analysis conducted here based on the interim EIA and usual Canadian practice does not suggest that social and environmental concerns will have a significant impact. The main measures seem to be linked to regulatory impacts, and even then they are only to ensure SPS standards are consistent with WTO rules. Most disappointing is the lack of innovative provisions to promote green trade, such as those found in the EU SIAs. These include, for example, measures to secure liberalization in EGS or to reduce subsidies to unsustainable sectors, such as fishery or fossil fuels.

4.2 Sustainable Development in the KORUS

According to the USTR, the “overarching goal of the ER [environmental review] process is to ensure that, through the consistent application of principles and procedures, environmental considerations are integrated into the development of US trade negotiating objectives and positions.”205 Similar to the Canadian environmental assessment process, the US environmental reviews are meant to provide information to USTR trade negotiators on potential environmental impacts. They are in no way binding. These reviews are also meant to suggest options when negative impacts are identified. As emphasized by the USTR guidelines,

[w]here significant regulatory and/or economically driven environmental impacts have been identified, there shall be an analysis of options to mitigate negative impacts and create or enhance positive impacts. Options may include changes to negotiating positions as well as environmental policy responses outside the trade agreement, such as seeking possible changes to relevant U.S. domestic and international environmental policies.206

As with the Canadian process, USTR normally publishes a final environmental review after the conclusion of the FTA process. The final EIA indicates how environmental concerns were addressed in the context of the FTA process. Unfortunately, the final EIA of KORUS was made available to the public too late for inclusion in this analysis. It is also worth noting that pursuant to the requirements of the US Trade Act of 2002 (section 2104(e)), several advisory committees, including a Trade and Environment Policy Advisory Committee (“TEPAC”),

204  Ibid at 17.
206  Ibid at 10.
submitted reports on KORUS to the President, USTR, and Congress within thirty days of the President notifying Congress of his intent to enter into the agreement.

In fact, KORUS resulted in two developments with problematic social and environmental effects, which were not mentioned in the interim EIA analyzed above. Firstly, US negotiators obtained a reduction in environmental standards applied to American vehicles exported to Korea.\footnote{207} While standards did constitute a barrier to US auto exporters to Korea, they were also an important measure in reducing Korean greenhouse gas emissions. Essentially, US automakers do not have to meet as stringent standards in fuel consumption and GHG emissions reductions as Korean automakers do. Resumption of US beef exports to Korea was another contentious issue. Such exports were suspended in 2003 after the discovery of bovine spongiform encephalopathy (also known as ‘mad cow disease’) in US herds.\footnote{208} Korean consumers were particularly concerned about health implications and the issue was very sensitive during FTA negotiations with the United States.\footnote{209} Imports of US beef into Korea gradually resumed in 2006 and 2007; however, this was linked in part to concessions made under the auspices of FTA trade negotiations. Despite regulations directing the removal of specified risk materials known to transmit mad cow disease from cattle that are less than thirty months old when slaughtered, renewed US beef imports were accompanied by widespread protests in Korea. It is worth noting that the beef industry in the United States is a significant contributor to greenhouse gas emissions and other environmental challenges, and as such increased activity linked to the decreased tariffs can also cause unmitigated environmental impacts. Overall, the examples of car imports and beef imports between the United States and Korea illustrate that the United States obtained concessions from Korea in the trade negotiation process that in effect lower Korean standards for greenhouse gas emissions and the protection of human health, by lowering standards for imported goods.

The two impacts noted above are regulatory in nature, insofar as they are linked to the lowering of Korean standards in the context of the trade agreement. These developments are not coherent with the objectives of KORUS as expressed in the preamble, which notes that parties aim to strengthen “the development and enforcement of labour and environmental laws and policies, promote basic workers’ rights and sustainable development, and implement this Agreement in a manner consistent with environmental protection and conservation.”\footnote{210} KORUS does address regulatory impacts directly in several provisions. It is worth mentioning that KORUS was negotiated in the context of the US Bipartisan Trade Deal of May 2007 (“the Bipartisan Deal”) between the Democrat Congress and the Bush administration. This document notes that the “Administration and Congress have agreed to incorporate a specific

\footnote{207}{Cooper et al, supra note 54 at 19.}

\footnote{208}{Ibid at 4.}

\footnote{209}{Ibid. It is important to note that US beef exports to Korea were a contentious issue at the WTO prior to the discovery of ‘mad cow disease’ in US flocks. In Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, cases DS161 and DS169, 2001, the WTO Dispute Settlement Body found, in response to a request by the United States, that Korea discriminated against imported beef (violating “national treatment” in GATT) by requiring imported beef to be retailed separately from domestic beef, through specialist stores, and Korea was found to have incorrectly calculated its domestic support under the Agriculture Agreement.}

\footnote{210}{KORUS, supra note 52, preamble.}
list of multilateral environmental agreements in our FTAs.”\textsuperscript{211} The Trade Deal also postulated that environmental sanctions of FTAs would now be enforced in a similar manner to trade sanctions. Coherent with the terms outlined in this deal, Annex 20-A of \textit{KORUS} includes seven MEAs referred to under article 20.2 of \textit{KORUS}. This list does not include prominent MEAs such as the \textit{CBD} or the \textit{UNFCCC}. Interestingly, article 20.10.3 of \textit{KORUS} seeks to address the issue of potential conflicts between \textit{KORUS} and MEAs. Parties should balance their obligations under each agreement, and are not precluded from taking measures pursuant to the MEA, provided that they are not a disguised restriction on trade. \textit{KORUS} contains a number of other safeguards meant to preserve the parties’ ability to regulate for social and environmental purposes. For example, article 20.3.2 states that the “[p]arties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in its environmental laws.”\textsuperscript{212} Article 11.10 preserves the parties’ ability to regulate for environmentally-sensitive investment. Therefore, \textit{KORUS} does respond to the regulatory impacts mentioned in the EIA with regard to MEAs, albeit in a limited manner. However, the lack of a contextualized analysis in the EIA with regard to regulatory impacts may have precipitated the negative regulatory effects on the automotive and beef sectors.

\textit{KORUS} contains several collaborative mechanisms aimed at countering negative impacts of trade in sectors with pre-existing vulnerabilities. All of the material impacts highlighted in the EIA are not addressed in the FTA process, however. \textit{KORUS} establishes an Environmental Affairs Council under article 20.6 in order to oversee the implementation of chapter 20 on the environment. The Council is meant to seek public participation and decide upon environmental collaboration opportunities linked to trade. Presumably, the Council would develop measures to mitigate potential impacts on vulnerable sectors noted in the EIA, such as marine fisheries or trade in endangered species. Another mechanism worth noting is the environmental enforcement mechanism, which is a unique development. Indeed, article 20.9 outlines a dispute settlement procedure for issues arising under chapter 20 on the environment, which ultimately allows the parties to access the agreement’s dispute settlement mechanism of chapter 22. These provisions reflect the terms of the Bipartisan Deal of May 2007. As such, \textit{KORUS} contains a few co-operation mechanisms to address material impacts.

The lack of provisions in \textit{KORUS} aimed at promoting sustainable development-oriented trade is disappointing. Despite mentioning EGS in the interim EIA, \textit{KORUS} contains no specific reference to preferential tariff reductions for EGS. The tariff schedule similarly does not contain an EGS category. Despite the recommendations in the EIA, USTR negotiators did not appear to focus in a coherent manner on tariff reductions in EGS. A few provisions throughout the agreement could be considered as promoting sustainable development through trade. For example, article 5.5 aims to promote ethical business practices in the pharmaceutical sector by preventing “improper inducements to health care professionals or institutions for the listing, purchasing, or prescribing of pharmaceutical or medical device products eligible for reimbursement under health care programs operated by its central level of government.”\textsuperscript{213} Chapter 5 in general expresses the parties’ objective of promoting access to high-quality health care, which

\textsuperscript{211} United States, Office of the United States Trade Representative, \textit{Trade Facts: Bipartisan Trade Deal}, (Washington: USTR, 2007) at 2.

\textsuperscript{212} \textit{KORUS, supra} note 52, art 20.3.2.

\textsuperscript{213} \textit{Ibid}, art 5.5.
is a growing concern linked to aging demographics in both states. Notwithstanding this objective, KORUS fails to integrate a significant number of concrete measures to promote sustainable development through trade.

Overall, the negative impacts of KORUS on Korean regulations for greenhouse gas emissions and food safety highlight the inadequacy of the interim EIA, which did not even mention these potential issues. It is unclear whether the interim EIA had any influence on the negotiation process, although this is difficult to ascertain without analysing the final EIA, which as noted above was unfortunately made available to the public too late for inclusion into this analysis. The environmental provisions of chapter 20 seem to respond to the Bipartisan Deal of May 2007, rather than address in a contextualized manner the potential impacts noted in the EIA. Several other concerns discussed in the EIA, such as impacts in marine fisheries or trade in endangered species, are not directly addressed. Nor are opportunities such as liberalization in EGS. Overall, when compared to the EU SIA process, the US EIA process needs greater detail, contextualization, and direct impact on the negotiation process.

4.3 Sustainable Development in the EU-Korea FTA

The European Commission’s Handbook for Trade Sustainability Impact Assessment indicates that “[i]ntegrating the results of Trade SIAs into EU policy is the responsibility of the European Commission.”\(^{214}\) EU SIAs are drafted by independent expert consultants acting at arm’s length from government. The EU SIA handbook emphasizes that the “credibility of the EU’s pursuit of sustainable development goals depends on how the Trade SIA analysis is used to influence trade policy making and trade negotiations.”\(^{215}\) In order to indicate its opinion with regard to the SIA, the EC drafts response papers involving input from relevant EC departments. The EU SIA handbook emphasizes that the response papers set out the European Commission’s position on the findings of the Trade SIA, identify points of agreement and explain any disagreements. They may also add complementary analysis, flag lessons to be learnt, put forward ideas for technical assistance, or propose monitoring. The position papers should also identify concrete action to be taken in order to enhance the benefits of liberalization both inside and outside the EU in the sectors under scrutiny or to mitigate negative effects. Such action may be in the trade domain or outside it, in areas such as aid, cooperation and technical assistance.\(^{216}\)

As such, the main instrument employed to integrate SIA recommendations into the EU trade negotiation process is through the EC response papers, which can lead to concrete policy decisions having a direct impact on the trade agreement provisions themselves, as well as parallel measures.

The EC position paper on the EU-Korea SIA responded positively to most of the SIA recommendations and indicated how they were implemented through the negotiations. The position paper noted that the “[t]rade SIA recommendations have been in most instances taken on

\(^{214}\) Handbook, supra note 1 at 13.

\(^{215}\) Ibid.

\(^{216}\) Ibid.
board by the Commission's negotiators." The EC expressed some reservations, which were related to the level of detail and justifications for a few specific recommendations.

In the position paper, the EC explained its response to each major policy recommendation formulated in the SIA. With regard to RTA-related policy measures, the EC agreed and fully took into account recommendations related to the timing of reductions in trade barriers. In sensitive areas such as the automotive sector in the EU, the EC ensured a slower liberalization schedule in order to mitigate impacts on employment. On the other hand, the EC stated that “100% of EU tariffs on environmental goods are destined for early liberalization (i.e. entry into force of the agreement).” The EC also took note of the SIA recommendations related to SPS and TBT standards, and indicated that it “has tried, as much as possible, to reflect them in the negotiations' outcome.” The SIA recommended following WTO rules for SPS and securing reliance on the WTO dispute settlement mechanism. The EC eventually integrated these aspects into the treaty. Regarding SPS and TBT, the EC emphasized its efforts at harmonizing Korean SPS and TBT standards in some areas such as animal and plant products, rather than promoting social or environmental protection. Similarly, the EC highlighted the SIA’s recommendation on enforcement of IPRs, enhancement of FDI, as well as the inclusion of a chapter on sustainable development. The sustainable development chapter should safeguard against any lowering of social or environmental protections to encourage FDI and refer to ILO labour standards. The EC disagreed with the consultant on employing a negative-list approach for the liberalization of financial services and noted that “the Commission services do not consider a sanctions-based enforcement system as an effective tool in the sustainable development arena.” With regard to flanking and enhancement measures, the EC fully agreed with the SIA and implemented a number of consultative measures involving civil society, as well as environmental co-operation.

Analysis of the EU-Korea FTA itself also reveals the extent to which concerns noted in the SIA were successfully addressed by EC negotiators. As with all EU trade agreements, the pre-amble of the EU-Korea FTA reaffirms the [p]arties' commitment to sustainable development. Article 1.2(g) also notes that the [p]arties agree to “commit, in the recognition that sustainable development is an overarching objective, to the development of international trade in such a way as to contribute to the objective of sustainable development and strive to ensure that this objective is integrated and reflected at every level of the [p]arties' trade relationship.” As such, the EU-Korea FTA is intended to be interpreted and applied in a manner consistent with the objective of sustainable development.

218 Ibid at 5.
219 Ibid.
220 Ibid at 6.
221 Ibid at 7-8.
222 Ibid at 8.
223 Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part. 6 October 2010, OJ L127/6 (provisionally entered into force 1 July 2011) at art 1(1)(2)(g) [EU-Korea FTA].
Coherent with the challenges outlined in the SIA, the EU-Korea FTA attempts to address potential regulatory impacts within the agreement itself. The agreement highlights the parties’ international commitments under a number of MEAs and reaffirms these obligations within the trade agreement. For instance, article 10.39 notes that the parties shall comply with the International Treaty for the Protection of Plant Varieties (1991). Article 10.40 further highlights the parties’ commitments under the CBD with regard to access and benefit sharing of genetic resources. Article 13.5 of the agreement addresses compliance with MEAs in general. For example, article 13.5.2 indicates that the “[p]arties reaffirm their commitments to the effective implementation in their laws and practices of the multilateral environmental agreements to which they are party.”

Likewise, article 13.5.3 reaffirms the parties’ commitments under the UNFCCC and the Kyoto Protocol, and even commits them to the “development of the future international climate change framework in accordance with the Bali Action Plan.”

Regarding the relation between domestic legislative frameworks for sustainable development and the trade agreement, article 2.15 notes the parties’ reliance on article XX of the GATT. Further safeguards are found throughout the agreement. For example, article 6.1(g) indicates that measures taken pursuant to the agreement for trade facilitation “shall not prejudice the fulfilment of legitimate policy objectives, such as the protection of national security, health and the environment.”

Article 7.50 contains general safeguards meant to preserve the parties’ non-discriminatory measures to protect “human, animal or plant life or health,” natural resources, or national treasures and artistic objects. Article 13.7 further commits the parties, as recommended by the SIA, not to use the relaxation of environmental or labour standards as an investment incentive. Overall, the trade agreement responds adequately to the regulatory concerns highlighted in the SIA.

The EU-Korea FTA also contains provisions aimed at addressing material impacts. These take the form of “enhancement” social and environmental co-operation activities between the parties to strengthen domestic social or environmental laws and policies. As mentioned above, material impacts, for example in the automotive sector, are also addressed by a slower phasing in of tariff reductions in order to mitigate job loss. The agreement prescribes co-operation in a wide range of areas. For example, article 5.9 outlines future collaboration between the parties’ with regard to animal welfare. Article 15.2 establishes a number of specialized committees under the framework of the agreement, including a committee on SPS, as well as a committee on trade and sustainable development. Article 13.12 indicates that the trade and sustainable development committee is notably in charge of monitoring co-operation activities prescribed under Annex 13 of the agreement on sustainable development. These committees report back to the Trade Committee. Pursuant to article 15.1, the Trade Committee has broad powers to ensure that the agreement operates functionally, and is charged with its interpretation and various aspects of dispute settlement. Other relevant mechanisms to mitigate and address material impacts include a civil society dialogue mechanism under article 13.13 “to

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224 Ibid, art 13(5)(2).
225 Ibid, art 13(5)(3).
226 Ibid, art 6(1)(g).
227 Ibid, art 7(50)(b).
228 Ibid, art 7(50)(c).
229 Ibid, art 7(50)(d).
conduct a dialogue encompassing sustainable development aspects of trade relations between the Parties.”230 The EU-Korea FTA addresses negative impacts on sectors with pre-existing social or environmental vulnerabilities either by modulating tariff and non-tariff barriers, or by setting up co-operation and consultation mechanisms that influence the implementation and interpretation of the trade agreement.

Finally, the EU-Korea FTA addresses integration impacts by attempting to favour and promote “sustainable development-oriented” trade. Article 13.6 notes that the “[p]arties reconfirm that trade should promote sustainable development in all its dimensions.”231 As noted, the parties agreed on immediate and significant tariff reductions in EGS. Annex 13 to the agreement, outlining co-operation on trade and sustainable development, establishes an “indicative list” of areas where parties’ agree to enhance trade relations. This list includes energy efficiency, low carbon technology, biofuels, sustainable fishing, combating illegal logging, and trade-related aspects of MNEs. This annex remains indicative, and pursuant to EC policy does not contain an enforcement mechanism. Unfortunately, the parties’ commitment to promote “sustainable development-oriented” trade, beyond the liberalization in EGS, does not include any clear timetables, roadmaps or concrete objectives that could guide the elaboration of future trade policy in the context of this trade agreement. Nevertheless, annex 13 and article 13 might inspire the work of the Trade Committee, and could ground future arguments by the parties in the context of disputes. These provisions also constitute a strong statement by the parties in terms of the relation between trade and sustainable development. However, the agreement lacks precision on the means that parties will use to achieve their sustainable development objectives, which are themselves vague and not operationally defined.

Overall, the EU-Korea SIA was well received by the EC, and most of its recommendations were taken into account by EC negotiators in the context of the negotiations. Further, the EU-Korea FTA responds through a number of innovative provisions to some of the challenges outlined in the SIA. The FTA contains regulatory safeguards for social and environmental policy, promotes respect of MNE obligations, enhances collaboration on social and environmental issues, and streamlines sustainable development concerns in the work of the Trade Committee. It also promotes trade in EGS and trade enhancement for “sustainable development-oriented” trade. Unfortunately, specified objectives as well as clearer guidelines concerning the promotion of sustainable development through the trade agreement are lacking.

5. CONCLUSION

As the above analysis indicates, the impact and usefulness of the Canadian and US EIAs for trade negotiations are less significant than the EU SIAs. This is linked to the quality of the impact assessments themselves. As exemplified by the case studies analyzed in this paper, the Canadian and US EIAs tend to engage in a superficial analysis of a limited range of issues. Their tone is reassuring and highlights the adequacy of current practices and regulatory regimes to address negative impacts of trade. However, both EIAs lack a rigorous methodology, and their focus on domestic environmental issues tends to limit their usefulness. EU SIAs are more comprehensive and analyze a variety of key sectors, formulating specific recommendations that are directly pertinent to the work of negotiators. The external consultants involved may have

230 Ibid, art 13(13).
231 Ibid, art 13(6).
a better technical expertise than government officials and also benefit from greater indepen-
dence. As such, it is perhaps unsurprising that the EU-Korea FTA is more successful at addressing sustainable development concerns and promoting sustainable development through trade than KORUS or the CKFTA. Naturally, the SIA methodology is not a panacea, and involves a number of methodological issues.\(^\text{232}\) Further, this essay does not address legitimate criticisms that can be directed at SIAs in general, such as that the inherent flexibility of SIAs facilitates outcomes that often do not adhere to the three goals enshrined in most definitions of sustainable development: economic growth, environmental protection and enhancement, and the wellbeing of the human population (meaning that the best alternative is recommended by the SIA even when unsustainable).\(^\text{233}\)

Based on the case studies analyzed in this research project, several types of RTA provisions or parallel agreements have been identified that address negative impacts of trade and/or promote sustainable development. This typology constitutes a useful input of this research project in the RTA context and as such it is integrated directly into this conclusion, although it in no way constitutes an exhaustive list. Sustainable development provisions can be classified based on the three main tensions used as an analytical framework in this study.

Regulatory Impact Provisions include the following features:

- general exceptions from trade rules where such rules might impact the parties’ ability to initiate laws and policies for the conservation of natural resources, the protection of human, animal or plant health, or progressive labour standards;
- interpretative statements to guide parties in the event of a conflict between trade obligations and specific trade obligations contained in MEAs;
- provisions that reaffirm the parties’ commitments to a wide range of MEAs in the context of trade liberalization; and
- safeguards to ensure that the lowering of environmental or labour standards will not be used as an incentive for FDI.

Material Impact Provisions include the following features:

- adapted tariff schedules for vulnerable sectors in the context of the FTA, and tolerance for non-tariff barriers that ensure important safeguards in terms of sensitive environmental or social issues;
- parallel agreements or chapters of the FTA for co-operation between the parties on environmental matters;
- the development within the FTA institutions of specialized committees or councils dealing with environmental or sustainable development matters directly related to the trade agreement;

\(^{232}\) See e.g. Kirkpatrick & George, supra note 37.

• parallel agreements or FTA chapters promoting co-operation for capacity building and technology transfer that can assist in terms of modulating impacts for vulnerable sectors;

• enforcement and complaint mechanisms involving public participation to ensure that the parties respect their environmental and social commitments under the trade agreement; and

• measures that discourage illegal trade in forestry products and fisheries.

Integration Impact Provisions include the following features:

• tariff schedules that ensure liberalization for EGS and ensure that the approach adopted will indeed accelerate the development and dissemination of green technologies, and agreement between the parties in the context of the FTA as to what EGS are and what they are not, using a positive list approach;

• IPR provisions that promote innovation and technology transfer in green technologies;

• investment and financial services provisions that ensure a strong oversight of the financial sector in the context of globalization and promote green investments;

• provisions that promote transfer of knowledge for pharmaceutical products and high quality health care;

• measures that promote green government procurement and discourage subsidies to unsustainable sectors of the economy; and

• measures that encourage the co-operation for technology transfer and promotion of renewable energies and phasing out of fossil fuels.

Trade liberalization is, overall, a process of change in the conditions for trade that will involve varying degrees of economic, social, and environmental transformation. EIAs and SIAs are tools meant to guide and shape this process of change in order to favour outcomes conducive to sustainable development. The EU SIA process is much more effective in this regard, and represents a current best practice that other states should follow.