

# State of Play: Canada's Internal Free Trade Agenda

March, 2009

**Steven Shrybman**  
**Sack Goldblatt Mitchell LLP** *Lawyers*

20 Dundas St. W., Suite 1100, P.O. Box 180 Toronto ON M5G 2G8  
T 416.977.6070 F 416.591.7333 [www.sgmlaw.com](http://www.sgmlaw.com)

## Contents

Executive Summary	
Introduction and Overview .....	1
The Harper Government’s Commitment .....	3
Behind the Smokescreen: What is Internal Free Trade Really About? .....	3
Do Inter-provincial Barriers to Trade, Investment and Labour Mobility Really Exist?.....	5
A Determined Lack of Transparency.....	6
What’s at Stake .....	6
Exposing Municipalities and Other Public Entities to Trade Challenges.....	7
A Legally Binding Enforcement Regime .....	9
AIT Agreements On Labour Mobility And Dispute Resolution .....	10
Enforcement.....	12
An AIT Energy Agreement.....	12
Agreement on Enhancing the Ontario-Quebec Economic Region .....	14
Nova Scotia - New Brunswick PARE .....	14
Free Trade With the European Union (EU).....	15

## **State of Play: Canada's Internal Free Trade Agenda**

### **Executive Summary**

Canadian trade officials are working to establish a comprehensive set of federal, provincial and territorial agreements concerning trade, investment and labour mobility. The flagship of this enterprise is the Agreement on Internal Trade 1995 ("AIT") which is now being expanded, and has recently spawned bi-lateral trade agreements between some provinces.

For example, federal and provincial trade Ministers have recently signed agreements on dispute resolution and labour mobility - an energy agreement is pending. The Trade, Investment and Labour Mobility Agreement ("TILMA") formally goes into effect between Alberta and British Columbia on April 1, 2009.

The impact of these domestic trade initiatives will be broad and often incompatible with other societal goals, from stimulating local economies and maintaining a universal health care system, to protecting the environment. Yet this internal trade agenda is proceeding with very little transparency and virtually no public debate.

In reality there are few barriers to interprovincial trade, investment and labour mobility. As we know, Canadians are free to live, work and invest anywhere in this country they choose. There are no customs stations along provincial borders and no tariffs on interprovincial trade.

Rather the true purpose of this domestic 'trade' agenda is to impose broad constraints on the exercise of governmental and public authority under the rubric of addressing trade barriers. At its core, this is an agenda to promote further privatization and deregulation, precisely the policies that have been ruinous for domestic and global economies, and also have frustrated efforts to deal with pressing environmental challenges such as climate change.

### *Municipalities and Public Services At Risk*

As of April 1, 2009, municipalities in BC and Alberta will be exposed to claims that they have taken *or maintained* a policy, bylaw, program or action that offends the broadly-worded constraints of TILMA. TILMA also applies to school boards, utilities, and other public bodies. But when such claims are made, municipalities and public bodies have no right to defend their actions before the tribunals that will judge them, even though they are at risk when monetary penalties for as much \$5 million are levied for non-compliance with TILMA rules.

TILMA dispute procedures may also be invoked to challenge the regulations, programs, and funding arrangements for public and social services, on the grounds that such measures restrict, impair, or discriminate against private sector service providers.

The best evidence of what lies in store for governments is provided by claims now proceeding under the NAFTA dispute regime that served as the prototype for TILMA, including claims by:

Centurion Health, a US health service provider, for \$160 million because it claims that Canadian governments prevented it from establishing a chain of private health clinics;

Dow AgroSciences, for \$2 million because Quebec is banning the use of 2-4 D.

## **What's at Stake**

The real goal of domestic trade liberalization is set out in one simple TILMA Article under the heading: *No Obstacles*, which provides:

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. [emphasis added]

But virtually any government action can be seen as offending this broad and ill-defined prohibition. After all, everything a government does is likely to affect the market, ie. investment, in some manner.

## **Expanding the AIT: Labour Mobility, Dispute Resolution and Energy**

In December 2008, two draft agreements to expand the AIT framework were signed concerning:

*Labour Mobility*: Under rules which go into effect on April 1, 2009, a worker certified for an occupation in one province is entitled to work anywhere in Canada. This will pressure provinces to lower their training and occupational standards to the lowest common denominator. Whatever mobility gains may result from this AIT agreement are likely to come at the expense of weakening of training, certification and apprenticeship standards.

*Dispute Resolution*: An AIT enforcement regime will provide “an appeals process as well as imposition of monetary penalties ....” [emphasis added].

*Energy*: Ministers agreed to receive a draft energy text at their June 2009 meeting. Its purpose is expected to be ensuring compliance by provincial governments with the international free trade commitments Canada has made, particularly under NAFTA.

Negotiations of a bi-lateral TILMA style agreement between Ontario and Quebec are underway in accordance with a *Joint Statement: Agreement on Enhancing the Ontario-Quebec Economic Region* signed by the Premiers on November 26, 2007. That framework includes a commitment to establishing a “binding and effective dispute resolution mechanism for specific commitments and rules under the Agreement”. It may be released this Spring.

On February 24, the Provinces of New Brunswick and Nova Scotia announced a *Partnership Agreement On Regulation And The Economy (PARE)*. The central thrust of this Agreement is the harmonization and streamlining of provincial regulation to “minimize the impact of regulation on a fair, competitive and innovative market economy”.

Canada's goals in trade negotiations with the European Union are similar to those of its domestic trade agenda. Both seek through the modality of trade negotiations, to achieve the same outcome – namely to lock provincial governments into a policy framework that favours de-regulation and privatization.

Unfortunately, free trade with the EU is not expected to reflect the more progressive social and environmental policies of the European community. In fact, within the EU, neo-liberal trade and investment policies are often invoked by the European Commission to challenge progressive actions by member states.

## **Conclusion**

The central goal of changes to AIT, TILMA and others is to entrench “trade liberalization” policies in manner that will compel adherence by current and future governments. For this purpose these regimes empower investors and corporations to directly challenge government actions that interfere with their ambition and profit, and to win substantial monetary awards when they succeed.



# State of Play: Canada's Internal Free Trade Agenda

## Introduction and Overview

This report provides an overview of the current state of federal, provincial and territorial (“FPT”) efforts to complete a framework of internal agreements concerning trade, investment and labour mobility. The flagship of this enterprise is the Agreement on Internal Trade (“AIT”). Established in 1995, the AIT is now being expanded, and has recently spawned a number of bi-lateral interprovincial trade agreements. While few Canadians will know of this domestic trade agenda, it promises to have far-reaching effects on the economy, public services and the environment.

A more thorough and substantive assessment of this domestic trade agenda is provided by legal opinions prepared for the Canadian Union of Public Employees.<sup>1</sup>

Under these agreements, dispute procedures may be invoked to challenge government policies and actions that are taken to achieve a diversity of societal goals, from protecting the environment, water and public health, and providing public services such as health care and child care, to using public funds to stimulate local economies.

Trade officials describe their initiatives as “trade liberalization” - an agenda that would limit the role of government by promoting policies of de-regulation and privatization. This is of course precisely the policy approach that has been ruinous for domestic and global economies, and played a key role in forestalling meaningful efforts to address climate change and other pressing ecological challenges.

Remarkably, the federal government, and some provinces, continue to champion these same policies and are seeking to entrench them in internal trade agreements for the purpose of constraining the policy and regulatory options of present and future governments. In fact, in the past few months trade officials have signed agreements on dispute resolution and labour mobility, and are presently working on an energy agreement. Several provinces are also negotiating bi-lateral free trade agreements, such as the Trade, Investment and Labour Mobility Agreement (“TILMA”) that formally goes into effect between Alberta and British Columbia on April 1, 2009.

Moreover, the Harper government is committed to deepening our international commitment to this trade agenda by concluding a free trade agreement with Columbia, and embarking upon similar negotiations with the European Union.

While Canada's international trade agenda has had the benefit of some public debate, domestic trade initiatives are proceeding with very little transparency. In fact, internal agreements are

---

<sup>1</sup> See for example the SGMlaw detailed assessment of TILMA  
[http://cupe.ca/updir/TILMA\\_CUPE\\_Opinion\\_May-07\\_FINAL2.pdf](http://cupe.ca/updir/TILMA_CUPE_Opinion_May-07_FINAL2.pdf)

made public only after being signed, and both federal and provincial trade officials have been less than forthcoming about their true purposes and effects.

This assessment was prepared to shed light on Canada's domestic trade agenda and provides an overview of the various internal trade agreements that have recently been concluded or are now being negotiated. It briefly describes some of the serious impacts these agreements are likely to have on the capacity of Canadian governments, at all levels, to respond to present economic, ecological and social challenges. We have also included a brief discussion of pending free trade negotiations with the EU to underscore its relevance to internal trade initiatives.

It is important to appreciate that in both their internal and international dimensions, present trade initiatives would considerably expand the scope and application of Canada's free trade commitments. Ironically, this is taking place at a time when the US is signalling the need to reconsider its commitment to trade liberalization in order to find a better balance between commercial and non-commercial policy goals.

As noted, a thorough analysis of domestic trade initiatives is available elsewhere, but two aspects of this agenda are worth highlighting by way of introduction. These concern the impacts of internal trade regimes on municipalities and services.

For municipalities, agreements such as TILMA impose serious new constraints on the authority and prerogatives of local governments, school boards, utilities, and virtually every other local public entity. A report prepared for the Union of British Columbia Municipalities (UBCM) describes the sweeping scope of the regime, and in particular its application to zoning, subdivision and noise bylaws, business regulation and licensing, tax exemption or other bylaws, procurement policies, licensing bylaws and practices, and "voluntary gifting" policies.<sup>2</sup>

Municipal governments in BC were able to ameliorate the application of certain TILMA rules in negotiations with the province. Nevertheless, on April 1, 2009, municipalities and local public entities will be exposed to claims that they have taken *or maintained* a policy, bylaw, program or action that offends the broadly-worded constraints of TILMA. If challenged, they must rely upon the authors of this regime to defend their actions with no assurance they will not ultimately be penalized by their own provincial government for non-compliance. It is important to keep in mind in this regard that the impugned municipal measure at issue in such disputes would almost certainly be entirely lawful and proper under the laws of the province and the constitution - otherwise Canadian courts would provide redress.

Internal trade rules may also be invoked to challenge the regulations, programs, and funding arrangements upon which public and social services depend, on the grounds that such measures restrict, impair, or discriminate against private sector service providers. In fact, international investment rules, that are analogous to, but less expansive than those set out in TILMA, have

---

<sup>2</sup> Donald Lidstone (Lidstone, Young, Anderson Barristers and Solicitors), Report prepared for the Union of British Columbia Municipalities, April 30, 2007, at p. 9, available at <http://ubcm.fileprosite.com/contentengine/launch.asp?ID=3155&Action=bypass>



been invoked to either limit the scope of public sector service delivery or to claim damages when governments seek to terminate privatization schemes that fail.<sup>3</sup>

Because TILMA provides unprecedented grounds for asserting the interests of private service providers, and a sympathetic forum for doing so, it is likely to become the preferred venue for those seeking to privatize public services. Rather than spend years litigating before domestic courts, challenges such as the ones mounted by Doctors Chaoulli and Day to the medicare system are now likely to proceed under TILMA. Moreover, TILMA offers an inducement to bring such challenges by empowering tribunals to order that substantial monetary awards be paid to successful complainants. As described below, present amendments to the AIT would establish a similar dispute regime.

### **The Harper Government's Commitment**

The Harper government's Throne Speech (November 19, 2008) committed the government to working with the provinces "to remove barriers to internal trade, investment and labour mobility by 2010." The Conservative election platform (October 7, 2008) went even further by stating that a Harper government "will work to eliminate barriers that restrict or impair trade, investment or labour mobility between provinces and territories by 2010 . . . We hope to see further progress, but are prepared to intervene by exercising federal authority if barriers to trade, investment and mobility remain by 2010." [emphasis added]

In other words, the Conservative government is so committed to this agenda that it is prepared to test the limits of federal constitutional powers by imposing 'free trade' rules on provinces that refuse to go along. However, without a majority in Parliament the Government would need support from one of other Parties, and they are likely to be leery of intruding so forcefully into the provincial constitutional sphere.

No doubt mindful of the legal and political difficulties, the federal government is pursuing its agenda at the negotiating table, and there it has the enthusiastic support of certain provinces, notably British Columbia and Alberta.

### **Behind the Smokescreen: What is Internal Free Trade Really About?**

Since signing onto North American Free Trade Agreement ("NAFTA") and the World Trade Organization ("WTO") more than a decade ago, the federal government has been working to

---

<sup>3</sup> A significant and growing number of such cases have been and are being adjudicated by arbitral tribunals empowered by international investment agreements that have provided the model for TILMA dispute procedures. See for example the cases reported on the web site of the International Center for the Settlement of Investment Disputes (ICSID) at <http://www.worldbank.org/icsid/cases/cases.htm> See also the International Center for Sustainable Development, which maintains an excellent service documenting such disputes at <http://www.iisd.org/investment/itn/archive.asp>

establish internal trade agreements for the purpose of implementing the commitments it has made under these treaties. The flagship of these domestic efforts is the AIT. First established in 1995, the AIT remains a work in progress, as provinces have been reluctant to entirely abandon their constitutional mandates to this free-market agenda.

While the AIT and its offshoots are agreements among and between Canadian governments, it is important to appreciate that this domestic ‘trade’ agenda is mandated by the federal government’s commitments under NAFTA and the WTO, for under both treaties Canada is obliged to ensure compliance by provincial governments.

Provincial adherence to international ‘trade’ rules has become particularly important, as these regimes have expanded to encompass government policies and laws that are reserved to provincial governments under the Constitution. This has happened because the new generation of international trade agreements apply to domestic policy and law regulating services and investment, even though these have little, if anything, to do with international trade in any conventional sense.

Moreover, there is little that governments do that does not impact private investment and services. This means that everything from environmental laws to public health insurance can and have already become fodder for international trade disputes or foreign investor claims.

However, while Canada is liable under international law when provincial measures violate trade rules, under our constitution the provinces are under no compulsion to comply with such international commitments.<sup>4</sup> In signing onto NAFTA and the WTO, the federal government’s reach exceeded its constitutional grasp.

Trade agreements acknowledge this limitation, but require Canada to take steps to address it. For example, NAFTA Article 105: *Extent of Obligations*, provides:

*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.*

To comply with this directive, the federal government needed a mechanism that would directly bind the provinces to the international commitments it had undertaken. It took a significant step in this direction with the establishment of the AIT at the conclusion of NAFTA and WTO negotiations. However, the AIT suffered from two principal limitations: it did not apply to several key areas of policy and law; and, more importantly, it lacked a legally binding dispute regime that would compel provincial compliance.<sup>5</sup>

---

<sup>4</sup> In the Labour Conventions Case - *Canada (A-G) v. Ontario (A-G)*, [1937] A.C. 326 at 347 (P.C.) - the Judicial Committee of the Privy Council held that while the federal government retains the power to make treaties, the power to implement treaties splits according to the division of powers between the national and regional authorities, such that treaties that fall within a provincial area of responsibility must be implemented by the enactment of provincial legislation.

<sup>5</sup> While the AIT includes dispute resolution provisions, neither the provinces nor the federal government is legally bound to comply with AIT rules.

TILMA addresses both of these limitations by i) greatly enlarging the scope of government actions constrained by the AIT, and ii) establishing enforcement procedures that may be invoked by private parties and yield damage awards. By doing so, TILMA transforms a political arrangement (the AIT) among provinces into legally binding agreement with which the provincial parties must comply on pain of substantial financial penalties if they fail to do so. Trade officials are committed to having all Canadian provinces submit to such constraints, either by signing TILMA or by acceding to similar rules under the AIT. Trade officials are now pursuing these goals on parallel tracks.

### **Do Inter-provincial Barriers to Trade, Investment and Labour Mobility Really Exist?**

But Canadian Ministers responsible for internal trade do not present this domestic trade agenda as required to ensure provincial compliance with NAFTA and WTO rules, but rather as reforms needed to remove *inter-provincial* barriers to investment, labour mobility and trade.

In reality, the AIT and its progeny have little to do with interprovincial trade in any conventional sense. For as we know, Canadians are free to live, work and invest anywhere in this country they choose.<sup>6</sup> There are no customs stations along provincial borders and no tariffs of any kind on inter-provincial trade. In fact, inter-provincial trade is a federal responsibility and provincial measures that have interfered with trade have been struck down by our courts.<sup>7</sup>

Evidence that few real impediments exist to internal trade, investment and labour mobility, can be found in the record of disputes that have been filed under the AIT since its inception fifteen years ago. On average, approximately three such disputes are filed each year, and only a handful have ever proceeded to dispute resolution. Several disputes have been dismissed during the screening process as having no merit, but most are resolved by consultation or are abandoned.

Of the fifteen disputes that actually concerned interprovincial trade (averaging one a year), *all* concerned agriculture goods. One third, or five of these cases concerned access to snow crabs harvested off the east coast, two involved Quebec's colouring requirements for margarine, and three others concerned wine and beer marketing. Most of the non-trade cases involved issues of labour mobility - for hair stylists, hunting guides, accountants, and a handful of other workers. Most were resolved through consultation.

---

<sup>6</sup> While some provinces maintain residency and qualification requirements for certain businesses and regulated trades and professions, this is not to exclude those from outside the province, but rather to protect the public and public safety.

<sup>7</sup> Constitutional authority regarding inter-provincial trade rests with the federal Parliament under section 91(2) of the *Constitution Act*, 1867, concerning trade and commerce. Therefore provincial legislatures cannot pass legislation concerning such matters. Where provincial law interferes with inter-provincial trade and commerce, such measures have been aside by Canadian courts for being *ultra vires* the provincial government. In other words, there is simply no need to create a regime for addressing provincial trade barriers, because it is unlawful under Canadian law for a provincial government to take such action.

Only two disputes concerned investment measures. One, a complaint by Alberta concerning the federal *Cost of Borrowing Disclosure (Bank) Regulation* was the subject of a public hearing and report. The other involved a complaint by a BC resident about municipal fees levied under the *Alberta Municipal Act* and was abandoned.

A review of the AIT dispute record explains why those who support expanding the AIT are so hard-pressed to provide examples of the barriers to trade, investment and labour mobility they propose to address.

While the handful of unresolved AIT cases are not trivial, they clearly do not support the need for dramatically expanding the existing and largely consensual regime that has successfully resolved most interprovincial ‘trade’ irritants. Furthermore, even if the domestic trade law regime is expanded, governments are likely to simply exempt measures they are unwilling to abandon.

### **A Determined Lack of Transparency**

In addition to misrepresenting the purpose and effects of this agenda, trade officials have taken steps to frustrate informed and public debate about the agreements they are negotiating. They know that such debate can prove fatal to an agenda that rarely stands up to public scrutiny. Thus when the Saskatchewan’s NDP government held public hearings on proposals that it sign onto TILMA, even the conservative Saskatchewan Party that initially favoured this project was persuaded to step back from that support. A similar fate was suffered by the *Multilateral Agreement on Investment* when it was leaked before it could be concluded, and perished in the storm of public controversy that ensued when its terms came to light.

To avoid the possibility of a similar public rebukes, internal trade agreements are made public only after they are signed, and in one recent case, not even then. Thus we know that the FTP trade ministers signed two further amending agreements to the AIT last December. The first concerned labour mobility and was made public after it was signed. The other agreement, which empowers AIT tribunals to award monetary damages where a province fails to expunge a policy, law, regulation or program that is found to offend the AIT, has yet to be made public.

A draft energy agreement is also being considered by AIT ministers. As noted below, such an agreement would almost certainly have far-reaching implications for Canadian energy security and our ability to meet the challenges of climate change. Once again, there is no plan to make that agreement public before it becomes a *fait accompli*.

### **What’s at Stake**

The application of AIT rules to provincial measures that may even indirectly affect trade are virtually inconsequential because, as noted, there are really no such impediments. AIT/TILMA rules concerning labour mobility are marginally more significant. However, the central goal of domestic trade liberalization is set out in one TILMA article under the heading: *No Obstacles*

(Article 3) which provides:

*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. [emphasis added]*

The implications of this broad prohibition are extremely problematic for two principal reasons. First, virtually any government action can be seen as offending this prohibition. Everything a government does is likely to affect the market, ie. investment, in some manner, or there would be no reason for government act in the first place.

Thus government measures will “operate to restrict or impair” where they determine: *whether* companies can invest, (eg. the prohibition on certain types of private health care services); *how they carry on business* (eg. environmental and workplace safety regulation); *where* they operate, (eg. land use restrictions); and many other matters that we elect governments to decide. Governments also determine how government funds are spent when goods such as transit equipment, or services like child care, are acquired. Unless these measures are explicitly exempt, all may be challenged for offending the broad *No Obstacles* prohibition.

The second reason why the *No Obstacles* rule is so problematic is that it applies to government actions that treat provincial companies in precisely the same way as those from outside the province. While BC trade officials have claimed that only discriminatory government measures would get caught in the TILMA snare, this is clearly not the case, as the plain wording of Article 3 makes clear. Where TILMA intends to address only *discriminatory* government measures, it plainly says so. For example, under the explicit heading *Non Discrimination*, Article 4 obliges all governments and public bodies to accord the goods, persons, services, investors or investments of the other province:

*.... treatment no less favourable than the best treatment it accords, in like circumstances, to its own or those of any non-Party.*

Article 3 clearly includes no such qualification. Of course very few provincial policies and laws make distinctions between investors and companies based in the province and those from elsewhere in Canada. Nevertheless, under TILMA even the most even-handed government environmental law may be found to offend the *No Obstacles* rule.

The expansive reach of this TILMA rule does makes sense however when one is mindful of the true purpose of the regime, which is to entrench policies of de-regulation and privatization as binding obligations to which current and future governments must adhere.

### **Exposing Municipalities and Other Public Entities to Trade Challenges**

Also key to understanding just how broad the impacts of this agenda will be is the fact that it applies to every level of government and virtually all public bodies. Thus domestic trade rules apply to all non-exempt measures by *government entities* which are defined to include:

- 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.<sup>8</sup>

Under this definition, institutions such as public hospitals, library boards, day care centres, children's aid societies, and regulatory tribunals must comply with the AIT and other interprovincial trade agreements.

Moreover, "measure" is typically defined to include:

*. . . any legislation, regulation, standard, directive, requirement, guideline, program, policy, administrative practice or other procedure;*

Municipal governments have struggled to confront this assault on their mandates, particularly in the absence of any persuasive evidence that they will benefit from accepting significant constraints on their program and regulatory roles. Thus in consultations with their respective provinces, municipal government associations in both Alberta and BC pressed for exclusions from TILMA.<sup>9</sup> While the provinces accommodated some of these concerns, in BC, for example, the government refused to accede to several requests made by the UBCM including:

- that municipalities be free to favour local businesses in procuring goods and services or allocating public subsidies,<sup>10</sup>
- for assurance that the provincial government will not seek to recover damages imposed by a Tribunal because it finds a municipal measure to be non-compliant with TILMA rules;

---

<sup>8</sup> TILMA PART VI: General Definitions. The AIT similarly describes the scope of its application [Article 102:Extent of Obligations].

<sup>9</sup> Alberta Background Report on Municipalities, Academic Post Secondary Institutions, School Districts and Health Sector (MASH) Consultations, pp. 13 and 24. Also see Memorandum from UBCM Executive to UBCM Members, Accord Reached on the Trade Investment and Labour Mobility Agreement, July 25, 2008, and Donald Lidstone, letter to Gary MacIsaac, Executive Director, UBCM, July 28, 2008.

<sup>10</sup> Municipalities are entitled to adopt local preferences where the procurement is for a value below specified thresholds.

- for safeguards to prevent frivolous and vexatious challenges being brought to challenge municipal measures (a protection afforded under the AIT); and
- that municipalities be allowed to defend their own actions before a TILMA tribunal sitting in judgement of their conduct.

As it stands, municipalities and virtually all local public entities are exposed to claims that they have taken, *or maintained* a policy, bylaw, program or action that offends the broadly worded constraints of TILMA. If challenged, they must rely upon the authors of this regime to defend their actions, with no assurance they will not be penalized for non-compliance. It is crucial in this regard to keep in mind that under TILMA, an impugned municipal measure is likely to be entirely lawful and proper under the laws of the province and the constitution. Where this is not the case, Canadian courts will provide redress.

### **A Legally Binding Enforcement Regime**

As noted, in seeking to entrench policies that favour de-regulation and privatization, the most important element missing from the AIT is an effective enforcement mechanism. While provinces and even individuals can call a province to task for failing to meet its obligations under the AIT regime, there are ultimately no effective sanctions when a province simply refuses to comply. In fact, the search for a truly binding enforcement regime can be seen as the foremost goal of present efforts to expand the framework of domestic ‘trade’ law.

In this regard, BC and Alberta are leading the way by taking the extraordinary step of exposing their governments to monetary sanctions for failing to comply with an interprovincial agreement – TILMA.

The architecture of TILMA dispute procedures represents an amalgam of elements taken from the AIT and NAFTA investment rules. Under both regimes, individuals, as well as the Parties themselves, may invoke dispute resolution. However, by far the most significant feature of TILMA dispute procedures is borrowed from Chapter Eleven of NAFTA, which entitles private investors and companies to claim monetary damages caused by a failure of government to comply with the treaty.

TILMA disputes are decided by a private tribunal, not a Canadian court, and adjudicators need have no particular qualification and are not independent of the parties.<sup>11</sup> Yet a TILMA tribunal is empowered to make binding decisions with which a province must comply.<sup>12</sup> If it (or the offending municipality or other local government entity) fails to do so, the tribunal is *obliged* to issue a monetary award which the province must pay to the individual or company initiating the challenge. Awards may be for as much as \$5 million for every offending government measure.<sup>13</sup>

---

<sup>11</sup> Under Article 34, however, the Parties must establish a code of conduct governing panelists prior to entry into force of the Agreement.

<sup>12</sup> Article 27.12.

<sup>13</sup> TILMA Articles 28, 29(7) and 30.

It is true that TILMA tribunals cannot actually compel provincial legislatures, municipalities or other public bodies to abandon their policies, laws or practices. But for practical purposes, the distinction is all but meaningless. It is simply not reasonable to expect a provincial government to maintain a measure (or allow a municipality or other public body to do so) for which it has paid \$millions in penalties, particularly when there may be a queue of other parties waiting in line to make a similar claim.

Because such private claims may be unilaterally asserted by countless individuals and corporations, they are likely to proliferate, pressuring governments (some of which may welcome the excuse) to abandon or weaken a diversity of public policies, laws, practices, and programs, in order to avoid the cost and notoriety of TILMA disputes.

Intent on following the TILMA lead, trade officials have now agreed to empower AIT dispute bodies to issue monetary awards where a province fails to comply with a tribunal ruling. However, to ensure that the project is not derailed by public criticism, this agreement to strengthen the AIT dispute regime is being kept a secret until ratified by provincial cabinets.

The best evidence of what lies in store for governments that expose themselves to claims under a TILMA-like regime is provided by claims now proceeding under the NAFTA regime that served as the prototype for TILMA. These include the following claims by:

Centurion Health, a US health service provider, for \$160 million in damages it claims to have suffered in consequence of being denied the right to establish a chain of private health clinics in Canada;

Dow AgroSciences, for \$2 million in damages which it claims it has suffered in consequence of a ban on the use of certain pesticides by Quebec;

Crompton (Chemtura Corp), a US pesticides manufacturer, for \$83 million in damages arising from a Canadian restrictions on the use of Lindane, a pesticide:

Merrill and Ring, a US-owned forestry company that has been operating in Canada for decades, for \$24 million in damages which it claims to have suffered in consequence of having to supply Canadian markets before exporting raw logs to the US, and along with them the jobs that go with value-added processing; and

Abitibi Bowater, which is now threatening to challenge Newfoundland's decision to reclaim a water license it issued to the company for the purpose of powering a pulp and paper mill, and which the company now wants to sell because it has closed the mill.

### **AIT Agreements On Labour Mobility And Dispute Resolution**

As noted, in December 2008, two draft agreements to expand the AIT framework were endorsed at a meeting of federal, provincial, and territorial trade Ministers. One concerned labour mobility, and has been made public. The other strengthens the AIT dispute regime and remains a



secret. The following offers a brief description of the former, and speculates about the content of the latter.

### **Labour Mobility**<sup>14</sup>

20 percent of Canadian workers are employed in regulated occupations or trades. Most are professionals, skilled technicians, or work in compulsory trades. Under our federal system, provinces decide what occupational standards are needed to ensure, for example, that heavy equipment operators, paramedics, accountants, and other skilled workers are properly qualified and will not put their clients, patients, students, or the public safety at risk. To ensure that provincial standards do not unduly impede labour mobility, the provinces have established various programs to reconcile competing standards where this is appropriate.<sup>15</sup>

Nevertheless, on December 5, 2008,<sup>16</sup> Canadian trade officials approved an agreement to substantially expand the application of the labour mobility provisions of the AIT, which is to come into effect on April 1, 2009. The key provision of that agreement provides that:

. . . any worker certified for an occupation by a regulatory authority of a Party shall, upon application, be certified for that occupation by each other Party which regulates that occupation without any requirement for any material training, experience, examinations of assessments as part of the certification procedure.” [Article 706:1]

Thus a worker certified for an occupation by any provincial regulator is entitled to work anywhere in Canada. Because occupational standards vary considerably across the country, the effect of this provision is to impose a lowest common-denominator approach on provincial training and occupational standards. While each province will still be allowed to maintain higher standards, they cannot impose these on workers certified by other provinces unless they can prove that their higher standard is necessary to achieve a “legitimate objective”.<sup>17</sup>

Provincial officials across the country are now reviewing thousands of occupational standards, presumably measuring each against the lowest common denominator in Canada, and deciding whether they will attempt to defend any higher standard.

Whatever mobility gains this AIT Agreement may deliver will likely come at the expense of an overall weakening of training, certification and apprenticeship standards. Because the negotiation of this Agreement has taken place with virtually no public input or comment there has been no opportunity to ask whether reducing the skills and training required by teachers,

---

<sup>14</sup> Attachment 1 to Ninth Protocol of Amendment to the AIT.

<sup>15</sup> Impediments to labour mobility are now addressed through *Mutual Recognition Agreements* among regulatory agencies, and the *Red Seal Program*.

<sup>16</sup> Council of the Federation: COMMUNIQUE OTTAWA, January 15, 2009

<sup>17</sup> “Legitimate objective” is a defined term, see TILMA Part VII: General Definitions.

nurses, gas fitters, investment brokers, and many other professional and skilled workers is consistent with protecting the public interest.

## **Enforcement**

In their brief press release of last December,<sup>18</sup> FPT trade ministers also revealed that with the exception of Ontario's representative they had all approved a draft text on proposed amendments to the AIT Dispute Resolution Chapter. These would "significantly strengthen the enforcement mechanisms, including through a more effective compliance process, provision of an appeals process as well as imposition of monetary penalties and suspension of dispute resolution privileges." [emphasis added].

A federal official responsible for this project has advised that this agreement will be made public only after it has been ratified by all provincial cabinets.

As noted, the gold standard for ensuring provincial compliance with AIT rules is the TILMA dispute regime. It would appear that the secret dispute resolution agreement entered into by most provincial trade ministers represents the penultimate step towards establishing such a regime as a pan-Canadian feature of the AIT.

The ministers' press release indicates that AIT dispute bodies are to be empowered to issue monetary awards against a province that fails to comply with tribunal rulings. While AIT dispute procedures may now be invoked by private parties, they are not as yet entitled to monetary awards as is the case under the TILMA. However, once AIT tribunals are accorded the power to issue monetary awards, it will be a simple matter to include private parties as beneficiaries.

As noted, pared to its essence, the central goal of this domestic 'trade' agenda is to entrench neo-liberal policies with which current and future governments must comply. The most effective means for achieving this goal is to equip private investors and corporations with powerful new tools to challenge government actions that interfere with corporate ambition and profit. Present reforms to AIT dispute procedures would appear to come very close to fully realizing this objective.

## **An AIT Energy Agreement**

The ministers' press release of December, 2008 also indicated that a status report on plans to complete negotiations on an AIT Energy Chapter was presented, and the ministers agreed to receive the draft energy text at the June, 2009 CIT meeting. In fact, a draft AIT agreement on energy has been waiting in the wings for some time - stalled by resistance from more than one

---

<sup>18</sup> Committee on Internal Trade: *Progress on Labour Mobility and Dispute Resolution Enforcement*, Dec. 5, 2008. Meeting of the Federal-Provincial-Territorial Committee of Ministers on Internal Trade Ottawa, Ontario - December 5, 2008.

province. The ministers' announcement indicates that these roadblocks may have now been removed.

Once again, the ministers appear intent on signing an energy agreement before it is made public or debated. However, a report published by the Council of the Federation in 2007 provides an indication of what such an agreement may include. That report, titled *A Shared Vision for Energy in Canada*, calls for Canadian governments to take seven specific actions. Several would promote green energy initiatives and may be applauded. However, two are problematic and call for i) speeding up regulatory approvals; and ii) allowing direct provincial participation in international negotiations on energy.

In the absence of any evidence that existing regulatory approvals are too onerous or unnecessary, the risks of further energy sector de-regulation are obvious and include adverse impacts on the environment and Canadian energy security.

Even more problematic is the proposal to accord the provinces and territories "formalized participation" in international discussions and negotiations on energy. As the 2007 report acknowledges:

. . . only provinces and territories have the authority to implement these agreements or treaties in areas of provincial/territorial jurisdiction.

and goes on to state:

Participation by the provinces and territories in international discussions on energy will not only ensure that the views and expertise of the resource owners and managers will be directly expressed, but also help ensure that Canada will be able to implement any commitments that might emerge from those discussions. [emphasis added]

These comments offer explicit recognition of the essential purpose that underlies all AIT related initiatives: compliance by provincial governments with the free trade commitments Canada has made, but which, under the Constitution, the provinces are free to ignore.

As NAFTA energy rules seriously constrain Canadian policy and law relating to energy security, energy sector economic development, and climate change, while offering no benefit in return, it would be a grave error for provinces to wed themselves to such a regressive agenda. Nevertheless certain provinces, most notably Alberta, are keen to do just that, and have consistently pressured their sister provinces to do the same.

Yet the acknowledged intent of the Council's report is to lock provincial governments into a NAFTA energy regime that not only prohibits meeting Canadian needs before those of export markets, but also precludes Canadian governments from adopting energy policies that favour Canadian industries and other consumers.

Moreover, according provinces a seat at international negotiations affecting the energy sector would ostensibly also entitle them to participate in climate change negotiations. This raises the

spectre of other nations having to contend, for example, with a delegation from Alberta acting virtually as a proxy for the oil and gas industry. Other provinces may adopt a more progressive stance. Introducing disparate Canadian voices to international climate change discussions in this manner would obviously undermine the prospects of Canada playing a constructive role in such negotiations.

Unfortunately, Canada's real energy problems do not appear to be on the ministers' agenda. Foremost among these are:

- energy security: we are virtually the only oil exporting nation that neither has a strategic oil reserve nor the capacity to meet our own needs. There is no oil pipeline connecting eastern Canada to western reserves, or any plans to build one. Similar problems exist in the electricity sector, where provinces are far better connected to the US than to their provincial neighbours; and
- climate change: as one of the most energy intensive economies in the world, we have no credible plan to stabilize, let alone reduce, greenhouse gas emissions.

But NAFTA, which by default represents Canada's only energy policy, exacerbates these problems. There is now good reason to expect that the secret AIT energy agreement would make matters worse.

### **Agreement on Enhancing the Ontario-Quebec Economic Region**

Negotiations of a bi-lateral TILMA style agreement between Ontario and Quebec got underway when the Premiers signed a *Joint Statement: Agreement on Enhancing the Ontario-Quebec Economic Region*, on November 26, 2007. A joint framework for those negotiations sets out a structure for an agreement that would address investment, labour mobility and regulatory cooperation. Significantly, it would also include a "binding and effective dispute resolution mechanism for specific commitments and rules under the Agreement".

The provinces have apparently yet to conclude their negotiations, but have indicated that the agreement may be released this spring. Importantly, Quebec has committed to holding public consultations on what presumably will only be a draft agreement when it is made public.

It is difficult to speculate on details of any such agreement, but as noted, private enforcement must be seen as a key objective for any such inter-provincial agreement. Virtually all other elements are now in place under the AIT, and the McGuinty government has declined to rule out a TILMA-like private dispute procedure.

### **Nova Scotia - New Brunswick PARE**

On February 24, the Provinces of New Brunswick and Nova Scotia announced that they were entering into a *Partnership Agreement On Regulation And The Economy (PARE)*. The Preamble describes its intent this way:

[to] enhance competitiveness, improve productivity, contribute to workforce development and availability and positively influence issues of mutual interest by streamlining practices, removing duplication, and harmonizing regulations and practices between the Parties.

Once again the agreement was negotiated with no public notice or participation. While the participation of the business community as stakeholders is acknowledged, no effort was made to consult trade unions or other groups as the project was underway.<sup>19</sup>

The central thrust of this Agreement is the harmonization and streamlining of provincial regulation to “minimize the impact of regulation on a fair, competitive and innovative market economy”. But neither province is known for having excessive regulatory regimes, and both lag significantly behind other provinces in establishing necessary regulations dealing with such diverse matters as the regulation of private health clinics and environmental protection.

However, unlike TILMA, the agreement has no dispute mechanism, nor does it impose explicit requirements on either province. Rather, it commits both to ongoing work to facilitate and implement the broad harmonization and streamlining goals the agreement delineates. Similar ‘friendship and cooperation agreements’ have been negotiated between the provinces from time to time.<sup>20</sup>

### **Free Trade With the European Union (EU)**

At their October 17, 2008 Summit, European Union and Canadian trade officials agreed to work together on a bi-lateral free trade agreement. As they described their agenda, the immediate task is to “define the scope of a deepened economic agreement and to establish the critical points for its successful conclusion, particularly the involvement of Canada’s provinces and territories and the EU Member States in areas under their competencies”.

On March 5, 2009, these officials published a *Joint Report on the EU-Canada Scoping Exercise* which identifies key areas for these pending trade negotiations. It is clear from this document that a central goal will be ensuring the adherence of the provincial governments to any agreement that may emerge.

As the scoping report states:

---

<sup>19</sup>Open Letter from Nova Scotia Federation of Labour, CLC to Premier MacDonald, Feb. 25, 2009

<sup>20</sup> See for example the agreement between Quebec and New Brunswick, April 2006, <http://www.marcan.net/assets/trade%20arrangements/06-04-18%20NB-QC%20coop%20agr.pdf>

A successful negotiation will include explicit commitments from provincial and territorial governments. These commitments will be incorporated into the agreement and provinces and territories will take the necessary steps to implement the provisions falling in their areas of competence. The provinces and territories will participate in the negotiations with a view to making binding commitments in all areas falling, wholly or in part, in their jurisdiction in any agreement to the full extent that European undertakings warrant.

The importance of provincial compliance arises from the EU's ambition to substantially expand the application of the WTO services regime (the *General Agreement on Trade in Services* – the GATS). Progress of the WTO GATS negotiations has faltered as nations have come to understand how intrusive this regime would be into spheres of domestic policy and law that have little if anything to do with international trade.

The same dynamic has frustrated multi-lateral efforts to impose neo-liberal trade policies on other areas of domestic policy and regulation, including procurement and investment.

But as the WTO door closes, Canada and the EU are prepared to see whether other doors will yield more readily to their ambitious trade liberalization agenda. In this regard services rules are key, because no other dimension of international trade law can exert a more pervasive influence over purely domestic policy and regulatory matters. As noted, this is because virtually everything a government does affects the delivery of services, and under the GATS, foreign investment is sufficient to transform even the most local service, such as municipal waste collection, into a matter subject to international trade rules.

Thus as the scoping document explains:

Any agreement should provide for a considerable higher level of ambition than the current WTO commitments, with the aim of achieving market access, non-discrimination and compliance with Article V GATS. In this regard, the Scoping Group took the view that the services provisions of any agreement should apply to measures taken by all levels of government, as well as non-governmental bodies, in the exercise of powers delegated by any level of government. No mode of supply or services sector should be excluded a priori.

But EU and Canadian officials have an even more expansive agenda, and laid out ambitious liberalization goals for investment, procurement and competition policy. Among the other casualties of this agenda, should it succeed, would be the ability of Canadian governments to spend public revenues to stimulate the Canadian economy.

The sweeping implications of pending EU-Canada free trade negotiations clearly warrant careful review. For present purposes however, two points should be noted. The first is that Canada's goals in trade negotiations with the EU are very similar to those of its domestic trade agenda. Both seek, through the modality of trade negotiations, to achieve the same outcome – namely to lock provincial governments into a neo-liberal policy framework from which escape can only come at the cost of both international and domestic sanctions. The only meaningful point of

departure between the federal government's domestic and international trade agendas is that in the case of the latter there is likely to be greater scope for public input.

The other point is to disabuse anyone of the notion that free trade with the EU will reflect the more progressive social and environmental policies of the European community. EU trade officials are as single-minded in their pursuit of trade and investment liberalization goals as are their Canadian counterparts, and their views are no more reflective of the values of the European community than are the views of Canadian trade officials reflective of broader Canadian norms concerning public services, environmental protection, and other non-commercial values. In fact, within the EU neo-liberal trade and investment policies are often invoked by the European Commission to challenge progressive actions by member states.

Steven Shrybman  
Sack, Goldblatt Mitchell  
March 2009.