ASKING FOR TROUBLE

THE TRADE, INVESTMENT AND LABOUR MOBILITY AGREEMENT

By Ellen Gould

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ABOUT THE AUTHOR

Ellen Gould is a consultant on trade and investment agreements. She advises public health organizations, consumer groups, and the Harrison School of Law, Georgetown University on the impacts these agreements can have on public policy.

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CCPA
CANADIAN CENTRE
for POLICY ALTERNATIVES
BC Office

www.policyalternatives.ca

CCPA BC Office
1400 – 207 West Hastings St.
Vancouver, BC V6B 1H7
tel: 604-801-5121
ccpabc@policyalternatives.ca

CCPA National Office
410 – 75 Albert St
Ottawa, Ontario K1P 5E7
tel: 613-563-1341
ccpa@policyalternatives.ca

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Summary

In April 2006, the Alberta and BC governments signed a far-reaching agreement – the Trade, Investment and Labour Mobility Agreement (TILMA). Most of the agreement is scheduled to come into effect on April 1, 2007, with additional areas covered by April 1, 2009. TILMA's purpose, according to the BC government, is "breaking down all of the economic barriers between the two provinces."

TILMA raises some major questions about democratic governance, both in terms of how the deal was struck, and in potential impacts of the agreement itself on democratic decision-making. In addition to its clear constraints on public policy, TILMA contains many provisions that are open to interpretation. The true meaning of many of these clauses will not be fully understood until the limits are tested by a dispute panel process that enables the parties to the agreement, individuals, and corporations to launch complaints against governments, and to be awarded compensation for violations.

This paper compares the legal language of TILMA to the existing structure of regulations and public enterprises, and finds numerous troubling examples where democratic decision-making could be second-guessed, or over-ruled, by dispute panels. Based on the analysis in this paper, it is recommended that TILMA not be implemented in BC and Alberta, and that other provinces not sign onto the agreement.

TILMA Privileges Private Sector Investment Over Public Interest Objectives

The BC and Alberta governments have chosen to subject all areas within provincial and local government jurisdiction to TILMA and only allow exceptions that are explicitly listed. The "top-down" approach to negotiating an agreement is risky because it requires that governments anticipate the full legal jeopardy TILMA poses for all measures they might want to safeguard, now or in the future.

TILMA requires governments not to "restrict" or "impair" trade, investment or labour mobility. Yet, by their very nature, government programs and Crown corporations confine private investment within certain limits by providing some services that otherwise might profitably be provided by the private sector. Similarly, government regulations often place limitations on private investment.

TILMA goes beyond requiring that a province treat the goods, services, investors and investments of the other province the same as it normally treats its own. Even government measures that do not discriminate between investors from BC and Alberta can still violate TILMA. The agreement establishes absolute constraints on government, regardless of whether there is a level playing field for companies in either province.

All provincial governmental entities are covered by TILMA, including municipal governments, school and health boards, Crown corporations, and agencies.

TILMA restricts the use of subsidies and procurement policies that promote local economic development.

TILMA Creates a Deregulatory Framework for Public Interest Regulation

One of TILMA's purposes is to "reconcile" existing and future standards and regulations. TILMA's provisions dealing with regulations are an example of an overall trend to cast regulatory differences as barriers to trade and investment. But TILMA goes beyond addressing "unnecessary paper burden." Once existing regulations are reconciled, no new ones can be established if they restrict or impair investment; consequently, BC and Alberta regulatory policies will tend to be permanently frozen unless a future government withdraws from the agreement.

TILMA can only result in pressures to deregulate. The requirement to reconcile regulations and standards is subject to enforcement by private investors, who are far more likely to launch complaints over regulations because they are too high rather than because they are too low.

TILMA's Exemptions and Allowances Are Very Narrow

When it initially enters into force, TILMA will contain some exceptions, including for measures related to water, aboriginal peoples, energy, forestry, and mining. These exceptions are to be reviewed annually "with a view to reducing their scope." Health and education are not specifically exempted, and are among the areas – agriculture, tourism, parks, heritage conservation, consumer protection, land use planning – where the agreement could have major negative impacts.

In a limited number of areas, governments are allowed to adopt or maintain measures that deviate from TILMA rules, but only if they can pass a three-part test: the measure is to achieve a legitimate objective; the measure is not more restrictive to trade, investment or labour mobility than necessary to achieve that legitimate objective; and, the measure is not a disguised restriction to trade, investment or labour mobility.

The list of "legitimate objectives" has significant omissions, including protection of heritage sites, promotion of culture, provision of education, and expansion of the supply of affordable housing. It does not include most of the objectives municipalities pursue to enhance the lives of their residents – e.g., land use planning to keep noisy or high traffic uses out of residential neighbourhoods, green space requirements to provide recreational areas for residents, building height restrictions and sign bylaws to preserve scenic views. The consequences of opening health, education, and social services measures to TILMA challenges are significant.

Some examples of regulations that could be ruled to be TILMA violations if they "impair or restrict" investment:

- Penalties such as fines that provinces may impose to prevent hospitals from allowing individuals to pay in order to be put at the head of waiting lists for surgery or diagnostic tests;
- Restrictions the BC government may consider necessary to regulate the operation of private, for-profit surgery clinics;
- More stringent standards that the BC or Alberta government may impose on private care homes; and
- Differences in BC and Alberta regulation of private schools.

While some environmental measures are exempted from TILMA, significant areas are covered by the agreement:

- Designation and protection of ecological reserves;
- Environmental assessments of projects like ski resorts or chemical plants;
- Regulation of air pollution produced by manufacturing plants and automobiles, such as BC's Air Care program;
- Restrictions on particular products like ozone depleting substances or pesticides; and
- Regulation of recreation and tourism to protect ecologically sensitive areas.

TILMA's Dispute Process Will Impact Public Policy

Private parties can receive up to $5 million in compensation over any one violation of TILMA. But TILMA does not limit the number of complaints that can be brought forward against any specific government measure. Thus the potential cost to governments of violating TILMA is much higher than $5 million.

TILMA's dispute process will have an impact on public policy development in two fundamental ways: through panel rulings that fine governments up to $5 million if they are ruled to be in violation of the agreement, and through a "chill" effect whereby governments eliminate measures or decline to introduce new ones to avoid TILMA challenges.

Among the grounds TILMA provides for governments to have to pay monetary awards to private complainants are:

- Government measures that restrict or impair trade, investment or labour mobility;
- Lack of reconciliation of existing regulations and standards that restrict or impair trade, investment or labour mobility;
- Establishment of new regulations and standards that restrict or impair trade, investment or labour mobility;
- Business subsidies that distort investment decisions; and
- Treatment less favourable than the best treatment provided to a province's own persons, services, and investors or investments in like circumstances.

TILMA Is an Obstacle to Addressing Real Concerns

TILMA is a radical solution to a problem Canadians have not identified, as inter-provincial barriers do not figure anywhere in the list of their concerns. This may be one reason why the public was not consulted in either Alberta or BC before TILMA was signed.

Within the federal system, provinces have very important powers to exercise on behalf of their citizens. TILMA constrains those powers by making commercial interests the paramount consideration in policy making. TILMA coerces governments to disregard demands for higher standards even if these are expressed by the majority of citizens. The agreement restricts the objectives that governments can pursue, and limits the means that can be used to achieve objectives. This erases not only borders, but also the powers of government.

Introduction

In April 2006, the Alberta and British Columbia governments signed a far-reaching agreement – the Trade, Investment and Labour Mobility Agreement (TILMA).[1] Advocates of TILMA have underlined its significance, describing the agreement as an "erasing of the provincial boundary for all purposes except voting and the colour of the license plate,"[2] "the single most important economic event to happen in Western Canada in the last hundred years,"[3] and "breaking down all of the economic barriers between the two provinces to create one economy out of the two."[4]

TILMA raises serious questions about the ability of provincial and local governments to act in key areas such as regulation, procurement, and economic development. To give force to these measures, the agreement enables private individuals to launch complaints against governments, to have an independent panel rule on these complaints, and to be awarded compensation for violations. In fact, TILMA provides broader grounds for such complaints than in the controversial investor-to-state mechanism of the North American Free Trade Agreement (NAFTA). Most of the agreement is scheduled to come into effect on April 1, 2007, with additional areas covered by April 1, 2009.

Like other trade and investment agreements, TILMA acts as a conditioning framework. In addition to its clear constraints on public policy-making, TILMA contains many provisions that are open to interpretation and carry with them the potential for unintended consequences. The interpretation of many of these clauses will not be fully understood until the limits are tested by arbitral panels. In the meantime, TILMA will provide a "chill" over the development of new regulations in the public interest. It constitutes a template that will negatively influence and shape how governments think about the use of public policy tools to achieve social and economic objectives.

TILMA's provisions are analyzed in the following sections under the categories of:

- scope and structure of the agreement;
- restrictions on governmental authority;
- restrictions on regulations;
- conditions required to justify government measures;
- impacts on key areas – health, education, and social services, government "entities" including local governments and Crown Corporations, and the environment; and
- dispute settlement.

This paper focuses on the potential harm to the public interest that may arise from TILMA. A companion piece by Marc Lee and Erin Weir considers the economic case made for TILMA. They argue that there exist few real trade barriers among provinces, only differences in regulations that are a natural outcome of the federal division of powers. They also find a study by the Conference Board of Canada, commissioned by the BC government, claiming massive economic benefits of TILMA for BC, to be seriously flawed. The labour mobility provisions in TILMA are not analyzed in this paper, as a separate agreement that will include all provinces is under negotiation through the Council of the Federation. The benefits and drawbacks of harmonizing professional certification requirements hopefully will be publicly debated in the two-year period before the Canada-wide agreement is completed.[5]

Based on the analysis in this paper, it is recommended that TILMA not be implemented in BC and Alberta, and that other provinces not sign onto the agreement. TILMA raises some major questions about democratic governance, both in terms of how the deal was struck, and in terms of potential impacts of the agreement itself on democratic decision-making.

> In addition to its clear constraints on public policy-making, TILMA contains many provisions that are open to interpretation and carry with them the potential for unintended consequences. The interpretation of many of these clauses will not be fully understood until the limits are tested by arbitral panels.

Scope and Structure of the Agreement

TILMA is intended to be a very broad agreement.[6] According to its operating principles, BC and Alberta are resolved "to establish a comprehensive agreement on trade, investment and labour mobility that applies to all sectors of the economy." The fact that TILMA covers investment is key to understanding its potential impacts. Coverage of investment means TILMA not only sets rules about cross-border issues, but also about what limits governments may place on commercial activity within a province's boundaries.

TILMA applies to "measures of the Parties and their government entities that relate to trade, investment and labour mobility" (Article 2.1). It is difficult to think of a government measure that would be beyond TILMA's reach because it did not relate to either trade, investment, or labour mobility.

TILMA is a "top-down" agreement, covering all measures unless they are specifically exempted. Rather than listing particular areas that would fall under TILMA, the BC and Alberta governments have chosen to subject all areas within provincial and local government jurisdiction to TILMA and only allow exceptions that are explicitly listed.

The "top-down" approach to negotiating an agreement is risky because it requires that governments anticipate the full legal jeopardy TILMA poses for all measures they might want to safeguard, now or in the future.

The definition of the measures the agreement covers is open-ended, but includes: "any legislation, regulation, standard, directive, requirement, guideline, program, policy, administrative practice or other procedure" (Part VII – General Definitions). Domestic court and local planning authority decisions are other examples of measures that a panel might rule are subject to TILMA.[7]

When it initially enters into force, TILMA will contain some exceptions, including measures related to water, aboriginal peoples, energy, forestry, and mining. These exceptions are to be reviewed annually "with a view to reducing their scope" (Article 17.1(b)). BC and Alberta can unilaterally eliminate any of their exceptions at any time, but cannot add to them without negotiation (Articles 8.2 and 8.3). Health and education are not specifically exempted and are among the areas – agriculture, tourism, parks, heritage conservation, consumer protection, land use planning – where the agreement could have major negative impacts.

TILMA includes a transitional period for certain government entities and measures. During the two-year transitional period, cabinet ministers from each province will be responsible for negotiations to extend the agreement to cover these entities. According to Alberta Intergovernmental Relations Minister Gary Mar, by April 2009 TILMA will "be extended to trade, investment and labour mobility in the broader public sector, including municipalities, school boards, health and financial services."[8]

The agreement refers to "further consultations" that will take place during the transitional period, although it does not specify who will be consulted, what the consultation process will involve, or what is meant by "further" consultations. A "standstill" for entities listed under transitional measures takes effect as of 1 April 2007, meaning that they cannot amend or renew their measures in a way that would make them less consistent with TILMA (Article 9.4(a)). So, for example, after April 2007 a municipality cannot not adopt an ethical purchasing policy or amend its bylaws to make them stricter without risking being in violation of TILMA.

> Rather than listing particular areas that would fall under TILMA, the BC and Alberta governments have chosen to subject all areas within provincial and local government jurisdiction to TILMA and only allow exceptions that are explicitly listed.

Some of TILMA's most sweeping provisions, such as its prohibition on government measures that are obstacles to trade, derive from the Agreement on Internal Trade (AIT). The AIT was signed by all provinces and the federal government in 1994 to promote inter-provincial trade and co-operation in resolving disputes. The AIT, however, is a largely voluntary agreement that requires screening of complaints taken by persons to prevent ones that are "frivolous or vexatious" or intended "to harass" (AIT Article 1713.4). AIT dispute panels do not grant monetary awards to successful complainants.

AIT dispute panels have consistently ruled that governments cannot use the fact that they are acting within their constitutional authority to justify violations of the AIT. For example, one panel stated: "In signing the Agreement, the Parties recognized that constitutionally valid measures may be contrary to the Agreement and may need to be changed in order to achieve the objectives of the Agreement."[9] TILMA, by pairing the strict wording of the AIT with the ability of private investors to enforce it, will significantly limit the policy space provincial and local governments are granted under the Canadian constitution.

TILMA does not incorporate provisions from the AIT that moderate that agreement's impacts. For example, TILMA subjects investment to a "No Obstacles" requirement, whereas the AIT exempts it.[10] The AIT stipulates that when environmental and consumer protection regulations are being reconciled, governments are prohibited from engaging in a deregulatory race to the bottom. TILMA omits these safeguards.

TILMA's first article states that in the event of an inconsistency between it and the AIT, "the provision that is more conducive to liberalized trade, investment and labour mobility prevails between the Parties." This clause means that in bringing complaints against governments, private interests will be able to choose the provisions from either the AIT or TILMA that are the most favourable to their case.[11] The BC and Alberta governments will also be able to use TILMA's more stringent dispute process to enforce existing AIT provisions.

TILMA's Restrictions and Prohibitions

Governments Cannot "Impair or Restrict" Investment

TILMA imposes restrictions and prohibitions that will effectively reduce the powers of the BC and Alberta governments and local governments in the two provinces. The TILMA provisions most likely to adversely affect governmental authority are:

- Article 3 – No Obstacles, which states that "Each Party shall ensure that its measures do not operate to restrict or impair trade between or through the territory of the Parties, or investment or labour mobility between the Parties"; and
- Article 5.3 – Standards and Regulations, which states that "Parties shall not establish new standards or regulations that operate to restrict or impair trade, investment or labour mobility."

The potential ramifications of these articles are substantial, particularly in relation to the treatment of investment. Investment is defined in the agreement as:

a) an enterprise;

b) financial assets, including money, shares, bonds, debentures, partnership rights, receivables, inventories, capital assets, options and goodwill;

c) the acquisition of financial assets; or

d) the establishment, acquisition or expansion of an enterprise.

Applying Articles 3 and 5.3 to everything defined in TILMA as an investment means, for example, that regulations that restrict the "expansion of an enterprise" such as a chemical plant or ski resort would, in principle, be violations of the agreement. Subject to TILMA's exemptions and legitimate objectives provisions, Articles 3 and 5.3 obligate governments to allow unrestricted commercial development (see TILMA's Conditions for Justifying Government Measures on page 23).

In its backgrounder on TILMA,[12] the BC government expresses the view that TILMA's provisions related to investment are not that onerous. For example, in relation to municipalities the BC backgrounder on TILMA states: "If bylaws apply equally to all contractors, there is no discrimination and no complaint under TILMA. The vast majority of municipal actions are non-discriminatory and have no restrictive effects on trade, investment or labour mobility and are thereby not affected by TILMA."

The BC government appears to interpret TILMA as primarily requiring discrimination to be involved for a TILMA complaint to be valid. Under Article 4 – Non-Discrimination, TILMA prohibits governments from giving preferential treatment to local companies or workers. But Articles 3 and 5.3 prohibit restrictions or impairment of investment, trade and labour mobility, and do not make this prohibition contingent on governments acting in a discriminatory way.

These TILMA articles contrast with bilateral investment treaties that also prohibit "impairment" of investment, but limit the prohibition to instances where impairment involves "arbitrary and discriminatory measures."[13] It is unreasonable to expect a dispute panel to read into TILMA's unqualified prohibition on measures that restrict or impair investment the qualifier that a violation needs to involve discrimination, especially since treaty language to this effect exists but was not adopted by TILMA's negotiators. Consequently, it would seem clear that even government measures that are not discriminatory can still violate TILMA.

For example, contractors from Alberta would not have to prove they had been treated any differently than BC companies to successfully challenge the City of Vancouver's View Protection Guidelines that restrict construction in "a number of view corridors in the downtown with height limits to protect public views of the north shore mountain backdrop from a variety of vantage points in the city."[14] Under TILMA, even if these guidelines are applied even-handedly – with no arbitrary or discriminatory treatment of out-of-province firms – they restrict investment in real estate development and so would, in principle, violate the agreement.

Protection of public views is not a policy exempted from the agreement and it does not fit clearly with any of the objectives recognized in TILMA as legitimate. To safeguard this measure from TILMA challenges, the City of Vancouver would need to obtain an exemption for it during the two-year transitional period before the agreement fully applies to local governments. In the transitional period, TILMA prohibits Vancouver from amending or renewing its view protection guidelines to make them stronger.

In challenging government measures, complainants could also use the "No Obstacles" article in the AIT, which states: "Subject to Article 404 [Legitimate Objectives], each Party shall ensure that any measure it adopts or maintains does not operate to create an obstacle to internal trade." The AIT panel in the Alberta/Quebec margarine case interpreted the AIT's "No Obstacles" article in the following way: "(A)pplying the ordinary dictionary definition of the term, an obstacle to trade is created when

a measure impedes trade. It need not restrict or prohibit it entirely; an obstacle is created simply when trade is impeded."[15]

In the absence of a definition in the AIT for the word "obstacle," the AIT panel referred to the definition in the Concise Oxford Dictionary.

TILMA's "No Obstacles" article is different from the AIT's. It requires governments not to "restrict" or "impair" trade, investment or labour mobility, but does not define these terms. The Concise Oxford Dictionary, which following the AIT panel's lead might be used by a TILMA panel to help clarify TILMA's undefined terms, provides the following definitions:

> *Restrict v.t. Confine, bound, limit. Subject to restriction.*
>
> *Impair v.t. Damage; weaken.*

Government programs and Crown Corporations confine private investment within certain limits by providing some services that might otherwise be profitably provided by the private sector. Government regulations can result in an investment being confined, bound, limited, or damaged. Governments, if their measures were challenged, might put forward alternative, less forceful definitions to the words "restrict" and "impair."[16] It would then be up to a panel to decide from the range of possible meanings what "impair" and "restrict" mean in the context of the agreement and in light of its stated purpose.

Applying Articles 3 and 5.3 to everything defined in TILMA as an investment means, for example, that regulations that restrict the "expansion of an enterprise" such as a chemical plant or ski resort would, in principle, be violations of the agreement.

One clause in TILMA that might be used by governments to defend their measures is the statement in the operating principles that the parties are resolved to "promote sustainable and environmentally sound development, and high levels of consumer protection, health and labour standards." As well, Article 5.4 states: "Parties shall continue to work toward the enhancement of sustainable development, consumer and environmental protection, and health, safety and labour standards and the effectiveness of measures relating thereto." However, governments are free to pursue these objectives only in ways consistent with obligations they have undertaken under TILMA, including to "eliminate" barriers to trade or investment, to "ensure" that measures do not restrict or impair trade or investment, and to "not establish" new standards or regulations that restrict trade or investment.

Regulatory bans, such as municipal bans on billboards, would seem to be the most vulnerable to successful challenges under TILMA as they so clearly restrict investment. However, the prohibitions in TILMA on restricting or impairing investment are unqualified, so any degree of impairment or restriction could be a violation of the agreement. The agreement also does not have what is termed a "de minimis" clause that would allow rejection of complaints on the basis that the injury to a complainant was negligible. As is discussed below, normal restraints on litigation due to the costs and time involved will tend to be reduced under TILMA. Alberta's Intergovernmental Affairs Minister Gary Mar has said "the TILMA dispute resolution is accessible, cooperative, consultative and enforceable, everything Canadian business asked for."[17]

Governments Cannot "Discriminate"

TILMA's Article 4 prohibition on discrimination goes beyond requiring that a province treat the goods, services, investors, and investments of the other province the same as it normally treats its own. TILMA requires the province to give **"the best treatment it accords, in like circumstances, to its** own or those of any non-Party." This provision is one of the ways TILMA gives greater rights to non-residents than those granted to residents of a province.

Rulings based on similar provisions in NAFTA suggest that TILMA's non-discrimination clause would not require proof of discrimination based on a government's pattern of behaviour over time. A TILMA challenge could be successful if a complainant can cite one example of a local person or company receiving better treatment than he/she received in like circumstances.[18]

It will be up to TILMA panels to determine in each case whether there are "like circumstances." If a municipal council establishes a private-public partnership with extraordinarily lenient provisions that it lives to regret, subsequent councils might be obligated by TILMA to provide this same standard of treatment to contractors from the other province when like projects come up.

The non-discrimination clauses in NAFTA have produced the most panel rulings in favour of investors taking Chapter 11 complaints.[19] A current complaint against Canada involves the parcel delivery service UPS, which claims that Canada has breached its obligations under NAFTA by, among other things, "not providing UPS and UPS Canada with the best treatment available to domestic companies."[20] UPS has submitted to the NAFTA panel that an example of this discriminatory treatment is the fact that Canada Post can put mailboxes in public roadways free of charge and UPS cannot. If the panel rules that NAFTA requires that the best treatment Canada gives to Canada Post has to be given to UPS as well, complainants will likely be encouraged to use similar language in TILMA to challenge government provision of service.

Governments Cannot Grant Business Subsidies That Distort Investment

Under Article 12, TILMA states that the parties to the agreement shall not provide business subsidies "either directly or indirectly." A business subsidy is defined not only as a cash grant or loan, but also as deductions in taxes, royalties, and government fees that would otherwise be payable. It does not cover generally available infrastructure.

Subsidies and tax incentives are a major tool that governments use to influence business behaviour, for example, to stimulate local employment and investment or to encourage certain goals such as increasing the stock of affordable housing. But influencing business behaviour is a violation of Article 12's prohibition on government subsidies that "distort investment decisions."

All government subsidies to business could be viewed as "distorting investment decisions" since they involve government intervention in the marketplace. At the provincial level, BC's Small Business Venture Capital Act gives tax credits to venture capital corporations that invest in, and provide

expertise to, small businesses with no more than 100 employees. These corporations cannot maintain places of business outside of BC, invest outside of BC, or deposit their money in non-BC financial institutions. They cannot invest in small businesses unless most of their payroll is going to employees working in BC and they are "substantially engaged" in business in BC. Promotion of small business is not recognized as a legitimate objective in TILMA so it could not be used to justify the program.

At the municipal level, the City of Prince George's "Downtown Revitalization Tax Exemption By-law, passed in 2005, is an example of a tax exemption given to businesses that could be challenged under TILMA. The purpose of this bylaw is "to stimulate development initiatives in the downtown," an objective not recognized as legitimate under TILMA.

The agreement provides exceptions for compensation for calamities, and assistance for the cultural sector, recreation, academic research, and non-profit organizations. Subsidies to the "agricultural and agri-food sectors" are covered under transitional measures. This means during the two-year transitional period BC and Alberta will negotiate the extent to which the agreement should be applied to agricultural subsidies. In October 2006, Alberta granted Sun Valley Foods $1.5 million to fund an expansion of its beef processing plant.[21] The grant was given out under Alberta's Beef Product and Market Development Program, which is intended to increase value-added activity in the province's agricultural sector, another objective not recognized as legitimate in TILMA.

Regional economic development is listed under Part V – General Exceptions, but the conditions imposed are very restrictive. TILMA permits regional economic development only "under exceptional circumstances" – which may be interpreted as meaning a natural calamity like a flood. Regional economic subsidies, however, must also conform with the Article 12 prohibition of business subsidies that distort investment decisions.

> If a municipal council establishes a private-public partnership with extraordinarily lenient provisions that it lives to regret, subsequent councils might be obligated by TILMA to provide this same standard of treatment to contractors from the other province when like projects come up.

If other provinces sign TILMA, their regional economic development funds would appear to be jeopardized. For example, Saskatchewan's Northern Development Fund provides loans to private businesses "to stimulate economic development in northern Saskatchewan and encourage diversification and job creation." As TILMA defines loans as a form of subsidy to business, and as the Northern Development Fund does not only provide business loans "under exceptional circumstances" as required by TILMA, this program would appear vulnerable to challenge if Saskatchewan signed on to the agreement.

Governments Cannot Give Local Preferences in Procurement

TILMA's procurement provisions will require tenders for procurement and no discrimination among suppliers for purchases down to very low amounts, called "thresholds." Exceptions are permitted for certain types of suppliers, such as non-profits, and for particular circumstances, such as when purchases have to be made in an emergency. A comparison of the current thresholds in the AIT with TILMA's shows these thresholds for provincial government procurement in some cases are being cut in half:

- The AIT's threshold for purchases of goods is $25,000 or greater. TILMA reduces this to $10,000.
- The AIT's threshold for purchases of services is $100,000. TILMA reduces this to $75,000.
- The AIT and TILMA thresholds for construction are the same, $100,000.
- If TILMA's thresholds are extended to the MASH (municipalities, academic institutions, schools and health and social service entities) sector after the agreement's transitional period, the change will be even greater. Current AIT thresholds for the MASH sector are $100,000 for goods and services and $250,000 for construction.

While businesses cannot receive monetary awards for violations of TILMA's procurement provisions pending the development of an "effective bid protest mechanism" and other changes to the procurement dispute settlement process, they can get panel rulings that have binding effect. Businesses may still consider it worthwhile to seek a panel ruling against a procurement decision if this decision is based on a policy – such as ethical purchasing – that affects more than one procurement.

TILMA's Impacts on Regulations

Governments Must Reconcile Their Regulations

One of TILMA's purposes is, according to a BC/Alberta news release, to reconcile "all existing and future standards and regulations that impede trade, investment and labour mobility."[22] A number of TILMA's provisions create binding obligations to achieve this purpose:

- Article 5.1 requires BC and Alberta to "mutually recognize or otherwise reconcile their existing standards and regulations that operate to restrict or impair trade, investment or labour mobility";
- Article 5.5 goes further, stating that the two provinces "shall cooperate to minimize differences in standards or regulations" without any reference to impacts on trade, investment, or labour mobility; and
- Article 11.1 requires BC and Alberta "to reconcile their business registration and reporting requirements so that an enterprise meeting such requirements of one Party shall be deemed to have met those of the other Party." This requirement is covered under "transitional measures" so it will be accomplished by 2009.

TILMA also imposes "transparency" requirements that will tend to discourage regulatory diversity. Article 7.2 obligates a province to notify the other province if it intends to adopt or amend a measure that "may" affect TILMA and to provide the other province with an opportunity to comment. TILMA creates a binding obligation that can be enforced through its dispute system for the province considering new measures to "take such comments into consideration."

The obligation to give another provincial government the right to comment on policy proposals and to take such comments into consideration creates greater rights to interests outside of a province than those granted to a province's residents. For example, residents of BC and Alberta were not given prior notice or the right to comment on TILMA before it was signed. At the WTO services negotiations, some delegations have raised objections to similar "prior comment" obligations being inserted into the General Agreement on Trade Services because they would involve "foreign involvement in the domestic legislative process."[23] They are also critical of the administrative burden these provisions create: "Many Members opposed the creation of any prior comment provisions, saying they were unnecessarily burdensome, especially for sub-national entities."[24]

The BC government backgrounder on TILMA states that "TILMA does not require harmonization of regulations. Nowhere in the Agreement does it say this." However, the agreement does require governments to "reconcile" their regulations, a term left undefined. If a TILMA dispute panel referred to the Concise Oxford Dictionary, as AIT panels have, they would find "to reconcile" can mean "to harmonize." In any event, complainants who wanted to argue a case based on a governmental requirement to harmonize could draw on the AIT's Article 405 – Reconciliation, which requires reconciliation of standards to be achieved through "harmonization, mutual recognition or other means."

TILMA's Article 5.1 requirement that governments "mutually recognize" their standards and regulations imposes a particular model of regulatory change. Federal Industry Minister Maxime Bernier has praised the governments of BC and Alberta for implementing mutual recognition through TILMA because it puts regulators in competition with each other. When he appeared before the Senate banking committee, Bernier explained mutual recognition in the following way:

> *Mutual recognition is an important principle from the economic standpoint because it allows competition… mutual recognition allows, in the various jurisdictions — and here I am using the example of Quebec — for two companies to sell products in Quebec by following two sets of different standards, namely the standards at their own head office. Such a situation places regulators in competition with one another. Competition gives us better standards. Companies put regulators in competition with one another because, if they are completely free, they can choose where to locate their head office and hence choose which set of rules they believe is most appropriate for their economic growth.*
>
> *This is different from harmonization. If I compare the concept of competition to that of a monopoly — harmonization is a monopoly — only one rule will apply for all businesses, no matter where they operate. This concept is not quite as consistent with the economic theory of the free market.25*

TILMA's Regulatory Provisions in Context

TILMA's provisions dealing with regulations are an example of an overall trend to cast regulatory differences between all jurisdictions – be they inter-municipal, inter-provincial and inter-state, or international – as barriers to trade and investment. The task force chaired by Tom d'Aquino of the Canadian Council of Chief Executives that advocates deep integration between Canada and the US has stated that "differences in regulatory codes and procedures continue to retard trade and

investment."[26] Regulatory differences within Canada are raised as a constant source of complaint during Canada's periodic trade policy reviews at the WTO and OECD.[27]

Companies often do incur some additional costs when they export their products to countries with different regulations than their own (e.g., US consumer exports to Canada must be labelled in both official languages). Increasingly, trade agreements determine whether such regulatory differences are an "unnecessary" barrier. This has the perverse effect of delegating to dispute panels composed of trade lawyers, who are looking through the lens of what is best from a commercial perspective, decisions over whether regulatory differences are to be permitted.

Is an agreement like TILMA, with its dispute process allowing private investors to sue governments and be awarded compensation by independent panels, a proportional response to the problem of paper burden? In requiring mutual recognition and reconciliation of BC and Alberta regulations in all sectors save those covered by exceptions, the provincial governments are going beyond addressing unnecessary paper burdens. Once existing regulations are reconciled, no new ones can be established if they restrict or impair investment; consequently, BC and Alberta regulatory policies will tend to be permanently frozen unless a future government withdraws from the agreement.

TILMA eliminates provisions in the AIT that prevent the reconciliation of regulations from resulting in lower levels of consumer and environmental protection. Article 807 of the AIT states:

> *For the purposes of Article 405 (Reconciliation), the Parties shall, to the greatest extent possible, reconcile their respective consumer-related measures and standards listed in Annex 807.1 to a high and effective level of consumer protection. No Party shall be required by such reconciliation to lower the level of consumer protection that it maintains as at the date of entry into force of this Agreement.*

Junk Food and Schools

BC's provincial prohibitions on the sale of junk food in schools and hospitals, to be implemented in the spring of 2007, could be a violation of TILMA's regulatory requirements. BC Premier Gordon Campbell announced this regulatory ban in the context of an effort to establish BC as a province leading the way in fostering healthy lifestyles.[28] But such regulatory distinctiveness and innovation conflicts with the reconciliation of regulations required by TILMA.

A BC ban on junk food in schools and hospitals could violate TILMA because Alberta has rejected adopting similar regulations.[29] If the ban is introduced before TILMA enters into force, BC could be challenged because it has not reconciled its existing regulations with those of Alberta. If it is implemented after TILMA comes into force, BC will be vulnerable to a challenge because it is establishing new regulations that restrict or impair trade and investment.[30]

Vending machine companies could launch a complaint under TILMA and argue that although the goal of encouraging healthier eating is laudable, it should be achieved through less trade-restrictive means. Companies could suggest that governments should have taken reasonably available, less restrictive alternatives, such as requiring inclusion of healthy choices in machines or establishing healthy eating education programs in schools. In the event of a challenge, it would be left to a TILMA panel to determine whether BC should have adopted alternative measures.

Article 1508.2 of the AIT states:

> *In harmonizing environmental measures, the Parties shall maintain and endeavour to strengthen existing levels of environmental protection. The Parties shall not, through such harmonization, lower the levels of environmental protection.*

The fact that TILMA's negotiators did not include such safeguards would almost certainly be considered significant by a TILMA panel. TILMA's first article permits only those provisions in the AIT that are "more conducive to liberalized trade, investment and labour mobility" to be incorporated into the agreement. The AIT's safeguards for regulations are therefore not part of TILMA.

The question of whether reconciling regulations under TILMA will result in deregulation has been responded to in various ways by government ministers. In a speech on TILMA to representatives of professional regulatory bodies, Alberta Intergovernmental Affairs Minister Gary Mar said "I want to emphasize that we will not be 'dumbing down' professional standards. Our two provinces will reconcile them to the highest level."[31] When asked on a CBC Radio program whether it would be the BC or Alberta standard that would be adopted under TILMA, Mar said "It may not be Alberta standard, or British Columbia standard, but it will be the most appropriate one." During the same program BC's Economic Development Minister Colin Hansen was asked what would ensure the standard adopted was the highest one. He answered "I would argue the highest standard is not necessarily the best standard… And so what it forces us to do through this process is to look at, as Gary says, not what's the highest standard or the lowest standard, it's what makes sense."[32]

Agreements that require that difference among regulatory regimes be minimized can result in harmonizing to a higher standard, depending on the nature of the agreement. The European Union creates a supranational body with powers to set standards for EU members in key areas like the environment. In some instances, membership in the European Union has required acceding countries to strengthen their regulations to conform with those set by the EU.[33]

TILMA, however, can only result in pressures to deregulate. TILMA does not establish a new level of government to create regulations for both provinces, it just allows regulations to be challenged if they impact on trade and investment. The requirement to reconcile regulations and standards is subject to enforcement by private investors, who are far more likely to launch complaints over regulations because they are too high rather than because they are too low.

Circumstances peculiar to a province can prompt differences in regulations, but these differences are not recognized in TILMA's requirement for regulations to be reconciled. BC has experienced particular problems in its housing industry with leaky condominiums. BC homebuyers are currently raising complaints about some of the province's home inspectors; with housing prices at all-time highs in the province, the consequences of missed defects in home inspection reports can be very costly. If the BC government increased housing construction standards or required that home inspectors be certified, it could be faced with a TILMA challenge for having regulations not reconciled with Alberta's.

If challenged over a regulation that is not reconciled with the other province's, a government can attempt to claim that its stricter regulation was based on legitimate objectives. But a dispute panel would subject this claim to TILMA's "necessity test" that requires governments to demonstrate their regulation is not more restrictive than necessary. This test involves proving to the satisfaction of a panel that regulations are effective in meeting their stated goals and that there are no reasonably available alternatives to them. It could also be interpreted to mean an obligation to adopt an alternative measure that restricted trade and investment the least.

TILMA's Conditions for Justifying Government Measures

Legitimate Objectives and Necessity Tests

TILMA's binding obligations to reconcile regulations, not to impair or restrict investment, to give non-discriminatory treatment to out-of-province firms, not to subsidize small business or businesses in economically distressed areas, and not to show preference to local firms in government purchasing can be deviated from if governments can meet the requirements of Article 6 – Legitimate Objectives. But this article imposes such strict conditions on when governments can act inconsistently with the agreement that it would be of uncertain value to governments if they were brought before a TILMA tribunal.

The provincial ministers responsible for negotiating TILMA are describing the legitimate objectives provisions as though they constitute absolute "carve-outs" – provisions that completely exempt particular areas from the application of the agreement. They appear to see Article 6 as an effective safeguard against TILMA challenges to government policy. Alberta's Intergovernmental Relations Minister Gar Mar said in a speech on TILMA to the Richmond Chamber of Commerce: "Our provinces each retain sole responsibility to protect our water, environment, consumers, and workplace health and safety. We each retain sole responsibility for social, health and aboriginal policy."[34] BC's Economic Development Minister Colin Hansen wrote, in response to a letter expressing concern about the

environmental implications of TILMA, that "BC and Alberta have reserved the right to supersede the Agreement when they are pursuing a legitimate objective."[35]

TILMA does not allow governments to act inconsistently with the agreement simply because they are pursuing a legitimate objective. Article 6 of TILMA is clearly worded in stipulating that this is only one component of what governments have to demonstrate to defend their measures. Governments are allowed to adopt or maintain measures otherwise inconsistent with TILMA if they can demonstrate that:

a) *the purpose of the measure is to achieve a legitimate objective;*

b) *the measure is not more restrictive to trade, investment or labour mobility than necessary to achieve that legitimate objective; and*

c) *the measure is not a disguised restriction to trade, investment or labour mobility.*

All three conditions must be met for governments to deviate from TILMA. Because similar provisions exist in the Agreement on Internal Trade, the difficulty governments would face trying to defend their measures using TILMA's Article 6 is revealed by a review of AIT panel rulings, where panels have consistently determined that governments have failed to prove their measures are necessary. Although TILMA panels could depart in certain instances from what previous panels have done, they will most likely be guided by existing dispute settlement rulings and interpret these provisions very restrictively.

The objectives TILMA defines as legitimate are:

- *public security and safety;*
- *public order;*
- *protection of human, animal or plant life or health;*
- *protection of the environment;*
- *conservation and prevention of waste of non-renewable or exhaustible resources;*
- *consumer protection;*
- *protection of the health, safety and well-being of workers;*
- *provision of social services and health services within the territory of a Party;*
- *affirmative action programs for disadvantaged groups; and*
- *prevention or relief of critical shortages of goods essential to a Party considering, among other things, where appropriate, fundamental climatic or other geographical factors, technological or infrastructural factors, or scientific justification.*

Although this definition may seem comprehensive, it has significant omissions, such as objectives designed to protect heritage sites and promote culture, provide education, or increase the supply of affordable housing. It does not include most of the objectives municipalities pursue to enhance the lives of residents, such as land use planning to keep noisy or high traffic uses out of residential neighbourhoods, green space requirements to provide recreational areas for residents of an area, or building height restrictions and sign bylaws to preserve scenic views.

Because TILMA is a top-down agreement, with all measures being covered unless they are explicitly excluded, the list of objectives defined as legitimate needs to cover all objectives governments want to safeguard. The definition starts with the words "legitimate objective means any of the following objectives," which means that the list that follows is a closed one, not an illustrative or open-ended one. Governments would not be successful in using Article 6 to try to justify measures that are aimed at objectives absent from this list.

Using Alberta's Provincial Parks Act as an example, a number of the purposes named in the Act are not defined as legitimate in TILMA. The Act says that parks are to be established and maintained for the purposes of conservation of flora and fauna, purposes that might be justified under the conservation and environmental protection objectives listed in TILMA. But the Act lists other purposes, such as preservation of areas with cultural and historical interest that do not fit with any on TILMA's list. If Alberta took action under the Act to prevent harm to heritage or cultural sites, a TILMA complaint could be launched on the basis that the province was restricting or impairing investment and Article 6 would provide Alberta no good grounds for its defence.

To challenge one of the government measures covered under TILMA, a complainant needs only to establish a "prima facie"[36] case that the measure restricts or impairs trade, investment, or labour mobility. According to the AIT panel in the Alberta/Quebec margarine case, neither the complainant nor the panel have to "engage in a detailed economic analysis of the measure's impact." The panel stated "Rather, it is open to a panel to make a common sense determination as to whether the impugned measure has impaired or would impair internal trade or has caused or would cause injury."[37]

To challenge one of the government measures covered under TILMA, a complainant needs only to establish a "prima facie" case that the measure restricts or impairs trade, investment, or labour mobility.

Panels have elaborate criteria to determine what is more restrictive than necessary, and apply these criteria as a "necessity test." This test has proven very challenging for governments. For example, in all six of the AIT cases[38] where governments tried to claim that their measures were justified, the panels found that governments failed on the grounds that they could not prove necessity.

One AIT panel ruled that a necessity clause similar to TILMA's meant that "The onus is on the Respondent to demonstrate… that no other available option would have met the legitimate objective."[39] This is a very tough requirement, as it means governments have to prove a negative. In the case of the Agricultural Land Commission for instance, BC would be required to prove it had no other option available to it that would have achieved its objective.

In an AIT challenge to Quebec's accounting regulations, the panel accepted that reliable financial statements were "unquestionably critical" for the protection of consumers, an objective recognized as legitimate. However, the panel ruled that:

> *The Respondent has also not provided evidence that less mobility restrictive means of meeting its objective of protecting the Québec consumer was considered and found to be inadequate. Such an analysis of alternatives to meeting a legitimate objective is essential for a Party to adequately demonstrate that it has met the tests of Article 709.*[40]

Agricultural Land Commission

A TILMA challenge to BC's Agricultural Land Commission Act, the purpose of which is "to preserve agricultural land" and "to encourage farming on agricultural land," would pose thorny questions for a dispute panel. Is agricultural land a non-renewable resource? Does encouragement of farming tend to conserve non-renewable resources? Or does farming tend to exhaust non-renewable resources such as fresh water? An assessment of TILMA should consider whether it is appropriate for dispute panels to be determining such questions, or whether they should remain the responsibility of elected representatives.

Since the Agricultural Land Commission clearly restricts investment in real estate development, it would not appear difficult to make a common sense case to that effect. The burden of proof then shifts to governments if they want to defend themselves using Article 6 to demonstrate not only that they are aiming to fulfill an objective defined in TILMA as legitimate, but also that what they are doing to achieve that objective is not more restrictive than necessary.

At the WTO, panels have applied necessity tests in a different way, but the results in the majority of cases have been the same – governments have been required to change their measures when panels have deemed they are not "necessary." AIT panels have looked to these WTO rulings for guidance in their own determinations of what a government is required to do to prove "necessity." Drawing from WTO cases, in the event of a TILMA challenge to the Agricultural Land Commission Act, BC would likely only succeed in demonstrating the Act were necessary if it could prove:

1. That the Act *was effective*. If sufficient doubts can be raised that the measure is effective, then a defending party fails to demonstrate its measure is necessary. A complainant could argue that given the loss of agricultural land to residential development in BC, the Agricultural Land Commission does not appear to be successful.

Panels are empowered to call the experts they choose to help them make judgments about the effectiveness of measures.[41]

2.That the Act's *objectives were important enough to justify how restrictive it is*. The panel would have the authority to decide if preservation of agricultural land is a sufficiently important objective to justify the severity of the restrictions the Act imposes on real estate development.[42]

Panels are more inclined to rule in favour of a severe restriction on trade if it is a matter of life and death. A panel would be less likely to see measures such as the Agricultural Land Commission Act or a municipality's ban on billboards as justified because the objectives they serve are not as vital.

3. That the Act's *objectives could not be achieved through less restrictive means* that are "reasonably available" to the BC government. If either the panel or the complainant can propose "reasonably available" alternative measures that would meet the measure's objective but in a less restrictive way, then the measure is ruled to be unnecessary. Could the BC government have adopted alternatives to the Agricultural Land Commission Act? A panel might suggest, for example, that BC could have provided incentives to developers not to build on agricultural land or provided swaps with Crown land, and these would be less restrictive ways of preserving agricultural land than regulatory restrictions. Trade panels have ruled that the fact that an alternative measure would cost a government more is no reason why it should not have been adopted if it is less trade restrictive.[43]

If a government is able to overcome all of these hurdles, a TILMA panel could still rule under Article 6 that the measure violates TILMA because a government was unable to demonstrate the measure was not "a disguised restriction on trade, investment, and labour mobility." Meeting these combined requirements is a very tall order, which is why so many governments[44] have failed to defend their measures using provisions similar to Article 6.

TILMA's Impacts on Specific Sectors

Health, Education, and Social Services

Coverage and Exclusions

The BC/Alberta fact sheet on TILMA explains how the agreement works in the following way: "A set of General Rules and Special Provisions apply to all government measures across all sectors of the economies of British Columbia and Alberta. Investors, businesses and workers will know that if a measure is not clearly identified as an exception, it is subject to the rules of the agreement."[45] Since health and education measures are not clearly identified as exceptions, it would seem they are subject to the rules of the agreement.

Article 11.4 of TILMA allows governments to maintain, designate, and regulate monopolies for the provision of services. A "monopoly" is not defined in the agreement. Education is not provided as a monopoly in BC and Alberta, so would be unlikely to be exempted by Article 11.4. It could be argued that some health services are provided as a monopoly. In the event of a challenge, it would be left to a panel to determine whether the competition that exists in the provision of health services in BC and Alberta means health cannot be considered a monopoly service exempted under Article 11.4. Such determinations might well vary according to the specific health service at issue. For example, health insurance for "medically necessary" services is very likely to be deemed a monopoly, while the provision of certain types of day surgery widely available from private clinics would not. The majority of health services fall into a grey area between these two.

Measures of or relating to publicly-funded health, education, and social service entities are listed in TILMA as transitional measures, meaning that unless the parties agree otherwise, the agreement will apply fully to these service sectors two years after the date the agreement comes into force (April 1, 2007). Other policies could be affected, however, starting on April 1, 2007. Government health, education, and social service policies consist of more than policies related to particular institutions and agencies. For example, BC's general ban on smoking at indoor public spaces, to be implemented by January 2008, is a health policy related to more than just hospitals. Because of TILMA's top-down structure, smoking bans could be covered by the agreement. Bars and restaurant owners could launch a TILMA challenge to these bans and argue (as they have done in the past) that while the government's health objectives are legitimate, they should be achieved in a less restrictive way, such as through provision of ventilated rooms or designated smoking sections. TILMA panels would then be responsible for determining whether smoking bans are unnecessarily restrictive and whether governments have to pay compensation for implementing them.

In Part V, TILMA has an exception for "social policy":

> *General Exceptions:*
>
> > *1. Measures adopted or maintained relating to:….*
> >
> > *f) Social policy, including labour standards and codes, minimum wages, employment insurance, social assistance benefits and worker's compensation.*

"Social policy" is not defined in the agreement. To interpret TILMA's social policy exception, a dispute panel might examine how exclusions in other agreements are worded. While seriously flawed, the NAFTA exception is stronger than TILMA's. In NAFTA, Canada reserved the right "to adopt or maintain any measure with respect to … the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care." A TILMA panel is likely to interpret the weaker TILMA version as reflecting that the parties to the agreement intended to provide less protection for these services.

If, after looking at definitions and comparing TILMA's provisions with those in other agreements, a panel was still not able to resolve the ambiguity in the TILMA exception for social policy, it would then look at the stated purpose of the agreement. TILMA's first sentences emphasize the broad scope of the agreement, that BC and Alberta are resolved to "establish a comprehensive agreement on trade, investment and labour mobility that applies to all sectors of the economy" and to "eliminate barriers that restrict or impair trade, investment or labour mobility." The emphasis on the comprehensive character of the agreement would likely influence panels to interpret exceptions narrowly.

TILMA's Transitional Measures

During the transitional period between April 2007 and April 2009, TILMA will be extended to more aspects of government than are covered when TILMA initially enters into force. At the same time, special provisions and exclusions may be negotiated over those two years. Measures of or relating to school boards and publicly funded academic, health, and social service entities are among those covered under Part VI – Transitional Measures. These cannot be amended or renewed during the transitional period in a way that would make them less consistent with TILMA. If they are, this violates the agreement and can be challenged through the dispute settlement process beginning on the date the agreement comes into force, April 1, 2007.

Measures relating to all of these health, education, and social service entities would include provincial legislation and regulations such as BC's and Alberta's Hospital Act and BC's Medicare Protection Act. Provincial policies that set limits on the amount of for-profit activity permitted in health and education could fall foul of TILMA as a restriction on investment. Measures of these entities would involve everything they do that fits TILMA's definition of a measure, which includes standards, requirements, guidelines, programs, and policies. An example of school board measures that could be violations of TILMA are policies limiting corporate advertising or sponsorship.

The consequences of opening health, education, and social services measures to successful TILMA challenges are significant. The following are some examples of regulations that could be ruled to be TILMA violations if they "impair or restrict" investment:

- Penalties such as fines that provinces may impose to prevent hospitals from allowing individuals to pay in order to be put at the head of waiting lists for surgery or diagnostic tests. Private investors could not launch a TILMA challenge against the Canada Health Act, which is a federal measure not covered by the agreement. But the penalties provinces impose could be ruled a violation of TILMA Article 3 – No Obstacles, which prohibits measures that impair investment. Complainants could argue that health care is not being provided as a monopoly service, and therefore is not exempted from TILMA under Article 11.4.
- Restrictions BC governments may consider necessary to regulate the operations of private, for-profit surgery clinics such as the Cambie Surgery Centre. Stricter regulations of private clinics could be ruled a violation of Article 5 – Standards and Regulation, paragraph 3, which prohibits governments from introducing new regulations that restrict investment.

Stricter regulations of private clinics could be ruled a violation of Article 5 – Standards and Regulation, paragraph 3, which prohibits governments from introducing new regulations that restrict investment.

- More stringent standards that BC or Alberta governments may impose on private care homes. Stricter standards also could be ruled a violation of the prohibition on establishing new standards that restrict investment in Article 5, paragraph 3.
- Differences in BC and Alberta regulation of private schools under BC's Independent School Act and its Independent School Regulation, and Alberta's School Act and its Private Schools Regulation. Among other differences, these regulations set different criteria for funding of private schools. These differences could be ruled a violation of Article 5, paragraph 1, which requires BC and Alberta to "recognize or otherwise reconcile" their existing regulations.

If challenged, governments could try to defend their social and health service measures[46] claiming they served one of the objectives defined in TILMA as legitimate: "provision of social services and health services within the territory of a Party." But for such a defense to be successful, it would also require governments to satisfy each of the stringent tests specified in Article 6, including the "necessity test" (see above) to the satisfaction of the dispute panel.

Environmental Measures

The following environment-related measures are exempted from TILMA:

- water, and services and investments pertaining to water;
- measures relating to fish, wildlife, and forests, including requirements that timber be used or manufactured within a province;
- the management and disposal of hazardous and waste materials; and
- measures adopted or maintained to promote renewable and alternative energy.

Because of TILMA's top-down structure, with measures being covered unless they are explicitly exempted, significant environmental measures are not exempted in this way and so are covered by the agreement. These include:

- designation and protection of ecological reserves;
- environmental assessments of projects such as ski resorts or chemical plants;
- regulation of air pollution produced by manufacturing plants and automobiles, such as BC's Air Care program;
- restrictions on particular products like ozone depleting substances or pesticides; and
- regulation of recreation and tourism to protect ecologically sensitive areas.

All of these measures would be vulnerable to challenge under TILMA as restrictions on trade or investment. To be maintained in the event of a TILMA challenge, governments will have to demonstrate that their measures are not more restrictive to trade and investment than necessary to achieve their environmental protection objectives. In obligating provinces to reconcile their regulations, TILMA omits both the safeguard in the AIT against downward harmonization of environmental regulations as well the AIT article that states: "Nothing in this Agreement shall be construed to affect the rights and obligations of the Parties under environmental agreements, including conservation agreements, in effect on the date of entry into force of this Agreement" (AIT Article 1504).

Important classes of measures relating to energy and minerals are exempt from TILMA, but Article 4 – Non-Discrimination applies, which means that provinces will not be able to provide preferences to local companies in the development of the province's energy resources. Alberta has taken a province-specific exception to allow it to maintain discrimination in the ownership of Power Purchase Arrangements. BC has taken a province-specific exception allowing BC Hydro to continue to give low-cost power to domestic customers and to ensure that domestic customers receive priority in the provision of electricity ("domestic load" requirements). However, BC has explicitly excluded from its energy exception measures that would prevent access to transmission lines, curtailing the province's ability to restrict energy exports.

TILMA's Article 15 commits the provinces to "promote enhanced inter-jurisdictional trade in energy." This obligation appears to go beyond encouraging inter-provincial trade in energy, as a "jurisdiction" could include a foreign country. Article 3 reinforces this interpretation, as it states: "Each Party shall ensure that its measures do not operate to restrict or impair trade between **or through the territory** of the Parties…" (emphasis added). These obligations threaten provincial ability to restrict energy

export and import projects that have negative environmental consequences. The proposed pipeline from Alberta to terminals in Kitimat, BC, for example, has raised concerns about the environmental effect of increased tanker traffic in BC's ecologically sensitive Inside Passage.

Local Governments and Other "Governmental Entities"

TILMA covers provincial governments and their "entities," which are defined in Part VII as meaning:

> *a) departments, ministries, agencies, boards, councils, committees, commissions and similar agencies of government;*
>
> *b) Crown Corporations, government-owned commercial enterprises, and other entities that are owned or controlled by the Party through ownership interest;*
>
> *c) regional, local, district or other forms of municipal government;*
>
> *d) school boards, publicly-funded academic, health and social service entities; and*
>
> *e) non-governmental bodies that exercise authority delegated by law.*

TILMA's coverage of these entities is limited in some cases by exception and transitional measures clauses. Under Article 11.4 of TILMA, "maintaining, designating, or regulating a monopoly for the provision of goods or services within its own territory" is exempted from the agreement. This article does not appear to be a clear exemption for all of BC's Crown Corporations, since ICBC, BC Liquor Stores, BC Ferries, and BC Hydro do not have full monopolies on insurance, liquor distribution, ferry transport, and electricity generation.

There does not appear to be a clear exemption for all of BC's Crown Corporations, since ICBC, BC Liquor Stores, BC Ferries, and BC Hydro do not have full monopolies on insurance, liquor distribution, ferry transport, and electricity generation.

"Measures of or relating to Crown Corporations" are listed as transitional measures in Part VI. At the end of the transitional period on April 1, 2009, Crown Corporations are to be covered by the general rules and special provisions detailed in Part II of the agreement and the dispute settlement provisions described in part IV, unless otherwise agreed.

Negotiations between BC and Alberta during this transitional period will determine what, if any, "special provisions, exclusions and transitional provisions" are "required" to determine the extent to which Part II of TILMA will cover crowns and measures related to crowns. Permanent exemptions for crown-related measures, extending beyond April 1, 2009, can be added only by the mutual consent of both parties (Article 8.2). By mutual agreement, the parties could extend the transitional period beyond April 1, 2009.

In any event, on April 1, 2009 the dispute settlement provisions of TILMA (part IV) will apply fully to Crown Corporations. BC and Alberta may decide to have only TILMA's procurement provisions apply. If Crown Corporations are subjected to Part II of TILMA in its entirety, private investors could

launch challenges under Article 4 – Non-Discrimination claiming that this article gives them the right to have access to Crown Corporation infrastructure. Or under Article 3 – No Obstacles they might challenge the very existence of Crown Corporations as restrictions on private investment.

Public-private partnerships, in cases where governments retain ownership or control of an entity, seem to be fully covered by the agreement as soon as it enters into force. Municipalities and municipal organizations are listed under transitional measures, but regional and district forms of municipal government are not.[47]

In BC, local government is organized differently than it is in Alberta. BC local government legislation provides for regional and district forms of government such as the Greater Vancouver Regional District (GVRD) and the Island Trusts. Unless they can be defined as "municipal organizations," and therefore be covered by transitional measures, TILMA could apply to BC's regional districts and the Island Trusts as soon as the agreement enters into force in April 2007. A key role of regional districts and the Island Trusts – land use planning – would be in question if TILMA applied to these entities, since by its very nature land use planning restricts investment.

TILMA's Dispute Process

Penalties and Private Enforcement

Making the Agreement on Internal Trade enforceable has been a longstanding objective of business lobby groups in Canada. A 1998 Canadian Chamber of Commerce paper on the AIT said that rights under the agreement "have to be expanded by the development of a rules-based dispute settlement system that is fully enforceable and that allows effective access by private parties and not simply by governments."[48] In testimony before House of Commons and Senate committees, and in position papers from both its national and local branches, the Chamber has made getting private enforcement of the AIT a key objective of its work. Having expended so much effort to achieve the dispute process TILMA provides, Chamber members can be expected to use it once it is in place.

TILMA's dispute process will have an impact in two fundamental ways: through panel rulings that fine governments up to $5 million if they are ruled to be in violation of the agreement, and through a "chill" effect whereby governments eliminate measures or decline to introduce new ones to avoid TILMA challenges.

The possibility of being sued under NAFTA has played a role in key public policy debates since the agreement entered into force. Two examples of NAFTA chill are the threat by Philip Morris to launch a NAFTA suit if Canada introduced plain paper packaging regulations for cigarettes[49] and concerns raised about the NAFTA implications of establishing public auto insurance in Ontario and Maritime provinces.

TILMA's chill effect will probably be stronger because the grounds for private complaints under TILMA are far broader than those under NAFTA and because in a variety of ways TILMA makes it easier for complaints to be filed. Only investors can take private suits under NAFTA, and then only under Chapter 11 – Investment and Chapter 15 – Competition Policy, Monopolies and State Enterprises.

Under TILMA, any person of the two provinces can launch a complaint over "*any matter* regarding the interpretation or application of this Agreement" (emphasis added).

Among the different grounds TILMA provides for governments to have to pay monetary awards to private complainants are:

- Government measures that restrict or impair trade, investment, or labour mobility;
- Lack of reconciliation of existing regulations and standards that restrict or impair trade, investment, or labour mobility;
- Establishment of new regulations and standards that restrict or impair trade, investment, or labour mobility;
- Business subsidies that distort investment decisions; and
- Treatment less favourable than the best treatment provided to a province's own persons, services, and investors or investments in like circumstances.

Private parties can receive up to $5 million in compensation over any one matter. The threat of such a substantial fine will act as a very significant deterrent to taking any measure that might be challenged under TILMA. However, because TILMA does not limit the number of complaints taken and compensation awarded over the same measure, even the $5 million cap does not convey the full economic pressure governments will face to eliminate measures if they are successfully challenged.

Although the BC government's backgrounder on the agreement states that "No more than one dispute may be lodged on what is essentially the same complaint,"[50] this view of the agreement is at odds with the dispute resolution procedures provided in Part IV. Article 34.2 in Part IV bars persons from taking complaints about the same measure at the same time, but appears to anticipate consecutive complaints about the same measure. Article 34.2 states: "A person may not initiate any proceedings under this Part regarding any measure that is already the subject of proceedings under this Part until such time as those ongoing proceedings have been completed."[51]

Regulatory Takings and TILMA

One of the articles in NAFTA's Chapter 11 that has proved very controversial is Article 1110 – Expropriation and Compensation. This article provides grounds for private investors to sue if a government has either expropriated their investment or taken a measure that is tantamount to expropriation. NAFTA has raised uncertainty about when a government's actions that do not actually seize property but instead reduce the value of that property can be ruled to be "expropriation."[52]

TILMA will create much greater scope for panel rulings that require governments to pay to regulate. A government measure does not have to "expropriate" an investment to be in violation of TILMA. In requiring individuals to be compensated if a measure merely "restricts or impairs" an investment, TILMA is similar in wording to regulatory takings propositions that have been advanced in the US by radical libertarian lobby groups.

Concerns about excessive litigation resulting from TILMA appear to be borne out by the experience of Oregon, where a regulatory takings ballot measure was successful in 2004. Similar to provisions in TILMA, the ballot measure that became Oregon law states that governments must pay compensation for restrictions on property enacted by a public entity. Oregon's Department of Land Conservation and Development reports that on the basis of this "takings" law, 2,700 claims worth a total of $6.1 billion had been filed with the state. Given that no new revenue had been identified to pay this compensation, a state official said "that means for those claims we judge to be valid, the issue is only waiver of regulation."[53]

TILMA dispute panels may rule in ways that moderate the language in the agreement. BC and Alberta could also do this by exercising their right under Article 34.4 to issue joint decisions on interpretation that panels must follow. A danger is that if more provinces sign on to TILMA, the possibility for such interventions would be significantly diminished due to the complexity of achieving multi-party agreement.

Waivers of land use regulation in Oregon have already led to conflicts, such as gravel pits having to be permitted in agricultural areas and plummeting land values due to incompatible development projects. According to Sheila Martin, Director of the Institute of Portland Metropolitan Studies, "Measure 37 has disabled the tools used over the past four decades to prevent sprawl and preserve agricultural and forest land in Oregon."[54]

The Oregon experience raises immediate concerns over whether BC's Island Trusts and Regional Districts are covered by the agreement as soon as it enters into force on April 1, 2007. Provincial regulation of land use in provincial parks also seems vulnerable to a potential flurry of lawsuits after this date. Other bodies responsible for land use regulation can attempt to seek exemptions for their regulatory authority during TILMA's two-year transitional period.

> TILMA will create much greater scope for panel rulings that require governments to pay to regulate. A government measure does not have to "expropriate" an investment to be in violation of TILMA.

TILMA, as a top-down agreement, allows complaints against a wider range of regulation than the land use regulation targeted in Oregon's takings law, so TILMA would require BC and Alberta to make more "pay or waive" decisions in more regulatory areas than Oregon.

Subjecting Governmental Authority to Arbitration Panels

Independent arbitration is a useful option to resolve intractable disputes when both parties explicitly and voluntarily consent to submit the specific matter to binding arbitration. But in TILMA, as under NAFTA Chapter 11, governments give their unconditional prior consent to submit disputes, however sensitive, to arbitration at the sole instigation of a private party. Given TILMA's particularly broad scope, this means that by adopting the agreement, elected governments would substantially fetter their constitutionally recognized powers to govern.

Arbitration can be an effective means to protect the rights of non-citizens in a foreign jurisdiction. But Canadians already have access to the courts in any part of the country and are afforded due process and the full protection of the law. The TILMA dispute settlement mechanism, and particularly the mandatory enforcement of the dispute panel's monetary awards, is unprecedented and seemingly inappropriate within a federal state.

Because of their origin as alternatives to the court system for commercial parties in dispute over a contract, investment agreement tribunals do not operate in the same way as domestic courts. They may be influenced but are not bound by precedent, and their decisions often conflict not only over similar wording in different agreements but also the same wording in the same agreement. According to law professor Susan Franck:

> *Investment treaty arbitration has a dirty little secret that is becoming less secret every day. Different tribunals come to different results under nearly identical textual treaty rights … these arbitral inconsistencies mean that governments cannot exercise their legislative and regulatory powers without exposing themselves to a litigation risk. Treaty claims amount to more than 'bet the company' disputes; they often become 'bet the country' disputes.*[55]

Conclusion

In promoting TILMA, Alberta cabinet minister Gary Mar has painted a very bleak picture of Canadian federalism: "Borders between provinces may look like just lines on a map, or a friendly roadside sign to tourists, but to business and workers, borders between provinces are endless lengths of red tape."[56] TILMA is provided as the answer to the question of how the huge burdens supposedly created by the existence of provincial boundaries can be overcome. But TILMA is a radical solution to a problem Canadians have not identified, as inter-provincial barriers do not figure anywhere in the list of their concerns. This may be one reason why the public was not consulted in either Alberta or BC before TILMA was signed.

Within the federal system, provinces have very important powers to exercise on behalf of their citizens. TILMA constrains those powers by making commercial interests the paramount consideration in policy making. TILMA coerces governments to disregard demands for higher standards even if these are expressed by the majority of citizens. The agreement restricts the objectives that governments can pursue, and limits the means that can be used to achieve objectives. This erases not only borders, but also the powers of government.

As tariffs have been removed through successive rounds of trade negotiations, these negotiations now increasingly focus on areas of domestic policy formerly considered to be unrelated to trade. If implemented, TILMA would be the ultimate expression of this trend, an agreement that sets severe constraints on provincial and local government policy in the absence of traditional barriers to trade. TILMA could also be the most compelling argument for why these types of agreements should not be negotiated behind closed doors and why they should be fully exposed to public scrutiny and the democratic process.

Notes

1 BC Ministry of Economic Development, "The British Columbia-Alberta Trade, Investment and Labour Mobility Agreement," http://www.gov.bc.ca/ecdev/popt/media_room/bc_ab_trade_investment_mobility_agreement.htm, accessed 14 January 2007.

2 Hirsch, Todd, "A Match Made in the West," Globe and Mail, 10 July 2006, p. A13.

3 Bond, David, CBC Radio – BC, "Almanac," interview with Mark Forsythe, 2 October 2006.

4 B.C. Economic Development Minister Colin Hansen, cited in the Edmonton Journal, "Alberta, B.C. expect other provinces to join deal," Geoffrey Scotton, 26 September 2006, p. F7.

5 In the TILMA context, labour mobility provisions have been promoted as a means for Alberta to solve its labour shortage. Heather Douglas, president of the Calgary Chamber of Commerce, has said that Alberta cannot possibly solve its future need for workers from its current population or through foreign immigration. In her view, TILMA should be extended to all provinces so that professionals can leave their home provinces and have their qualifications recognized in Alberta. A consideration in this discussion is how poorer provinces will cope with this accelerated out-migration of their trained professionals.

6 Shawn Robbins and Robert Musgrave, trade officials with the Alberta and BC governments respectively, are recorded in the minutes of the Pacific Northwest Economic Region's Trade and Economic Development Working Group meeting during PNWER's July 2006 conference in Edmonton saying that TILMA is "very comprehensive and covers essentially almost everything with very few exclusions."

7 For example, a NAFTA panel ruled it had jurisdiction to hear a complaint against the Massachusetts Supreme Judicial Court and the Boston Redevelopment Authority in the case of Mondev International Limited and the United States of America.

8 Gary Mar, Minister International and Intergovernmental Relations, Speech to Alberta Professional Regulatory Bodies, 18 September 2006. Posted at: http://www.iir.gov.ab.ca/trade_policy/documents/SpkNotes_Mar-TILMA-18Sept06.pdf, accessed 16 January 2007.

9 Agreement on Internal Trade. "Panel Report in the matter of the dispute between Farmers Co-operative Dairy Ltd. and New Brunswick re: fluid milk distribution," 13 September 2002, p. 24.

10 TILMA Article 3 and AIT Article 600.

11 The AIT appears to be stricter than TILMA in some areas. For example, in regards to a measure relating to the licensing, certification, and registration of workers, the AIT requires that this measure "relates principally to competence" (AIT Article 707.1(a)). The concern with such a requirement is that it discounts the value of a broad education, which can give professionals a more comprehensive understanding of their work than is provided by training strictly related to acquiring specific skills. In contrast with the AIT, TILMA states that standards and regulations are to be specified in terms of results, performance, and competence "where appropriate and to the extent practicable" (TILMA Article 5.2). A complainant could use TILMA's dispute process to enforce the stronger language in the AIT because more liberalizing AIT provisions are automatically incorporated into TILMA.

12 BC Ministry of Economic Development, "Backgrounder – Fact, not fiction, on TILMA," 10 January 2007

13 For example, the US-Bahrain Bilateral Investment Treaty, Article 2.3(b) states: "Neither Party shall in any way impair by *unreasonable and discriminatory measures* the management, conduct, operation, and sale or other disposition of covered investments" (emphasis added).

14 City of Vancouver, "Policy Report and Urban Structure," 19 July 2002. Posted at: http://vancouver.ca/ctyclerk/cclerk/020814/pe1.htm, accessed 15 January 2007.

15 Agreement on Internal Trade, "Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Québec Regarding Québec's Measure Governing the Sale in Québec of Coloured Margarine," June 2005, p. 26.

16 Regarding the use of dictionaries in trade rulings, the WTO Appellate Body has said: "In order to identify the ordinary meaning, a Panel may start with the dictionary definitions of the terms to be interpreted. But dictionaries, alone, are not necessarily capable of resolving complex questions of interpretation, as they typically aim to catalogue all meanings of words—be those meanings common or rare, universal or specialized" (para. 164 in "United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Appellate Body," 7 April 2005).

17 Gary Mar, Minister Alberta International and Intergovernmental Relations, Speech to the Richmond Chamber of Commerce, 6 June 2006.

18 Marvin Feldman v. Mexico, NAFTA Final Award, December 2002.

19 One of these rulings meant Canada had to pay compensation to the US toxic waste firm SD Myers for not allowing Canada's PCBs to be processed in the US.

20 UPS, "Amended Statement of Claim under the Arbitration Rules of the United Nations Commission on International Law and the North American Free Trade Agreement – United Parcel Service v. Government of Canada," paragraph 14(a), 30 November 2001.

21 Alberta Agriculture, Food and Rural Development, news release, "Beef plant expansion marks another success for Alberta's Beef Product and Market Development Program," 20 October 2006.

22 BC Ministry of Economic Development and Alberta International and Intergovernmental Affairs, news release, "B.C. and Alberta Promote Agreement at Trade Meeting," 5 September 2006.

23 WTO, GATS Working Party on Domestic Regulation, "Report on the Meeting Held on 12 July 2000," WTO Document Symbol S/WPDR/M/7, 19 September 2000.

24 WTO, GATS Working Party on Domestic Regulation, "Report on the Meeting Held on 11 May 2001," WTO Document Symbol S/WPDR/M/11, 7 June 2001.

25 Standing Senate Committee on Banking, Trade and Commerce, Proceedings, 14 December 2006.

26 Task Force on the Future of North America, "Summary of the Toronto Meeting," 2005.

27 For example, at a WTO meeting in May 2003, the European Union criticized Canada for its internal policy differences on the basis that these could cause difficulties for European exporters. The EU praised Canada's harmonization initiatives with the US, and "hoped this dialogue would be extended to third countries and would give priority to international harmonization, whilst also involving sub-federal entities in Canada." WTO, Trade Policy Review Body, "Trade Policy Review – Canada, Minutes of Meeting," WTO Document Symbol WT/TPR/M/112, 12 May 2003.

28 Gordon Campbell, "Reaching Higher for British Columbia – Premier Campbell's Address to BC Liberals Convention 2006," 4 November 2006.

29 Alberta Hansard, Legislative Assembly of Alberta, 29 November 2005, p. 1967. In response to a question on whether he would ban junk food in schools, Alberta Education Minister Gene Zwozdesky said "the short answer is no."

30 If the ban is implemented after TILMA comes into force, BC will be vulnerable to a challenge under Article 5.3 because it is establishing new regulations that restrict impair and restrict investment.

31 Gary Mar, Minister of International and Intergovernmental Relations, Speech to Alberta Professional Regulatory Bodies, 18 September 2006.

32 Colin Hansen and Gary Mar, Interview with Mark Forsythe, CBC Radio, BC Almanac, 3 October 2006.

33 For example, to accede to the European Union Romania has to "harmonize up" in the area of environmental protection. "Romania and European Integration," Romania National News Agency, Bulletin No. 11(51), November 2005.

34 This statement mixes the exceptions from TILMA listed in Part V with the legitimate objectives defined under Part VII. The exceptions listed in Part V do give complete exceptions from the application of the agreement. The legitimate objectives defined in Part VII, however, do not.

35 Colin Hansen, email to constituent, 28 November 2006.

36 Prima facie means "sufficient to establish a fact or case unless disproved." Merriam-Webster's Dictionary of Law – 1996.

37 Agreement on Internal Trade, Alberta/Quebec-Margarine, p. 32.

38 The AIT panel rulings on necessity were made in the following cases: "Dispute Between the Certified General Accountants Association of New Brunswick and Quebec Regarding Quebec's Measures Governing the Practice of Public Accounting (2005)"; "Dispute Between Alberta and Quebec Regarding Quebec's Measure Governing the Sale in Quebec of Coloured Margarine (2005)"; "Dispute Between Alberta / British Columbia and Ontario Regarding Ontario's Measures Governing Dairy Analogs and Dairy Blends (2004)"; "Dispute Between Farmers Co-Operative Dairy Limited of Nova Scotia and New Brunswick Regarding New Brunswick's Fluid Milk Distribution Licensing Measures (2002)"; "Dispute Between the Certified General Accountants Association of Manitoba and Ontario Regarding the Public Accountancy Act (R.S.O., 1990, Chapter P-37) and Regulations (2001)"; and "Dispute Between Alberta and Canada Regarding the Manganese-Based Fuel Additives Act (1998)."

39 Agreement on Internal Trade, Alberta/Canada – MMT, p. 11.

40 Agreement on Internal Trade, "Report of the Article 1716 Panel Concerning the Dispute Between the Certified General Accountants Association of New Brunswick and Québec Regarding Québec's Measures Governing the Practice of Public Accounting," 19 August 2005, p. 21.

41 In its Dominican Republic – Cigarettes decision, the WTO Appellate Body ruled that although the Dominican Republic had succeeded in demonstrating that its objectives were important, that its measure did contribute to these objectives, and that the measure did not have much impact on trade, this defence failed because the original panel had concluded there were more effective alternatives to achieve the measure's objectives.

42 The WTO Appellate Body in the Korea-Beef case stated: "In sum, determination of whether a measure, which is not 'indispensable', may nevertheless be 'necessary' … involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports." This view of necessity involves dispute panels making their own judgments about how "important" government objectives are.

43 In the Korea – Beef case, the WTO Appellate Body described alternatives as "reasonably available" even though they would be more expensive to implement and Korea had already rejected them as not achieving the level of protection it was seeking.

44 At the AIT, six out of six governments have failed to justify their measures. At the WTO, governments failed to justify their measures in nine of 11 cases.

45 BC Ministry of Economic Development, "The British Columbia-Alberta Trade, Investment and Labour Mobility Agreement," http://www.gov.bc.ca/ecdev/popt/media_room/bc_ab_trade_investment_mobility_agreement.htm, accessed 14 January 2007.

46 Note that the definition of legitimate objectives in TILMA does not include any reference to education.

47 The definition of government entities covered by the agreement includes regional and district forms municipal government.

48 Canadian Chamber of Commerce, "The Agreement on Internal Trade: Taking Stock after Three Years," May 1998, p. 39.

49 Hills, Carla, "Legal Opinion With Regard to Plain Packaging of Tobacco Products Requirement Under International Agreements," Mudge, Guthrie, Alexander and Ferdon Attorneys. Memo to R.J. Reynolds and Philip Morris, 3 May 1994.

50 BC Ministry of Economic Development, "Backgrounder: Fact, not fiction, on TILMA," 10 January 2007.

51 It may be that the BC government has interpreted that complaints about the same measure would be "time barred" because the agreement does not allow complaints to be heard by a panel if more than two years have elapsed from when the complainant knew, or should have known, about the inconsistency of a measure. AIT panels, however, have interpreted a similar provincial in the AIT in a lenient way to allow complaints to be heard even though the two year period has arguably elapsed.

52 Howard Mann and Konrad von Moltke, two experts in international environmental regulation, stated in a 2002 assessment of NAFTA that "Chapter 11 sets out protections against expropriation that have now been expanded by the arbitration bodies to include an extreme reading of the American concept of 'regulatory takings': that a regulation impacting on the reasonable expectation of profit of a company constitutes an expropriation that requires compensation to be paid." Mann, Howard and Konrad von Moltke, "Protecting Investor Rights and the Public Good: Assessing NAFTA's Chapter 11," Background Paper to the Investment Law and Sustainable Development Tri-National Policy Workshops, 11 April 2002.

53 Arnoldy, Ben, "Topping 2006 ballots: eminent domain," The Christian Science Monitor, 5 October 2006.

54 John O'Donnell, "Taking the Public Trust: How a New York Real Estate Developer Is Threatening State Governments in the West," Public Citizen, November 2006, p. 12.

55 Franck, Susan, "The Nature and Enforcement of Investor Rights under Investment Treaties: Do Investment Treaties Have a Bright Future?" U.C. Davis Journal of International Law and Policy, Vol. 12, No. 47, 2005, pp. 55 and 58.

56 Gary Mar, Minister Alberta International and Intergovernmental Relations, Speech to the Richmond Chamber of Commerce, 6 June 2006.

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NATIONAL OFFICE
410 – 75 Albert Street
Ottawa, Ontario K1P 5E7
tel: 613 563 1341
fax: 613 233 1458
ccpa@policyalternatives.ca

BC OFFICE
1400 – 207 West Hastings Street
Vancouver, BC V6B 1H7
tel: 604 801 5121
fax: 604 801 5122
ccpabc@policyalternatives.ca

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