

# TILMA and LOCAL GOVERNMENT ENVIRONMENTAL INITIATIVES

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## UNCLEAR BUT POTENTIALLY FAR-REACHING EFFECTS

The Trade, Investment and Labour Mobility Agreement (“TILMA”) between BC and Alberta came into force on April 1, 2007. The governments of BC and Alberta tout TILMA as “a groundbreaking agreement to remove barriers to trade, investment and labour mobility” between the two Parties. They argue that it will create “the second-largest economic region in Canada.” In contrast, critics have characterized TILMA as a “race to the bottom” and “a far-reaching deregulation and privatization measure disguised as a trade agreement.”

Analysis of TILMA demonstrates that the Agreement could potentially be used to block measures that local governments take to respond to environmental concerns. As explained below, such measures could be challenged under TILMA as prohibited “barriers” to trade, investment and labour mobility.

Legal analysts have identified key areas of concern for local governments seeking to implement measures to address environmental issues. Concerns include:

- The sweeping nature of TILMA prohibitions against measures that impact trade, investment and labour mobility;
- The potential application of those prohibitions to key environmental measures, because of the limited TILMA exemptions for environmental measures;
- The onerous burden faced when seeking to justify a local government measure challenged by business; and
- The unsatisfactory dispute resolution process.

This document provides a brief overview of these issues.

It should be noted that much of the language in the Agreement is undefined or ambiguous. As a result, a full understanding of TILMA’s impacts awaits future panel/court rulings and amendments by the Parties. However, current wording of the Agreement clearly

The BC government has taken the position—at odds with the text of the Agreement—that TILMA simply requires non-discrimination between the Parties. In addition to including a number of provisions that directly contradict this interpretation, some of which are discussed in the following pages, TILMA is clear in its preamble that the intent of the Agreement is to “eliminate barriers that restrict or impair trade, investment or labour mobility”. The preamble does not even mention discrimination.

raises concerns for local governments that want to protect the environment.

## BROAD APPLICATION

TILMA applies to “*measures of the Parties and their government entities that relate to trade, investment and labour mobility*” – unless they are exempted under Part V ‘Exceptions to the Agreement’ or justified as legitimate objectives under Article 6.<sup>1</sup>

‘Measure’ and ‘government entity’ are both defined very broadly so that virtually any action by a district, regional or municipal government is subject to TILMA, unless specifically excepted.

This is in contrast to the progenitor to TILMA, the federal-provincial Agreement on Internal Trade (“AIT”), which confines the obligations of municipalities to particular areas of policy and law.

<sup>1</sup> Measures listed in Part VI, which include those “of or relating to ... municipalities” are not subject to the key TILMA prohibitions until April 1, 2009 when the transitional period ends. However, until then, Parties are to “ensure that no measure listed in Part VI is amended or renewed in a manner that would decrease its consistency” with TILMA.

## LIMITED ENVIRONMENTAL EXCEPTIONS

Part V of TILMA lists measures that are excepted from the Agreement's key prohibitions. This list fails to provide a comprehensive exception for environmental measures. Instead, it lists specific exceptions for certain measures that relate to the environment, such as those relating to:

- water and services and investments pertaining to water;
- fish, wildlife and forests;
- the promotion of renewable and alternative energy; and
- the management and disposal of hazardous and waste materials.

Local government measures on these specific issues are excluded from TILMA and wouldn't be thwarted.

However, TILMA's broad prohibitions apply to local government measures *unless specifically excepted*. Unfortunately, measures to address several key environmental issues are not exempted, for example: certain proactive measures to reduce greenhouse gases, protect endangered ecosystems or reduce air pollution. Measures dealing with these latter issues are vulnerable to legal challenges under TILMA.<sup>2</sup>

Thus, local governments could be prevented from dealing with the most fundamental environmental issue of all – climate change. Municipal land use initiatives will be a critical part of dealing with climate change, yet they are not protected from TILMA's sweeping prohibitions.

## KEY PROHIBITIONS RELATING TO ENVIRONMENTAL CONCERNS

Measures not exempted in Part V will be subject to the broad TILMA prohibitions.<sup>3</sup> Some of the most potentially problematic prohibitions are found in Articles 3.1, 5.1 and 5.3.

**Article 3.1** ('No obstacles') *Each Party shall ensure 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.*

What does it mean to "restrict or impair" investment, trade or mobility? This provision casts a potentially wide net. In interpreting the 'no obstacles to trade'

<sup>2</sup> They would then need to be defended under the onerous provisions of Article 6. See below.

<sup>3</sup> Note that until April 1, 2009, measures covered by the transitional provisions will not be subject to the prohibitions.

provision in AIT, an AIT panel held that "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."<sup>4</sup> This has led to legal analysis suggesting that TILMA would be similarly interpreted—meaning that any local government action not exempted under Article V that impedes trade, investment or labour mobility could be challenged.

The inclusion of investment in the TILMA 'no obstacles' provision is a significant departure from AIT, which specifies that the 'no obstacles' rule does not apply to *investment*. 'Investment' is defined broadly in TILMA to include financial assets, inventories, capital assets and goodwill; the acquisition of such assets; any enterprise;<sup>5</sup> and the establishment, acquisition or expansion of an enterprise. Legal analysts have suggested this could be used to challenge any environmental measure that limits an enterprise from expanding its operations or assets.

Note, however, that differences between the 'no obstacles' provisions in the two Agreements make it difficult to predict how the TILMA provision will be interpreted. Unlike Article 3.1, the AIT provision does not include the phrase "between the parties". This phrase could support the interpretation that on this singular issue, TILMA requires actual discrimination by one Party (or any of its 'government entities') against the other Party.

Even more troubling are Articles 5.1 and 5.3. These provisions contain no language suggesting that they apply only to instances of discriminatory treatment and would, therefore, likely be interpreted as absolute prohibitions.

**Article 5.1** ('Standards and Regulations') *Parties shall mutually recognize or otherwise reconcile their existing standards and regulations that operate to restrict or impair trade, investment or labour mobility.*

The scope of the obligation to "recognize" or "reconcile" is unclear. An investor might challenge a standard or regulation that is higher in one province than the other for failure to reconcile. In the absence of such reconciliation, the lower standard or regulation could apply in the spirit of 'mutual recognition'. This could severely constrain the exercise of municipal

<sup>4</sup> AIT Margarine case. See "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 23, 2005, at 26.

<sup>5</sup> Defined as a broad range of business entities whose purpose is economic gain.

government decision-making authority and spur a ‘race to the bottom,’ where the benchmark is always set by reference to the least restrictive provision.

This concern is given added weight by the fact that, while the AIT explicitly directs the parties to adopt the higher, not lower, standards in such a situation, TILMA contains no such provision.<sup>6</sup>

**Article 5.3** (‘Standards and Regulations’) *Parties shall not establish new standards or regulations that operate to restrict or impair trade, investment or labour mobility.*

This is very broad and many new standards and regulations for environmental protection will likely breach this provision. Regulatory bans would be particularly vulnerable to successful challenges under TILMA as they so clearly restrict investment. The prohibitions on restricting or impairing investment are unqualified—any degree of impairment or restriction could be considered a violation of the Agreement.

Article 5.3, combined with Article 3, if applied to everything defined in TILMA as an “investment”, means that regulations that restrict any “expansion of an enterprise” could, in principle, violate these prohibitions.

Also of concern with all three of these provisions is the requirement that government measures *not operate* to restrict or impair trade, investment and labour mobility—as this indicates that it is the *effect*, rather than the *intent* of the measure that matters. Thus, even unintended and indirect effects on trade, investment or labour mobility could cause a local government’s measure to run afoul of TILMA.

While Articles 3.1, 5.1 and 5.3 are of greatest concern, Articles 4.1, 7.2, 12 and 14 also potentially constrain municipal environmental measures.<sup>7</sup>

## JUSTIFYING BREACHES UNDER ARTICLE 6

If a business<sup>8</sup> challenges a local government’s measure it will fall on the defending Province<sup>9</sup> to “justify” the measure under Article 6. The requirements of this justification effectively create a complicated and

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<sup>6</sup> Note that the definition of ‘standards’ includes “goods or related processes and production methods,” and could thus include a broad range of environmental measures aimed at reducing the environmental impacts of manufacturing and production industries.

<sup>7</sup> See Ferguson for a detailed a discussion of these provisions.

<sup>8</sup> Through its provincial government, or on its own.

<sup>9</sup> As the responsible “Party” to the Agreement.

expensive regulatory process for local governments. A non-exempted measure that is inconsistent with TILMA prohibitions may still be justified under Article 6, but only if “the Party 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” [emphasis added].

The definition of “legitimate objective” includes “environmental protection”. Thus, the BC government has argued, TILMA doesn’t threaten environmental protection measures. The BC Ministry of Economic Development said in a media release that the legitimate objectives provision means “there is nothing in TILMA that would prevent either province from implementing a climate change action plan.”<sup>10</sup>

However, there are two key problems with this analysis. First, the mere fact that a measure is aimed at protection of the environment will not be sufficient to pass test (a) above—panels will scrutinize the measure at issue and require sufficient evidence to show that its objective is a legitimate one, as defined in TILMA. *Second, the pursuit of a legitimate objective alone is not sufficient justification. To be justified, a measure must be shown to satisfy all three aspects of Article 6.*

In particular, the ‘not more restrictive than necessary’ test will pose a significant hurdle to successful justification. The AIT includes a similar provision—and in all six AIT cases where governments sought to justify measures, they failed on this test. An AIT panel has held that a defending party must “demonstrate that no other available option would have met the legitimate objective”<sup>11</sup> and provide evidence that less restrictive means of meeting the legitimate objective were considered and found inadequate.

Thus, a municipality seeking to implement measures to protect the environment will need to establish both that their objective is legitimate and that less restrictive means to achieve the same ends are insufficient—a complicated and expensive hurdle to overcome. Instead

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<sup>10</sup> BC Ministry of Economic Development, “TILMA and the Environment” Press Release, February 15, 2007.

<sup>11</sup> AIT MMT case. See “Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Canada Regarding the *Manganese-Based Fuel Additives Act*” June 12, 1998, at 7.

of simply taking an action to protect the environment, the municipality will have to establish that it fully considered a whole constellation of alternative actions that might have addressed the problem with less impact on trade, investment and labour mobility—and that the course chosen was not more restrictive than necessary.

Over time, this could act as a powerful deterrent against local government implementation of environmental protection measures.

## DISPUTE RESOLUTION PROCESS

Numerous concerns have been raised about TILMA's dispute resolution process. Some of the most troubling are described below.

- Since the TILMA dispute resolution mechanism has been designed to be accessible to business and is therefore less expensive and time-consuming than traditional litigation, complainants may be motivated to challenge anything they see as harming their business interests.
- While the TILMA dispute resolution process is similar to AIT's, key differences between the two are cause for concern. Unlike AIT, TILMA does not have a '*de minimis*' clause that would allow rejection of complaints on the basis that the injury to a complainant was negligible; nor does TILMA include a procedure to screen out vexatious or frivolous claims. This could result in local governments being forced to expend resources to provide evidence in defence of spurious claims. Also, unlike AIT panels, a TILMA panel may award damages (up to \$5 million).
- If a local government measure is challenged, the local government must depend on the Province to defend the measure – but the local government may face potential liability and loss of powers if the Provincial defence flags or fails. The BC and Alberta governments have addressed such concerns by stating, "municipalities are not required to defend their own measures or pay monetary awards. Only the provincial governments can be subject to the dispute settlement process."<sup>12</sup>

However, it should be noted that the province is obligated under TILMA to ensure that municipalities

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<sup>12</sup> Joint letter to UBCM, AUMA and AAMDC from Colin Hansen, BC Minister of Economic Development and Guy Boutelier, Alberta Minister of International Intergovernmental and Aboriginal Relations, January 31, 2007. See UBCM website (<http://www.civicnet.bc.ca>).

comply with the requirements of the regime. The province's considerable leverage *vis-a-vis* local governments includes: tying funding to TILMA compliance, passing legislation to supersede local government measures, or seeking indemnity from a municipality in contravention of TILMA.

In addition, it will clearly take considerable municipal resources to gather evidence for presentation in the dispute resolution processes.

When the UBCM asked the Province for assurance that it would not seek to be indemnified by "a municipality that takes valid measures under its statutory and common law authority but ... the measures are found under the dispute resolution mechanism to trigger a monetary award against the Province," TILMA negotiators refused to respond, citing the hypothetical nature of the question.

## CONCLUSION

TILMA has the potential to endanger local initiatives to protect the environment. To avoid this possibility, it would be prudent for local governments to call for either the amendment or termination of the Agreement.

## RESOURCES

K. Ferguson, "TILMA and the Environment," March 2007. [http://www.sierralegal.org/reports/tilma\\_mar302007.pdf](http://www.sierralegal.org/reports/tilma_mar302007.pdf)

E. Gould, "Asking for Trouble," February 2007. [http://policyalternatives.ca/documents/BC\\_Office\\_Pubs/bc\\_2007/bc\\_ab\\_tilma\\_asking\\_trouble.pdf](http://policyalternatives.ca/documents/BC_Office_Pubs/bc_2007/bc_ab_tilma_asking_trouble.pdf)

D. Lidstone, "TILMA: Overview of Immediate Implications for Local Government" prepared for the Union of BC Municipalities, April 2007. <http://ubcm.fileprosite.com/contentengine/document.asp?id=3193>

S. Shrybman, "An Assessment of The Trade, Investment And Labour Mobility Agreement (TILMA) between the Provinces Of British Columbia and Alberta," May 2007. [http://www.cupe.ca/tilma/An\\_assessment\\_of\\_the](http://www.cupe.ca/tilma/An_assessment_of_the)

See the Union of BC Municipalities website at <http://www.civicnet.bc.ca> and then click on the "TILMA" link for a library of documents relating to TILMA.