INVESTOR RIGHTS AND CANADIAN FEDERALISM: THE CASE OF TILMA

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Introduction  On 1 April 2007, the British Columbia-Alberta Trade, Investment and Labour Mobility Agreement (TILMA) came into effect. The deal has been hailed as a major step towards investor protection.

From the perspective of internal trade in Canada, the TILMA brings some novel features. Whereas the Agreement on Internal Trade (AIT) balanced economic imperatives with public interest considerations, the TILMA places much greater emphasis on the former. The AIT is “bottom up,” covering only those areas where provinces made commitments; the TILMA is “top down,” meaning all measures by government bodies are covered unless specifically exempted. The TILMA specifies that there be “no obstacles” and no “new standards or regulations” that “restrict or impair trade, investment or labour mobility” between the two provinces (Articles 3 and 5.3). Furthermore, the definition of investment in TILMA is broad and is backed by rights to challenge measures deemed in violation of the terms of the agreement, through independent commercial arbitration panels.

While the TILMA is a significant agreement for these reasons, some truly hyperbolic claims have been made on its behalf. The British Columbia government has claimed, based on a study by the Conference Board of Canada that it commissioned, that the “agreement has the potential to add $4.8 billion to real GDP and create 78,000 new jobs in BC alone.”¹ These astonishing claims — $4.8 billion is equivalent to half of British Columbia’s annual exports to Alberta — that have been criticized by Lee and Weir.² Nonetheless, the TILMA has been greeted as an unambiguously positive development by its proponents in government and the business sector.
Outside of British Columbia and Alberta, the TILMA has sparked a new round of hand-wringing among Canada’s elites about supposedly negative economic costs of internal trade barriers (the last round culminated in the 1995 AIT). In Ottawa, the federal government released *Advantage Canada*, an economic strategy document that reinforces the notion that the TILMA is a significant step towards a “stronger economic union.” The Senate's Banking, Trade and Commerce Committee has been holding hearings on the issue, also starting with the assumption that barriers are substantial. However, to date the British Columbia and Alberta governments have not had success in convincing other provincial governments to sign on to the TILMA. In Saskatchewan, public hearings led both the then-governing New Democratic Party and the subsequently elected Saskatchewan Party to reject the deal. Ontario and Quebec have launched their own bilateral negotiations rather than join the TILMA.

TILMA is concerned with government policies that may have adverse effects on interprovincial trade. These include procurement policies and differences in regulation that may impede flows of investment and labour. Due to the federal nature of Canada’s government, there are differences in public interest regulation among provinces. In international trade, regulations may be deemed to be nontariff barriers to the extent that they inhibit market access by foreign enterprises. However, it is not obvious that these inhibit trade and investment across provincial boundaries such that an agreement like TILMA would be warranted. Some minor labour mobility issues arising from certification standards of professional organizations persist, but these are not *bona fide* trade barriers. In any event, the available economic evidence suggests that any inconsistent practices across jurisdictions that do exist have only a negligible effect on interprovincial commerce.

This paper argues that the TILMA, like its predecessor, the 1995 AIT, cannot be explained as a solution to trade barriers because, by and large, they do not exist. Instead, the TILMA is better explained in terms of the creation and codification of investor rights, and legal mechanisms for their enforcement. Indeed, the AIT is widely perceived as a failure by business elites precisely because it did not provide the requisite powers of enforcement. The AIT dispute settlement process required that a provincial government
take up a case on behalf of an investor, and even if successful there were no means of compelling the losing party to change its behaviour.

In developing legal frameworks of investor rights, TILMA is replicating, at the interprovincial level, investor rights provisions in the North American Free Trade Agreement (NAFTA) and thousands of Bilateral Investment Treaties (BITs). Public interest advocates have condemned such investor rights agreements on the grounds that they are antidemocratic: they artificially constrain the ability of governments to expand public services and to regulate in the public interest, in particular with regard to environmental protection, labour standards, and consumer protection.⁴ They do this in two fundamental ways: first, by opening up areas of democratic decision-making to challenges through external reviews outside domestic legal systems, and second, by casting a chill over the process of regulatory decisionmaking itself, thereby reducing the likelihood of new measures being introduced.

In the next section, the evidence on internal trade barriers is reviewed, with a more complete discussion of what the real issues are and why the top-down approach in the TILMA seems misplaced. Then, we take a step back to review the NAFTA as a prototype in the development of investor rights in trade agreements. Some linkages between the NAFTA and the AIT are considered. In the final section, the TILMA is used to demonstrate how the establishment of investor rights may undermine public policy objectives.

**Is Interprovincial Trade in Canada Hampered by Barriers?** Almost everyone agrees that interprovincial barriers to trade are astonishingly large, undermine our productivity performance, and prevent Canada from being a true economic union. Everyone, that is, except economists who have studied the issue. In fact, none of those assertions are substantiated by the available economic evidence. At the broadest level of abstraction, we find substantial rhetoric about barriers based on the logic of free trade. There are also some anecdotes, though not too many. In between the rhetoric and the anecdotes, there are no data one can point to that could be considered persuasive evidence of a fundamental problem.

The notion that substantial trade barriers exist has become a point of mythology among business advocates and Right-wing think tanks; so much
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so that their discourse typically flies straight from this assumption to policy recommendations in support of TILMA-like agreements, without stopping to present evidence of actual barriers that may be causing harm, or that their removal would be a net benefit to the nation.

In fact, once the rhetoric is swept aside, there is essentially no persuasive evidence that internal trade barriers in Canada are cause for concern. Barriers to internal trade are essentially banned by the Constitution, and this basic fact is reflected in the absence of customs inspection stations at provincial borders, and the use of a common currency. To the extent that there are real issues at stake in Canadian federalism, they are not trade barriers in the classic sense of the term (i.e., border measures, such as tariffs, quotas, and bans), the removal of which would suggest economic gains from trade.

In several hours of testimony before the Senate Banking, Trade and Commerce Committee, only two items were presented that could be considered *bona fide* barriers to trade. The first, independent provincial inspection of meat products, is considered a barrier, but it is also acknowledged that there exists a federal inspection regime which, if complied with, eliminates this so-called barrier. The second, vegetable oil products, is a case in which Quebec restricted the colouring of margarine from appearing the same colour as butter (the restriction was lifted by the Quebec government in July 2008). This may well have been a classic barrier, although testimony by the relevant industry association put their costs of the barrier at roughly 0.2% of total revenues. The benefits from removing the barrier, netting out losses elsewhere in the existing marketplace, are likely to be rather small.

Two reports have been used repeatedly to state a high cost to inter-provincial trade barriers. A report by the Canadian Manufacturers’ Association (CMA) argued that barriers cost one percent of Canada’s GDP. However, the CMA made only a crude estimate of some costs without considering any of the benefits of existing policies. More than three-quarters of the CMA estimate stemmed from government procurement policies, based on the assumption that liberalization would reduce procurement costs. In only one area did the CMA cite a classic barrier to trade: restrictions on alcoholic beverages. In both of these areas, the vast majority of gains have already been reaped through the AIT, although the ability of consumers in
British Columbia to buy Moosehead beer from the Maritimes is surely of dubious social benefit.  

Second and more recently, the Conference Board of Canada claimed in a report commissioned by the British Columbia government that the TILMA would add 3.8% to British Columbia’s GDP. This report is deeply flawed. It made no attempt to list or estimate the cost of barriers. Upon close examination, the Conference Board essentially made up its numbers after looking at a small sample of results from a survey of business organizations and government ministries. Its estimate was doubled through a simple arithmetic error. In a review of a similar contract with the Saskatchewan government, Helliwell likened the Conference Board exercise to “estimating national GDP by asking households how they think everyone else is doing these days,” and concluded that the Conference Board estimates had “no empirical support.” Even the CD Howe Institute, in its testimony to the Senate Committee, while supporting the abstract case for trade barriers, claimed the Conference Board estimates to be “widely exaggerated.”

In contrast, the available economic evidence suggests that any barriers to trade in Canada are miniscule. More than 20 years ago, the MacDonald Commission, based on a study by Whalley and Trela, found that barriers amounted to about one-twentieth of one percent of Canada’s GDP. Since then, the 1995 AIT has likely reduced that number even further.

While this evidence is now quite dated, the finding that interprovincial barriers must be incredibly small is corroborated by “gravity models” estimating border effects. Such models find that, after adjusting for population size and distance to market, Canadian provinces are substantially more likely to trade with each other than with US states. That number has fallen in recent years but still amounts to a factor of 12 for goods and 30 for services. Moreover, in recent years, interprovincial trade has grown faster than international trade: between 1997 and 2006 British Columbia’s exports to other provinces increased by a total of 95 percent compared to 43 percent for international exports, and British Columbia’s imports from other provinces grew by 63 percent compared to 52 percent for imports from other countries.
Thus, there is no *prima facie* evidence that Canada is suffering from internal trade barriers; to the extent that they exist, they must be an order of magnitude less than barriers between Canada and the United States. None of this means that, in those isolated cases where barriers do exist and are causing measurable economic harm, Canadian governments should not act to improve the situation. As long as the public interest — whether protecting the environment or ensuring decent labour standards or adequate consumer protection — is not compromised, this need not be controversial. But governments should not falsely convince themselves that this is a magic bullet to solve alleged productivity problems.

Clarity of language would also advance the debate. This issue is incorrectly framed as barriers to trade, when, really, concerns are related to differences in provincial regulation due to the federal nature of our government, different business registration and reporting requirements, and differences in professional certification standards. In all these cases, there exists a tension between expediency for corporate interests and legitimate and democratic decisionmaking.

Regulatory differences among the provinces are not trade barriers per se. Though they may pose some additional costs to business, they do not inhibit the cross-border trade in goods or services. Canada’s Constitution gives provinces the ability to make regulations based on local needs, so any attempts to harmonize regulations must consider the loss of local decision-making capacity as a cost netted out of any benefit arising from harmonization. Along the same lines, the call for a national securities regulator to replace separate provincial bodies is not particularly controversial (the opposition seems to be limited to the governments of Alberta and Quebec), but nor is it a barrier to trade.

Restrictions on investment have also been cited as barriers, though on closer inspection these are limited to requirements that companies doing business in another province register there, maintain an address for the purposes of communications, and file the standard reports. This would appear to be little more than the cost of doing business, and, in all likelihood, less than the costs associated with filing taxes or ensuring legal compliance in the normal course of operations. The move to single filing
(that is, filing once for both provinces), as in the case of the British Columbia-Alberta TILMA, if anything raises concerns about the absence of clear legal points of contact with regard to provincial judicial systems. (This point was raised in commentary by public officials in the Conference Board study for British Columbia.)

A final issue area is labour mobility. While, historically, there have been legitimate concerns related to differences in certification requirements by professional self-regulating bodies, much progress has been made in resolving such issues. The few remaining areas that need attention are being looked at through an interprovincial process involving the AIT. These largely constitute delays in being able to practice, rather than barriers to mobility. In some cases, however, such delays are warranted as laws and local conditions differ from one province to the next.16

Thus, even if we are generous and accept the sweeping definition of “trade barriers” presupposed by proponents of the TILMA, we still do not end up with much in terms of hard economic costs dragging down the Canadian economy as a result of federalism. Interestingly, this decentralization of decisionmaking is often defended vigorously by corporate Canada in the name of subsidiarity, usually when opposing the development of pan-Canadian public services or national regulations and standards. Indeed, differences in the level and quality of public services among the provinces, and the need for more coherent pan-Canadian approaches, are topics that are much more relevant to a “strong economic union” and to the day-to-day lives of Canadians.

It could be argued that what matters are the perceptions of trade barriers, and it is these perceptions that are behind the British Columbia-Alberta TILMA. However, a more compelling rationale lies in the desire of business interests to secure new investor rights, and mechanisms for their expedient resolution. The next section looks at this question, as through the origins of investor rights in international trade agreements.

**Investor Rights in International Trade Agreements** The postwar period, over numerous negotiating rounds under the General Agreement on Tariffs and Trade (GATT), culminating in the 1995 WTO, engendered a radical
shift in the nature of trade liberalization. By expanding the purview of trade well beyond border measures to include new areas (such as services and agriculture) and traditionally nontrade issues (such as investment, intellectual property rights, and government procurement), the agreements grew to cover a variety of restrictions on governments with regard to the treatment of foreign commercial interests. In the early days of the GATT, reductions in border measures on a most-favoured nation basis meant minimal intrusion into domestic political space. By the time of the NAFTA and WTO agreements, many concerns emerged about the relationship between international “trade” agreements and the capacity for democratic decisionmaking.

Modern trade agreements serve as conditioning frameworks that increasingly bind national governments’ policy choices. Stephen Gill calls this a “new constitutionalism” that locks in changes that are favourable to capital, creating an “enabling state” with a focus on protection of property rights and an economic climate conducive to securing inflows of investment from global corporations.17

In comparative terms, the NAFTA goes beyond the levels and scope of liberalization enshrined in the WTO agreements. Key provisions of the NAFTA are about conferring new rights to investors:

- National treatment and most-favoured nation treatment of foreign investors, which combined mean that a government must extend the best type of treatment it provides to any domestic investor to all foreign investors;
- Very broad definition of “investment,” covering virtually all types of ownership interests. Because the definition is so broad, the NAFTA contains a provision that states what the term does not mean;
- Preventing governments from regulating in- and out-flows of capital, and limiting governments’ ability to use performance requirements, such as requirements for investors to purchase inputs from local sources, to meet minimum levels of domestic content, to transfer technology, or to meet employment targets.

Perhaps the most controversial NAFTA feature is investor-to-state dispute resolution, a “privatization” of arbitration formerly confined to a state-to-state level. Investor-to-state dispute resolution has been criticized for giving
foreign corporations the unprecedented right to directly challenge sovereign governments for alleged breaches of investment rules, and to seek compensation. These claims bypass domestic judicial systems, and are adjudicated by commercial arbitration panels that can award substantial monetary damages.

The NAFTA investment guarantees go far beyond traditional concepts of expropriation — such as when the government must pay fair compensation to a property owner when seizing land to build a highway. In the NAFTA context, any government measure that reduces the future profitability of a corporation could be deemed “tantamount to expropriation.” This includes laws and regulations at all levels of government, regardless of the public interest issues they are intended to address.

This sets out a huge potential conflict between the provisions of the NAFTA Investment chapter and public interest regulation. The US legal concept of “regulatory takings,” where government actions that affect private interests are liable for compensation, has essentially been written into NAFTA’s Investment chapter. Mann and von Moltke comment that the language of the NAFTA Investment chapter changes the terrain from one where the principal concern was egregious acts of expropriation by Southern governments into something more nefarious:

When investment provisions were used only as a shield against egregious acts this created little controversy; it was understood that the intention was to provide a floor of minimum standards of fair treatment, regardless of whether domestic firms were being treated equally badly. But with the change in the use of the provisions from a defensive shield into a sword to attack government measures, the lack of precision simply invites new scope for claims under this discipline, often coming from different areas of law.18

Investment provisions may be used to challenge public interest regulations, but they also cast a large shadow due to the regulatory chill effect for governments contemplating new measures. For fear of being liable for large sums in compensation to foreign investors, governments may be inclined to take such measures off the table entirely. Thus, while the Investment chapter provides more certainty to investors, it provides less certainty to govern-
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ments and citizens concerned about protecting the public interest. This uncertainty is reinforced by a general lack of adherence to precedent in dispute panel proceedings.

For public services, the important point is that the NAFTA interacts with promarket domestic reforms, such as privatization, in ways that entrench those reforms. The NAFTA does recognize the existing state of public services and provides a patchwork of exemptions and reservations. The Investment chapter Article 1101(4) notes that nothing in the chapter prevents a Party from providing a range of services or functions, but then adds that they be “in a manner that is not inconsistent with this Chapter,” a qualification that essentially removes the effect of the provision.

A reservation in Annex I, which sets out existing nonconforming measures, has been made for any provincial or state nonconforming measures in place at the time of the implementation of the NAFTA. This is significant because most social services in Canada are delivered by provincial governments. This also means, however, that nonconforming measures are “grandfathered” and only acceptable to the extent that they are maintained. Thus, once a government enacts liberalizing or privatizing changes to public services, exposing them to the full disciplines of the NAFTA, the protective shield provided by the reservation shrinks in size.

In Annex II, which sets out reservations for future noncomplying measures for Services and Investment:

Canada reserves the right to adopt or maintain any measure with respect to the provision of public law enforcement and correctional services, and 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.

This reservation hinges on a two-part test: services must be “social services” and for a “public purpose.” Unfortunately, these terms are not defined in the NAFTA text, and Canada and the United States have taken very different interpretations. The United States argues a very narrow interpretation that the reservation would not apply to services provided publicly but delivered by a
private (for-profit or not-for-profit) entity. Canada argues that “government intent” is the key factor determining whether a service is provided for a “public purpose.” To date, the meaning has not been tested by a dispute panel.

In essence, these provisions privilege the investment rights of foreign corporations over legitimate, democratic decisionmaking. Ultimate decisions on these matters will, in all likelihood, be made by dispute panels, not by elected representatives. These are the grey areas or uncharted terrain of the NAFTA. In the case of public services reservations, a dispute panel may well side with the US position that any service, if delivered by a private for-profit or not-for-profit corporation, even if publicly funded, falls outside the reservation of Annex II, and thus is open to the full weight of the Investment and Services provisions.

Such concerns are not limited to the NAFTA but also apply to numerous BITs, the US-Central American FTA, and other bilateral “free trade” agreements, with the same essential model of investor rights. Writing for the World Bank on whether BITs are worth the potential “bite,” Hallward-Driemeier concludes:

Recent and pending cases of international investment disputes covered by investment treaties have raised concerns of the potential costs to host governments — both in terms of the size of potential awards and in the possible reduction of viable choices open to policy makers due to their adverse effects on foreign investors. Critics speculate that these cases will serve to encourage firms to look for ways to exploit the terms of the treaty as a lucrative way of doing business, seeking compensation for risks that they had not previously expected to be protected from. Given the increasing concern about the potential and often unanticipated costs of BITs, it is all the more important to examine whether BITs are delivering their expected benefits.

… Analyzing twenty years of bilateral FDI flows from the OECD to developing countries finds little evidence that BITs have stimulated additional investment.

The concerns about an excessively broad scope of the NAFTA investment chapter led to a 2001 declaration by the NAFTA governments to clarify the intent. Case law in both the NAFTA and BITs is evolving, and it can be argued that a more measured reading of the investment provisions
occurred in some high-profile cases, such as Metalclad vs. Mexico, which upheld a more conventional definition of expropriation, and Methanex vs. the United States, which was not successful. Nonetheless, a number of cases are still in the queue. Sinclair provides an overview of NAFTA cases to date, noting that new claims continue to mount, that a large number of them target environmental regulations, and that beyond specific cases, it is not possible to tell what effect “regulatory chill” has had on decisionmaking.20

Importing Investor Rights into Provincial Jurisdiction: The NAFTA, the AIT, and the TILMA The AIT came into force on 1 July 1995, shortly after the implementation of the WTO (earlier in 1995) and the NAFTA (1994). Apart from the policy fashion of liberalization, the AIT served the practical purpose of facilitating the implementation of Canada’s international trade commitments. This was much more important than stated needs to “strengthen the Canadian union.”

NAFTA Article 105 specifies that “The parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments” [italics added]. The WTO has a similar clause, although with somewhat weaker language, in GATT Article XXIV:12, which states that a WTO member “shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.”

The major stumbling block for implementation of international trade agreements is the federal nature of Canadian government. The Constitution sets out a division of legislative powers between federal and provincial governments. Historically, there has been a tension in Canadian federalism between the idea of a strong central government and a cooperative federalism. This tension plays out most significantly where there are blurry lines in the interpretation of federal and provincial powers.

Section 91 of the Constitution gives jurisdiction to the federal government over the “regulation of trade and commerce” with the general provision to “make laws for the peace, order and good government of Canada.” In addition, section 121 states that “All articles of the growth, produce, or
manufacture of any one of the provinces shall, from and after the Union, be admitted free into each of the other provinces.” These parts of the Constitution support the idea of a common market within Canada.

Provincial governments, however, have autonomy to protect regional diversity and to govern in different ways appropriate to provincial circumstances. Provinces have responsibility over property and civil rights, most areas of labour, education, health care, consumer protection, licensing, and investment.

The 1936 Labour Conventions case was a landmark case related to international agreements and Canadian federalism. The federal government at the time wanted to sign onto international labour conventions, but was opposed by the provinces that saw this as an imposition into areas of provincial jurisdiction. The case went to the Privy Council, which ruled that the federal government can negotiate international agreements, but cannot implement them in areas of provincial jurisdiction.

The ambiguity around jurisdiction remains to this day, and underlies the desire for an AIT as a political arrangement that parallels international trade agreements. One inherent danger is that rights granted through the AIT set the standard for national treatment under Canada’s international agreements. Under the NAFTA and the WTO, foreign traders, service providers, and investors are legally entitled to the best treatment Canadian governments give to domestic goods, services, and investment. In other words, foreign companies gain additional rights in the NAFTA and under the WTO agreements through the AIT back door.

There is an underlying incompatibility between the narrow, largely commercial aims of the AIT and the broader requirements for a stronger, healthier Canadian union. As previously noted, it is unacceptable to label differences in approach to environmental protection, regional economic development, resource management, or other legitimate policy issues as internal trade barriers. Many so-called interprovincial trade barriers result from legitimate public policy choices. It is neither possible nor desirable within a federal system to do away with differences in policy approaches that allow democratically elected governments to respond to local needs
and the aspirations of their citizens.

Shortly after its implementation, corporate Canada began to press for a broadening and deepening of the AIT. They were particularly interested in turning the AIT, a political agreement among Canadian governments, into a legally binding document. This includes enforcement and a stronger capacity for investor-to-state suits. Despite a couple of attempts to relaunch a new round of negotiations, there seemed to be little appetite to do so, and certainly no compelling case that this was needed.

The TILMA represents a new approach to launching that new round, one that begins with a bilateral agreement. But there are numerous costs and effects that have been swept aside in the boosterism for the TILMA. We turn to these next.

The Trouble with TILMA In light of the evidence on trade barriers, at best the TILMA is a gimmick that will have little impact on economic growth and interprovincial trade. More troubling, however, is that the agreement contains some very broad language that may prove problematic over time. Three papers — Gould (2007), Shrybman (2007), and Ferguson (2007) — have attempted to compare the legal language of the TILMA to the existing structure of public interest regulations, publicly funded services, and Crown corporations. These reviews are also informed by an understanding of how dispute panels have ruled in cases at the WTO, NAFTA, and AIT in order to assess the potential of the TILMA language to uphold commercial interests when pitted against democratic decisionmaking.

Gould summarizes:

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 NAFTA.²¹
The TILMA’s scope is expansive. As a “top-down” agreement, everything is “in” unless specifically exempted, which means governments must anticipate the full legal jeopardy of what they have signed. The safeguards provided by exemptions and restrictions (permitted measures contrary to the more general legal language) are quite narrow, and even these have their caveats. There are six areas that are specifically exempted from the agreement — including Aboriginal peoples, water, taxation, regulated rates, and “social policy” (not including health care and education) — but these are to be reviewed annually “with a view to reducing their scope” (Article 17.1b). There are also provisions for 10 “legitimate objectives” (Article 6), which can be introduced but only if they meet a three-part test. This test includes being “not more restrictive … than necessary,” language from international agreements that has been criticized for giving arbitral panels significant leeway to second-guess whether public interest objectives could have been accomplished differently.

Gould’s review of the areas of public interest regulation exposed by the TILMA finds many areas that are exposed to challenge, including most areas of municipal planning, major areas of environmental regulation, private schools, and efforts to restrict private health care.

In this context, we can consider the investor rights granted by the TILMA. The agreement includes a broad definition of investment, including “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.” This definition, although not as expansive as the NAFTA, is cause for concern when mapped together with two key blanket provisions of the agreement:

**Article 3 - No Obstacles.** 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.

**Article 5.3 - Standards and Regulation.** Parties shall not establish new standards or regulations that operate to restrict or impair trade, investment or labour mobility.22
The terms “restrict” and “impair” are not defined in the text of the agreement and have no parallel in international trade law. Thus, they could be open to a plain language reading that privileges investor rights over the ability of legislatures to pass laws or regulations in the public interest, where they are not explicitly excluded from the agreement (and even this latter point has significant grey areas with regard to interpretation).

Moreover, the TILMA enshrines the right of investors to directly challenge public interest regulation. This measure is ostensibly capped at $5 million per case, but this may not be a true upper limit if a government measure offends multiple sections of the TILMA, or if other investors in a similar situation avail themselves of the same legal challenge. Nonetheless, it is problematic to have trade panels second-guessing democratic decision-making. And, as noted above, the presence of such language creates a chill over the creation of new regulation.

In the case of conflict between the TILMA and environmental objectives, Ferguson reviews some broad areas of environmental protection that are exempted from the agreement, including measures relating to water, the promotion of renewable and alternative energy, the conservation of “forests, fish and wildlife,” and the management of “hazardous and waste materials.” But he adds that these exemptions do not cover some important areas of environmental protection, creating a number of grey areas in the interpretation of the agreement:

Such measures, if challenged, will therefore have to be justified under Article 6 [Legitimate Objectives]. While Article 6 recognizes that measures aimed at achieving environmental protection are legitimate, it requires that they be no more restrictive to trade or investment than necessary. This effectively requires the province to show that there was no reasonable alternative measure that could meet the objective in a less trade or investment restrictive manner. Given the broad range of measures that could be employed to address issues such as global warming, endangered species, and air pollution, this will often be a tall order, and will allow complainants and dispute panels to second-guess the particular measure chosen by the province or municipality.

Others have presented a more sanguine opinion of the TILMA’s impacts and potentials to undermine the public interest. Ultimately, whether
particular measures will be challenged, and whether those challenges succeed, remains to be seen. But it is of concern that decisions on interpretation will be made by trade panels outside the domestic legal system, not by the architects or proponents of the TILMA. In international disputes, there may be some rationale for a neutral dispute settlement arena. In the Canadian context, this is bizarre and, if anything, usurps the jurisdiction of the Canadian courts. One important concern with this is the lack of requirement to follow precedent in commercial arbitration proceedings. Another is the lack of right to appeal and review by a higher court.

An additional complication suggested by Shrybman is the implication of the TILMA investor rights for NAFTA parties, similar to the issues raised in the previous section in regards to the AIT. Shrybman cautions that:

TILMA also expands the scope of foreign investor rights that can be asserted under NAFTA. Moreover, these rights are bestowed on US and Mexican investors without any reciprocal gains for BC or Alberta investors in the US or Mexico. TILMA establishes a new high-water mark of investor entitlement that can now also be claimed by US and Mexican investors in consequence of NAFTA guarantees of National Treatment.24

In sum, the TILMA is a solution in search of a problem when viewed through the lens of trade barriers. But if the objective of the exercise is the creation and codification of investor rights, the legalistic framework makes commercial sense; it definitely does not make sense from a public interest perspective.

**Conclusion** In the Canadian context, resolving any outstanding trade barriers ought to be a relatively straightforward process: a list of the top 10 or 20 irritants in interprovincial commerce could be developed and vetted to make sure they do not violate any public interest concerns, and the federal government could press for action in those areas to capture the vast majority of benefits (the federal government has constitutional authority to resolve internal trade issues if necessary). In some areas, the changing nature of the Canadian economy and its trade and investment relationships with the United States and others may require new approaches that would upload
some responsibilities to the federal government in order to create national standards and regulatory frameworks. As long as such a process achieved a high standard and avoided lowest common denominator approaches, such as mutual recognition, there would likely be few concerns. This would be a better approach than the sweeping legalistic approach of the British Columbia-Alberta TILMA.

The legalistic approach, however, seems to appeal to those who are wedded to the abstraction that barriers exist, and that they can be resolved only by creating investor rights to challenge public policy. This approach is one that views all public interest regulation with suspicion. Regulations are trade barriers until proven innocent. Thus, what concerns activists in regard to investor rights is, in fact, the intention: to foster confidence of investors outside the principal jurisdiction (both foreign and rest-of-Canada investors), even though it is empirically unproven that doing so actually enhances such investment, nor that such investment is always desirable.

Thus, the TILMA replicates at the interprovincial level the trend in modern “free trade” agreements to go well beyond traditional notions of free trade, or restrictions at the border such as bans, tariffs, and quotas. Like the NAFTA, the TILMA is better thought of as an investor rights agreement, providing rights backed by legal recourse to arbitral panels if corporate entities feel that these rights have been restricted or impaired.

Fortunately, while the TILMA was essentially negotiated in secret, since being revealed to the public, concerns about its implications have arisen from trade unions, activist groups, and municipal councils, while other provinces have been wary of signing on in spite of corporate pressures to do so. Hopefully, the tide stops at the Alberta-Saskatchewan border and then recedes with repeal of the TILMA by a future British Columbia or Alberta government, so that Canadians can get on with the real pressing economic and social issues facing the nation.
Notes


16. S. Shrybman, *Guide to the Trade, Investment and Labour Mobility Agreement (TILMA)*. Legal Opinion for the Ontario Federation of Labour (February 2007). Shrybman finds 23 cases of labour mobility disputes under the AIT between 1996 and 2006, almost all of which have been resolved. He concludes that there appears to be little problem with labour mobility given the small number of disputes, and that the AIT process is essentially effective in resolving the few disputes that have arisen.


