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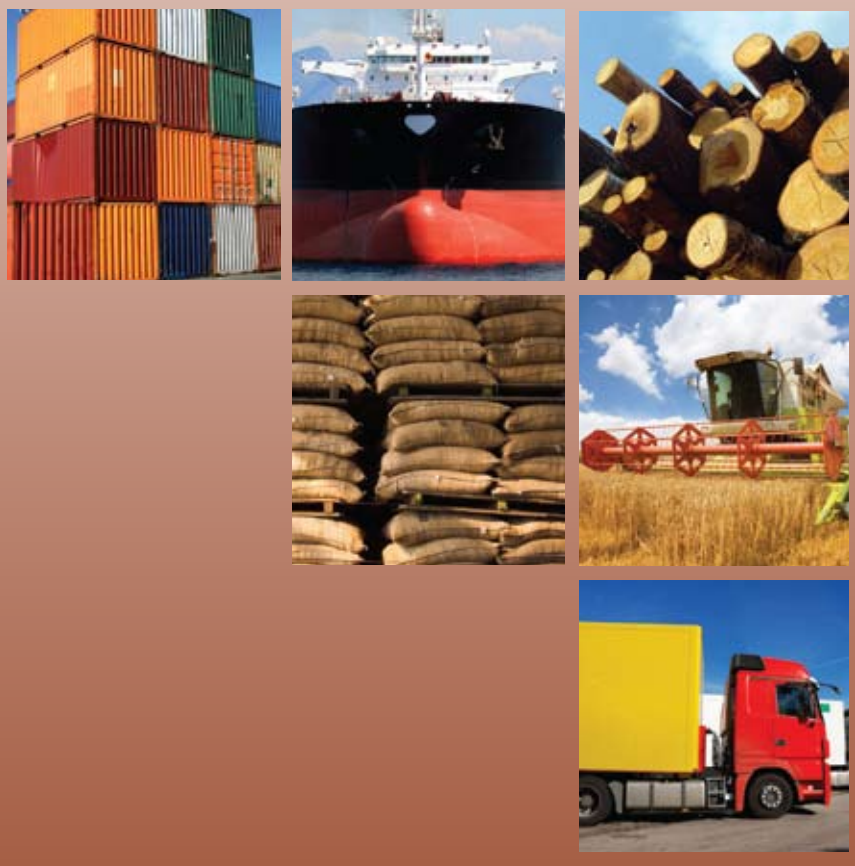
Myths and Realities of TILMA

by Robert Knox and Amela Karabegović



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Executive summary

On April 28, 2006, the premiers of British Columbia and Alberta signed the Trade, Investment and Labour Mobility Agreement (British Columbia, Ministry of Economic Development, 2006f) with the objective of creating a seamless economic region between the two provinces.

The agreement (TILMA) was born out of the failure of the national Agreement on Internal Trade (Canada, Internal Trade Secretariat, 1995)—an agreement between all Canadian jurisdictions that came into force in 1995 with the objective of establishing an open, efficient, and stable domestic market.

The Agreement on Internal Trade (AIT) failed because its complex, limited nature made it difficult to understand and apply. Moreover, the AIT is unenforceable and its obligations can be and are ignored by governments. Starting in 2004, most of the efforts to make the AIT comprehensive and effective, including those by the Council of the Federation, have been incremental and have accomplished little so far.

Domestic trade plays a significant role in determining the level of prosperity in Canada. Interprovincial trade barriers lead to misallocation of capital and labor as they prevent businesses and individuals from allocating their resources to the most beneficial use. Free trade eliminates artificial trade barriers and impediments which waste resources and time for those doing business in other provinces.

TILMA is, in many ways, an extension of the AIT, and uses the AIT as a starting point to accomplish open trade and commerce between British Columbia and Alberta. The AIT encourages trade enhancement agreements between provincial and territorial governments as long as they liberalize trade and can be acceded to by other governments.

This paper concludes that the AIT failed to establish free trade within Canada and that TILMA is a big step forward that can be adopted by other Canadian governments.

Costs of trade barriers

Studies suggest that the costs of interprovincial trade barriers range from 0.05–1.58% of Canada's gross domestic product (GDP). Using the lowest estimate, 0.05% of GDP per year, the cost of trade barriers is about $766 million (CA$, 2007), or around $23 per Canadian in 2007. Since the AIT came into force in 1995, we have "spent" about $9.1 billion in inflation-adjusted 2007 dollars.

Trade barriers also create indirect costs. The absence of enforceable rules creates permanent inefficiency and uncertainty in the marketplace, reducing our competitiveness and our productivity. The inefficiency comes from the misallocation of capital and labor due to interprovincial barriers; the uncertainty comes from the inability of businesses to predict which rules or which parts of the agreement can be enforced.

Some argue that the interprovincial trade barriers are few and minor and that their costs are insignificant. The fact is that there are barriers and impediments to trade in Canada, and there can be more. There are no rules or mechanisms to resolve or prevent them. Canada cannot expect to compete and prosper in a global economy with the uncertainty and costs of arbitrary, unresolved barriers and impediments to trade, commerce, and mobility.

Flaws of the Agreement on Internal Trade

The AIT has a number of weaknesses. First, the AIT's coverage is limited specifically to measures that restrict trade. It does not cover measures that affect market efficiency by impeding or making trade, commerce, and mobility more difficult.

Even though the AIT applies specifically to measures that restrict trade, this application is limited by the specific issues identified in the so-called "sectoral" chapters in part four. These chapters are impenetrable both individually and collectively to anyone except those with specialized knowledge.

The key limitation of the AIT is that it lacks an effective dispute settlement mechanism. There are no consequences if governments ignore their obligations because the dispute resolution process set out in the AIT is unenforceable and inaccessible in its complexity.

Advantages of TILMA

TILMA and the AIT differ in many ways, but there are two fundamental differences.

TILMA is based on the open trade principle, meaning it applies to all measures that relate to trade, investment, or labor mobility, unless the measure is specifically excluded from the agreement.

Second, TILMA applies not only to measures that actually restrict or prevent trade, investment, or labor mobility, but also to measures that impair trade—that is, make it less open. For example, if a measure requires, for instance, a licensing fee that is not required for those within the other province, the fee would be eliminated under TILMA, as would any differences in regulations that make it difficult to trade.

There are four specific areas of TILMA worth mentioning: labor mobility, business registration and reporting, government procurement, and dispute resolution.

Labor mobility

TILMA stipulates that anyone who is recognized as qualified for an occupation by a regulatory authority in one province will be recognized as qualified by the appropriate regulatory authority in the other. Other Canadian governments are learning from TILMA. At their annual meeting in July 2008, premiers announced that they were adopting the same mutual recognition principle through amendments to the AIT which would come into force in April 2009.[1]

Business registration and reporting

TILMA eliminates duplicate business registration and reporting requirements so that businesses registered in one province are automatically recognized in the other. This means that a business registered in British Columbia does not have to register again if they wish to do business in Alberta.

Government procurement

Under TILMA, the governments of British Columbia and Alberta are required to provide businesses in both provinces non-discriminatory access to government procurement for goods ($10,000 or greater), services ($75,000 or greater), and construction ($100,000 or greater) (BC-MED, 2006e). These new rules apply to all government entities including departments, ministries, agencies, boards, councils, committees, and commissions.

Dispute resolution

TILMA creates a clear and enforceable dispute resolution mechanism. If consultation and mediation fail to resolve a dispute, an arbitration panel is established and required to issue a binding report. The most important difference in the dispute settlement mechanisms between TILMA and the AIT is that, under TILMA, the non-complying party can be penalized up to $5 million by the panel. All Canadian governments, with the exception

1 "Emphasizing the critical importance of full labour mobility for all Canadians, Premiers agreed to amend the Agreement on Internal Trade (AIT) by January 1, 2009. These amendments will provide that any worker certified for an occupation by a regulatory authority of one province or territory shall be recognized as qualified to practice that occupation by all other provinces and territories. Premiers further directed that any exceptions to full labour market mobility will have to be clearly identified and justified as necessary to meet a legitimate objective such as the protection of public health or safety" (Council of the Federation, 2008). This commitment was confirmed at the meeting on December 5, 2008 (Committee on Internal Trade, 2008).

of Ontario, agreed to adopt similar provisions for government-to-government, but not person-to-government, disputes under the AIT (Committee on Internal Trade, 2008).

Dispelling the myths

There appears to be some misunderstanding about how TILMA works and what its impact will be.

Myth #1

Costs of interprovincial trade barriers and impediments to trade are insignificant.

Fact: The lowest estimate of the cost of barriers to the Canadian economy is about 0.05% of GDP per year, which amounts to roughly $766 million, or about $23 per Canadian in 2007 (CA$, 2007).

Myth #2

TILMA will lead to the adoption of the lowest occupational standards.

Fact: Nowhere in TILMA does it say that the lowest occupational standards have to be adopted. TILMA calls for the mutual recognition of existing occupational standards so that trade workers and other professionals in British Columbia and Alberta can practice in both provinces, regardless of where they received their certificate or professional recognition. The new standard will be the result of what the two provincial governments agree on and not necessarily the lowest standard.

Myth # 3

TILMA applies to intraprovincial measures.

Fact: This is not true. TILMA applies only to policies, legislation, regulations, or other measures that restrict or impede trade, investment, and mobility between the two provinces. The only requirement that TILMA places on intraprovincial measures is that they do not discriminate against a business or individual in the other province.

Myth # 4

Municipal laws such as zoning and land use laws, municipal bans on billboards, and provincial prohibitions on the sale of junk food in schools and hospitals could violate TILMA.

Fact: TILMA does not cover all government measures, only those that relate to trade, investment, and labor mobility between Alberta and British Columbia. There is nothing in TILMA that would prevent municipalities or provincial governments from implementing zoning and land use laws, billboard laws, or any provincial measure regarding junk food as long as those same laws do not discriminate against a business or individual from the other province.

Myth #5

Under the dispute resolution mechanism outlined in TILMA, businesses will be able to sue municipalities for up to $5 million and multiple complaints can be filed for what is essentially the same violation.

Fact: Penalties are issued for non-compliance only. If Alberta or British Columbia does not comply with a panel finding, the other party to the dispute can ask the panel, at its discretion, to penalize the government that is the subject of a dispute for non-compliance. While multiple complaints are not prohibited by TILMA, the process makes them very unlikely.

Myth # 6

US states will soon join TILMA.

Fact: Article 20(1) of TILMA states that any Canadian province, territory, or the federal government may accede to the agreement. It is unlikely a US state could join TILMA given that international trade is in the purview of the federal governments in the United States and Canada.

Conclusion

TILMA, an extension of the AIT, aims to eliminate or reduce many interprovincial barriers between British Columbia and Alberta that are not covered or have not been dealt with by the AIT.

The AIT is complex, inaccessible, and ultimately unenforceable. TILMA addresses most of the shortcomings of the AIT, making it an improvement over the AIT, but it is not perfect. It has many exceptions, such as taxation and social policy (including labor standards and codes, minimum wages, employment insurance, social assistance benefits, and worker's compensation), as well as regulated marketing and supply management of poultry, dairy, and eggs in Alberta.

Introduction

On April 28, 2006, the premiers of British Columbia and Alberta signed the Trade, Investment and Labour Mobility Agreement (BC-MED, 2006f).[2] The objective of the agreement (TILMA) is to create a seamless economic region between the two provinces that will be the second largest in Canada after Ontario.

TILMA is a response to the failure of the national Agreement on Internal Trade (C-ITS, 1995).[3] This agreement (AIT) between all Canadian jurisdictions came into force in July 1995. Its objective is to reduce and eliminate barriers to the free movement of persons, goods, services, and investments within Canada and to establish an open, efficient, and stable domestic market (C-ITS, 1995: art. 100).

The AIT is a limited and complex undertaking that is difficult to understand and apply. It is unenforceable and its obligations can be and are ignored by governments. Of course, the AIT was intended as the first step in a process towards a comprehensive and effective national trade agreement, as evidenced by its provisions for change and future negotiations (C-ITS, 1995: articles 1810, 902(4), 903).

Most of the recent efforts to make the AIT comprehensive and effective, including those by the Council of the Federation, have been incremental and have accomplished little since starting in 2004. It is likely that Alberta and British Columbia realized that not all provincial governments would

2 TILMA came into effect on April 1, 2007.

3 Canadian governments have been trying for some time to establish and maintain an open, efficient, and predictable domestic market. Problems arise when government measures, policies, or administrative practices interfere with the functioning of markets by restricting or impeding trade, investment, or labor mobility. The Rowell-Sirois Commission (Canada, Royal Commission on Dominion-Provincial Relations, 1940) identified trade restrictions and impediments created by differences in governmental measures as a problem, as did the MacDonald Commission, 1986. The Rowell-Sirois Commission said that "The heart of the problem of [interprovincial barriers to trade] lies in the fact that the simplest requirements of provincial autonomy … involve the use of powers which are capable of abuse … the problem is to preclude or restrict abuses without interfering with legitimate and even necessary powers." (Canada, Royal Commission on Dominion-Provincial Relations, 1940). The MacDonald Commission said that "Federalism justifies variation among provinces in response to local preferences … the need to accommodate diversity … must be balanced against the objective of gains from trade" (Canada, Royal Commission on the Economic Union and Development Prospects for Canada, 1985: vol. 3, 135–40).

accept a simpler, enforceable agreement that applies to all measures affecting domestic trade, mobility, and investment.

Since TILMA accomplishes the things that the AIT sets out to do, TILMA and how it works is best understood by examining and analyzing the AIT, which this paper does in the section "The AIT and its shortcomings."

TILMA is also an extension of the AIT and uses the AIT as a starting point to accomplish open trade and commerce between British Columbia and Alberta. The AIT encourages trade enhancement agreements between provincial and territorial governments as long as they liberalize trade and can be acceded to by other governments.[4]

TILMA eliminates many of the existing barriers to the movement of goods, services, capital, and individuals between the two provinces that are not covered by the AIT, but it goes beyond the AIT to deal with impediments, not just restrictions, to trade, investment, and labor mobility.

As the World Trade Organization (WTO) trade rounds and the North American Free Trade Agreement (NAFTA) have shown, the benefits of international trade are important for the Canadian economy. In general, trade leads to two important outcomes: more choice, and lower prices for consumers. Trade and competition among firms increase when trade barriers are reduced. Increased competition, in turn, forces firms to provide the highest quality goods and services at the lowest prices by specializing in providing certain goods and services while leaving the rest to competition. This specialization was quite evident after NAFTA was implemented. It led to substantial increases in intra-industry trade—a two-way trade among the three trade partners in products falling under the same industry classification (Burfisher et al., 2001; C-DFAIT, 2003). In other words, firms within the industries specialized in goods and services they could produce at a lower price than their competitors.

Competition not only produces more choice and lower prices for consumers, but it also leads to increases in overall competitiveness. Once the trade barriers are lifted, firms become more productive and innovative not only due to increased competition, but also because of the reduction in business costs resulting from the elimination of or decreases in trade barriers,

4 1. The Parties recognize that it is appropriate to enter into bilateral or multilateral arrangements in order to enhance trade and mobility.

2. This Agreement shall not prevent the maintenance or formation of a trade enhancement arrangement where:

(a) the arrangement liberalizes trade beyond the level required by this Agreement;

(b) there is full disclosure of the details of the arrangement to all other Parties at least 60 days prior to its implementation; and

(c) the signatories to the arrangement are prepared to extend the arrangement within a reasonable time to all other Parties willing to accept the terms of the arrangement.

(C-ITS, 1995: art. 1800)

access to larger markets, and access to potentially lower-priced business inputs.

Similarly, trade within Canada plays a significant role in determining the level prosperity in Canada. Interprovincial trade barriers lead to misallocation of capital and labor as they prevent businesses and individuals from allocating their resources to the most beneficial use. Free trade eliminates artificial trade barriers and impediments which waste resources and time for those doing business in other provinces.

Those opposed to TILMA argue that this new trade agreement will benefit only those engaged in trade and investment between the two provinces. While it is true that TILMA will benefit some of those doing business in both provinces, there is a much larger group who will benefit from TILMA: the citizens of British Columbia and Alberta. As already mentioned, reductions in trade barriers, either international or interprovincial, ultimately benefit the consumers through greater choice and lower prices.

This study examines the problems with current trade rules, TILMA, and the potential of the TILMA model as the basis for a national trade and commerce regime.

The study is broken down into six sections. The next two sections provide background information: (a) on the relevance of estimating costs of interprovincial trade barriers and impediments within Canada and a summary of the current literature on the subject; and (b) on the main shortcomings of the AIT. Together, the two sections place TILMA into a broader context and explain the environment in which TILMA was created.

The fourth section outlines the main differences between TILMA and the AIT and the fifth section provides a description of TILMA and how it addresses the weaknesses of the AIT. The sixth section deals with the most common myths surrounding TILMA and the last section concludes the report by recommending how governments can learn from current experience and develop a workable and effective regime for domestic trade and commerce.

What do barriers and impediments to trade and commerce cost, and is it important to know what these costs are?

In the past, there have been a few attempts to estimate the costs of interprovincial, non-tariff barriers in Canada. However, the estimates vary depending on the time period and methodology used. There are three studies most commonly cited in the literature related to domestic trade barriers.

Perhaps the most commonly cited study is the one published by the Canadian Manufacturers' Association. It estimated the cost of interprovincial barriers to be $6.5 billion per year, or about 1.0% of the GDP in 1990. The study made an assumption that procurement polices by the provinces and the federal government increased the costs of goods and services purchased by these governments by 5%. The study also estimated that, of the $6.5 billion, $500 million came from barriers on beer and wine and $1 billion from agricultural subsidies (Rutley, 1991; cited in Beaulieu et al., 2003: 15–16; Palda, 1994: xvi).

Other studies suggest that the costs might be lower than what the Canadian Manufacturers' Association estimates. Almost a decade before the Canadian Manufacturers' Association study, Whalley (1983) provided one of the first estimates of the costs of interprovincial barriers. He first reviewed interprovincial distortions or barriers imposed by both provincial and federal governments and the volume of interprovincial trade. Then, by assuming a potential range of distortions and how responsive imports are to prices changes (i.e., demand elasticity), he estimated the annual costs of interprovincial barriers to trade in goods to be from 0.11% to 1.54% of the GDP in 1974 (Whalley, 1983).[5] In addition, he estimated the costs of barriers to labor mobility to be 0.04% of the GDP. This brings the costs of interprovincial barriers to between approximately 0.15% to 1.58% of the GDP in 1974.[6]

Copeland (1998) criticizes the methodology used in the 1991 study by the Canadian Manufacturers' Association. For instance, he argued that the study confused some international trade barriers with interprovincial trade barriers. He also argued that one of the most costly barriers in the Canadian Manufacturers' Association study was in the alcoholic beverage

5 In fact, his highest cost estimate was 2.10 % of the GDP but he dismissed it as an unlikely high estimate.

6 Further, he provided an educated guess of the costs of barriers to capital flows to be similar to or the same as the cost of barriers to labor mobility: 0.04 % of the GDP per year.

industry. However, these barriers have decreased since the study was published. Copeland argued that a more precise estimate of interprovincial trade barriers is from 0.05% to 0.1% of the GDP (Copeland, 1998; cited in Beaulieu et al., 2003: 15–16).

Regardless of which estimate one uses, it seems that the costs of interprovincial barriers are not zero. It is true that the implementation of the AIT in July 1995 has reduced some of the barriers to interprovincial trade, but it is clear that many barriers remain, mostly related to different, excessive regulations. Besides, there can be no certainty that Canada's domestic market is open and efficient until there are clear trade rules effectively applied and enforced.

A couple of recent studies noted that the existing interprovincial barriers still have a negative impact on Canadian prosperity. For instance, a study by the Conference Board of Canada called *Death by a Thousand Paper Cuts* argues that interprovincial barriers are reducing Canadian productivity (Darby et al., 2006). Another study by the Organisation for Economic Co-operation and Development (OECD) urges Canada to "dismantle the remaining obstacles to interprovincial trade and reduce the number of 'regulated occupations' to increase its level of productivity" (OECD, 2007: 44).

It is important to note that most studies on the costs of interprovincial trade deal with measures or issues that restrict trade and not measures that impede trade and commerce such as policies and practices that make it difficult and expensive to do business, invest, or work in multiple provinces.

For example, it is not clear that cost estimates cover things such as differences in regulations or administrative practices that add to the cost of doing business or the cost to the economy of foregone business activities and opportunities that go elsewhere in the face of restrictions and impediments.

The issue of direct costs should not divert attention from another crucial issue: indirect costs. The absence of enforceable rules creates permanent inefficiency and uncertainty in the marketplace, which saps our competitiveness and our productivity.

Restrictions and impediments to domestic trade lead to misallocation of capital and labor as they prevent businesses and individuals from allocating their resources to the most beneficial use within Canada. This restriction on Canadian businesses puts them at a disadvantage when competing globally. Furthermore, the inability of businesses to predict which rules or which parts of the AIT can be enforced creates uncertainty and requires them to operate accordingly, which has negative consequences for their productivity.

The question is, do we need to know what the precise costs of trade restrictions and impediments might be to justify ensuring an open, efficient, and predictable domestic market, free of unnecessary restrictions and impediments? Is it not reasonable to provide certainty that there are no, and there

cannot be any, unnecessary restrictions and impediments to trade, commerce, and the mobility of workers between provinces in Canada?

It may be that we do not know and, possibly, cannot know, the precise cost of domestic trade barriers and impediments, but that may also be beside the point. If the costs of the interprovincial trade barriers are truly insignificant (due to a few minor trade barriers), then the AIT and TILMA are, in effect, simply formalizing what we already have in Canada: an open and barrier-free single market. Canada needs clear trade rules to govern its domestic market. Canada cannot expect to compete and prosper in a global economy with the uncertainty and costs of arbitrary and unresolved barriers and impediments to trade, commerce, and mobility.

The next three sections on the AIT and TILMA highlight some of the existing interprovincial barriers which the two trade agreements try to address.

The AIT and its shortcomings

The objective of the AIT is to eliminate interprovincial trade and labor mobility barriers within Canada. Even though the AIT has had the potential to eliminate at least some interprovincial barriers, its success has been limited.[7] This is mainly due to the AIT's complexity, its inaccessibility to those who are affected by measures that restrict trade, the fact that it cannot be enforced, and the tendency of some governments not to take their obligations seriously.[8]

The Appendix provides three examples of the ways the AIT has been ineffective: labor mobility, agriculture, and the dispute resolution mechanism.

The AIT's coverage is limited specifically to measures that restrict trade. It does not cover measures that affect market efficiency by impeding or making trade, commerce, and mobility more difficult.

It may be that the AIT can actually be used to resolve impediments, not just barriers. A panel on Quebec's restrictions on the sale of colored margarine found that an obstacle to trade is created if a measure impedes trade (C-ITS, 2005: 31). However, even if the AIT applies specifically to measures that impede as well as restrict trade, this application is then limited by the specific issues identified in the so-called "sectoral" chapters in part four and these chapters are virtually impenetrable, both individually and collectively, to anyone except those with specialized knowledge.

AIT article 400 says that the general rules in the AIT's chapter four apply only to matters covered in the chapters in part four of the AIT. Each of the chapters in part four establishes the extent to which the general rules apply to the matters that each chapter covers, but the matters covered by the chapter are then further defined and limited by other provisions in the chapter.

For example, chapter nine in the AIT—"Agricultural and Food Goods"—starts with a provision that the rules in chapter four apply to chapter nine, except as provided by chapter nine. Article 902 says that chapter nine applies

7 It is important to note that the AIT is currently being reviewed and revised by the Council of the Federation, <http://www.councilofthefederation.ca/>, which was established in December 2003.

8 Two papers published by the Certified General Accountants' Association of Canada (CGA Canada) provide an assessment of the AIT and its dispute resolution procedures. They are: *Canada's Agreement on Internal Trade: It Can Work If We Want It To,* by Robert Knox <http://www.cga-canada.org/en-ca/ResearchReports/ca_rep_2001-05_ait.pdf>, and *Making Trade Dispute Resolution in Canada Work* <http://www.cga-canada.org/en-ca/ResearchReports/ca_rep_2006-05_ait.pdf>.

to all government measures relating to internal trade in agricultural or food goods, but coverage is then limited to six technical barriers to trade identified by an intergovernmental committee of officials. New or amended measures are covered if they restrict trade in agricultural and food goods (C-ITS, 1995: articles 904, 905). The agriculture chapter leaves most existing barriers to trade in place but says the introduction of new ones should be prevented. Governments were supposed to review and expand the coverage of the agriculture chapter by September 1997, but discussions continue more than 10 years later (see Appendix).

Not all the AIT chapters in part four are this convoluted, but none are easily interpreted. The fact that the application of the AIT is limited to what is specifically covered and further limited by exceptions does not create the clarity and certainty that an open and predictable domestic market requires.

Canadian governments' commitment to establishing an open, efficient, and stable domestic market, which is the AIT's stated objective, is a conditional and equivocal undertaking. Governments agreed to reduce and eliminate trade barriers only "to the extent possible" (Beaulieu et al., 2003: 35). This partial commitment to free trade creates uncertainty concerning governments' commitment to open domestic trade and confusion about what is actually covered by the AIT (Beaulieu et al., 2003: 36).

The AIT's most critical shortcoming is that there are no consequences if governments ignore their obligations because the dispute resolution process is unenforceable and still inaccessible in its complexity.

At their meeting in July 2008, ministers announced that they had agreed on a dispute resolution enforcement mechanism for government-to-government disputes that will come into force in January 2009. Apparently it will involve penalties of up to $5 million in some jurisdictions for the non-implementationof panel reports.[9]

It is not clear what impact these changes will have. They appear conditional and equivocal and they do not apply to disputes brought by non-government complainants. No doubt they will help but governments still need to address issues of coverage, complexity, obscurity, and accessibility to make the AIT work (see Appendix).[10]

9 "Premiers announced an enhanced and effective dispute resolution mechanism to enforce AIT dispute panel recommendations for government-to-government disputes. Effective January 1, 2009, the strengthened mechanism includes the use of monetary penalties to a maximum of $5 million" (Council of the Federation, 2008). This decision was confirmed by all parties, except Ontario, at the December 2008 meeting as well. Specifically, Ontario did not approve the draft text on the proposed amendments to the AIT's dispute resolution chapter (Committee on Internal Trade, 2008).

10 For further details, see Knox, 2001; Internal Trade Coalition, 2008; CGAAC, 2006, 2007.

The AIT versus TILMA

TILMA and the AIT differ in many ways, but there are two fundamental differences. First, TILMA is based on the open trade principle, meaning it applies to all measures which relate to trade, investment, or labor mobility, unless the measure is specifically excluded from the agreement. That is, TILMA applies to all measures covering all sectors and industries (even those not explicitly mentioned in the agreement, such as agriculture) except, once again, those measures which are explicitly excluded. The AIT, by contrast, operates on the closed trade principle, which means that nothing is covered except those measures that are specifically included.

This new architecture used in TILMA is crucial for a number of reasons. It makes TILMA much more comprehensive and broader than the AIT. It also makes TILMA easier to understand and apply for individuals, businesses, and government officials enforcing the agreement because all the exempted sectors and industries are listed in TILMA. Lastly, but not least, the new construction makes TILMA much more transparent since all exceptions are visible and exposed to scrutiny.

It may be argued that one of the greatest achievements of TILMA is the use of this new architecture. Basing the agreement on broad principles, with exceptions explicitly listed in the agreement, not only makes TILMA more comprehensive, but also it makes exceptions and special interest group influence far more transparent. In other words, with TILMA, the influence of interest groups is apparent in the long list of exceptions in the agreement. By contrast, in the AIT, the influence is more implicit and hidden as those sectors and industries which are excluded from the AIT are not listed in the agreement.

Second, TILMA applies not only to measures that actually restrict or prevent trade, investment, or labor mobility, but also to measures that impair trade or make it less open. For example, if a measure requires a licensing fee that is not required for those within the other province, it would be eliminated, as would differences in regulations that make it difficult to trade. The additional application of TILMA to measures that impair trade make the agreement even more comprehensive.

The following section provides a summary of TILMA.

TILMA

TILMA is intended to make it easier for individuals and businesses to trade, invest, and work in British Columbia and Alberta. This is reflected in the operating principles in part one of the agreement. Some of the 12 principles are worth noting:

- Establish a comprehensive agreement on trade, investment and labour mobility;
- Eliminate barriers that restrict or impair trade, investment or labour mobility;
- Enhance competitiveness, economic growth and stability in Alberta and British Columbia;
- Increase opportunities and choice for workers, investors, consumers and businesses; and
- Reduce costs for consumers, businesses and governments.

(BC-MED, 2006f: 1)

These principles establish that the intention of TILMA is not only to eliminate remaining interprovincial barriers but also to deal with things that interfere with or impair trade, investment, and labor mobility between the two provinces.

There are four specific areas of TILMA which are worth mentioning: labor mobility, business registration and reporting, government procurement, and dispute resolution.

Labor mobility

TILMA stipulates that anyone who is recognized as qualified for an occupation by a regulatory authority in one province will be recognized as qualified by the appropriate regulatory authority in the other (BC-MED, 2006c).

This means that those in certified professional occupations or trades in British Columbia can work in Alberta without having to go through additional examinations or assessments. The same applies to those certified in Alberta. Before TILMA came into effect, chiropractors, for instance, had to be licensed and registered in the province in which they practice. Following the signing of TILMA, those who are licensed in British Columbia no longer have to obtain a license from the regulatory body in Alberta to practice there and vice versa (BC-MED, 2006f, 2007; Brock McLeod, Senior Advisor, Trade and Competitiveness Branch, Ministry of Economic Development,

Government of British Columbia, personal communications, March 30, April 18, May 4, and July 3, 2007).

Mutual recognition will come into full effect in spring 2009. The two provincial governments gave themselves two years of transitional period to fully comply with the occupational standards. Initially, the two provincial governments identified 65 professional occupations and trades with different standards to be reconciled by April 1, 2009. In April 2007, the list was updated and it now includes 85 occupations and trades (BC-MED, 2007; Brock McLeod, Senior Advisor, Trade and Competitiveness Branch, Ministry of Economic Development, Government of British Columbia, personal communications, March 30, April 18, May 4, and July 3, 2007).[11]

Part of the problem with the labor mobility chapter in the AIT is that it has no default mechanism. TILMA deals with this by: (1) identifying occupations that have differences that need to be resolved to allow for mobility; (2) establishing a two-year transitional period to resolve mobility issues; and (3) creating a default mechanism that establishes that any one qualified for an occupation or skilled trade in one jurisdiction will automatically be recognized as qualified for the same occupation in another jurisdiction. This is effectively mutual recognition by default.

TILMA's labor mobility agreement appears to have gained the attention of the federal government. The federal government has proposed that all provincial governments apply the equivalent of TILMA's mutual recognition default rule. At the annual meeting of the Committee of Ministers on Internal Trade (CIT) on June 7, 2007 in St. John's, the federal minister responsible for internal trade proposed that Canadian governments agree that after April 2009 anyone who is qualified for an occupation or skilled trade in any Canadian jurisdiction should automatically be recognized as qualified in any other Canadian jurisdiction.[12] And, indeed, Canadian governments have agreed to try again to resolve all outstanding labor mobility issues by April 2009.

Premiers confirmed their commitment to achieving full labor mobility at the annual meeting of the Council of the Federation on July 18, 2008, as well as at the meeting on December 5, 2008. The labor mobility chapter of the AIT will be amended so that it will operate on the same principles as TILMA,

11 There are an additional 133 occupations and trades for which certifications to practice are required in one of the two provinces. Employees moving from the province where certification is not available to the province in which certification is required have to obtain certification from the appropriate provincial authority (BC-MED, 2007). These occupations and trades should also be reconciled by spring 2009.

12 Communiqués: "Canada's New Government Commits to Full Labour Mobility," Industry Canada, St. John's, Newfoundland & Labrador, June 7, 2007; "Progress On Action Plan", Committee On Internal Trade, St. John's, Newfoundland & Labrador, June 7, 2007.

meaning the Alberta and BC initiative is changing the national economic landscape for the better.

Business registration and reporting

Eliminating duplicate business registration and reporting requirements so that businesses registered in one province are automatically recognized in the other will make it easier and less costly for businesses to operate in both provinces. This means that a business registered in British Columbia does not have to register again if they wish to do business in Alberta. Elimination of duplicate reporting requirements reduces the amount of time a business has to spend complying with two different reporting requirements for the two provinces.

Government procurement

Under TILMA, the governments of British Columbia and Alberta are required to provide non-discriminatory access to government procurement to businesses in both provinces for goods ($10,000 or greater), services ($75,000 or greater), and construction ($100,000 or greater) (BC-MED, 2006e). These new rules apply to all government entities including departments, ministries, agencies, boards, councils, committees, and commissions.[13]

There are a number of services and institutions that are excluded from procurement rules under TILMA, including procurement from non-profit organizations; from philanthropic institutions, prison labor, and persons with disabilities; of certain promotional goods and promotional construction; of health and social services; of lawyer and notary services; of goods intended for resale to the public; where it can be shown that only one supplier can meet the requirements of a procurement; where emergency situations exist; and where confidentiality prevents disclosure.

Dispute resolution

One of the crucial achievements of TILMA is the creation of a clear and enforceable dispute resolution mechanism. TILMA allows private persons, businesses and the two provincial governments to initiate dispute resolution proceedings against one of the two parties to TILMA—the provinces of British Columbia and Alberta—if they believe one of the governments has violated the agreement. If consultation and mediation fail to resolve the matter, an arbitration panel is established and required to issue a binding report.

13 By April 1, 2009, the two provincial governments will engage in negotiations with their respective government bodies to cover procurement from Crown corporations; government-owned commercial enterprises; regional, local, district, or municipal governments; school boards, publicly funded academic, health, and social service entities; and non-governmental bodies that exercise authority delegated by law (BC-MED, 2006e).

The most important difference in the dispute settlement mechanisms between TILMA and the AIT is that, under TILMA, the non-complying party can be penalized up to $5 million by the panel.

A monetary award is not available for economic damages if the government complies with the panel's decision. The monetary penalty is issued only in the event of non-compliance with the panel's findings and only at the panel's discretion after the panel has considered all the circumstances that have led a government not to comply with the panel's findings. That is, even if the panel found that a party violated the agreement it is not the basis for a monetary penalty. No penalty can be awarded with the initial ruling by the panel. Only if one of the disputants fails to comply with the panel's ruling and the other disputant asks the panel to consider it can the panel issue a monetary penalty.

Again, other Canadian governments are learning from Alberta and BC's TILMA initiative. At the annual meeting of the Council of the Federation in July 2008, premiers announced that they have agreed to adopt similar kinds of penalties for non-implementation of panel findings in government-to-government disputes.[14]

One of the factors determining the monetary penalty for non-compliance under TILMA is the economic injury caused to the complainant and the extent to which the injury will continue if the government that is the subject of the complaint does not comply with the panel's findings. If both of the disputants are parties to the agreement (i.e., the governments of British Columbia and Alberta), then the panel may either issue a monetary award, authorize a retaliatory measure of equivalent economic impact, or both.

It is important to note that even though municipalities and other local and regional government agencies will be covered by TILMA in 2009, only signatories to the agreement (the provinces of British Columbia and Alberta) can be subject to dispute resolution proceedings and monetary penalty.

British Columbia and Alberta are responsible for the compliance with TILMA of their government entities, including municipalities. Since this is the case, if a dispute preceding concerns a municipal measure, the provincial government that is responsible for the municipality will respond to the dispute. During the proceedings, the provincial government will work with the municipality in question to bring the measure in dispute in conformity with the agreement (Brock McLeod, Senior Advisor, Trade and Competitiveness Branch, Ministry of Economic Development, Government of British Columbia, personal communications, March 30, April 18, May 4, and July 3, 2007).

14 This decision was confirmed by all parties, with the exception of Ontario, at the December 2008 meeting as well (Committee on Internal Trade, 2008).

Exceptions

TILMA excludes numerous provincial and municipal laws and regulations which reduce its scope and coverage. It exempts provincial measures for water, taxation, royalties, occupational health and safety, social policy (including labor standards and codes, minimum wages, employment insurance, social assistance benefits, and workers' compensation), and Aboriginal policies and programs (BC-MED, 2006d, 2006f).[15] The fact that TILMA does not apply to these measures means that no legal action can be brought against either one of the two provincial governments concerning the exempted measures.

In addition to the general exceptions to TILMA, there are additional industry- or sector-specific exemptions that apply to one or both provinces. For example, measures that promote renewable or alternative energy and measures relating to the management and disposal of hazardous and waste material are exempted by both provinces. Furthermore, Alberta excluded measures relating to regulated marketing and supply management of poultry, dairy, and eggs.

The governments of British Columbia and Alberta are permitted to introduce measures that are inconsistent with TILMA if the purpose of those measures is to achieve a legitimate objective such as public safety and security; environmental and consumer protection; provision of social and health services within a province; protection of health, safety, and well-being of employees; and affirmative action programs for disadvantaged groups, among other things (BC-MED, 2006f). These measures cannot be more restrictive than necessary and cannot be disguised restrictions on trade, investment, and labor mobility. That is, a measure which is introduced or maintained to achieve a legitimate objective should not be more restrictive than needed to achieve that objective. The onus is on the province introducing the measure to demonstrate that the measure is intended to achieve a legitimate objective as defined by TILMA and is not a disguised restriction on trade, investment, or labor mobility.

Transitional provisions

TILMA came into effect on April 1, 2007, but there is a transition period of two years. The two provincial governments have two years to comply with transitional measures such as those relating to business registration and reporting and any remaining occupations and trades with different standards in the two provinces.

15 Measures are defined as any legislation, standard, directive, requirement, guideline, program, policy, administrative practice, or other procedure.

By April 1, 2009, the two provinces will negotiate the extent to which TILMA applies to Crown corporations; government-owned commercial enterprises; regional, local, district, and municipal governments; school boards, publicly funded academic, health, and social service entities; and non-governmental bodies that exercise authority delegated by law (BC-MED, 2006e).

The two provincial governments have also agreed to negotiate the inclusion of some specific services which were not originally covered by TILMA. For instance, they agreed to negotiate the inclusion of financial institutions and services into the agreement by 2009 (BC-MED, 2006a, 2006b, 2006d). Moreover, British Columbia and Alberta signed four memorandums of understanding (MOU) which cover charter buses, energy research, post-secondary education, and interprovincial parks (BC-MED, 2006a) for further negotiation and cooperation towards allowing operators of charter buses to have access to both provincial markets, sharing research and information on education and energy, and managing parks shared by both provinces. The MOU on chartered buses is included in TILMA; the remaining three MOUs are separate agreements outside of TILMA (Brock McLeod, Senior Advisor, Trade and Competitiveness Branch, Ministry of Economic Development, Government of British Columbia, personal communications, March 30, April 18, May 4, and July 3, 2007).

Dispelling myths

There appears to be some misunderstanding about how TILMA works and what its impact will be. Part of the problem may be that TILMA came into effect quite recently and thus most of TILMA's provisions have not been tested by independent panels. Furthermore, it may also be because TILMA threatens some monopolies. For instance, TILMA allows businesses from the other province much broader access to government procurement than was available under the AIT. Moreover, due to mutual recognition of occupations and trades, government agencies and non-government licensing authorities no longer have the monopoly over licensing and certification of professional occupations and trades practicing in their own provinces.

The purpose of this section is to discuss and clarify some of the misunderstandings related to TILMA. It is outside of the scope of this paper to discuss every single one of these issues. Instead, the section below discusses the most common myths such as the scope and coverage of TILMA and the implication of the dispute resolution mechanism for municipal and provincial governments.

Myth #1

Costs of interprovincial trade barriers and impediments to trade are insignificant.

Fact: Of course, what is significant and what is not is a matter of opinion. To some, it is acceptable if unnecessary barriers and impediments to trade and commerce cost the economy a few hundred million dollars a year. For others, any cost resulting from barriers and impediments that have no legitimate purpose and only hinder Canada's productivity is unacceptable, especially since establishing trade rules is a low cost solution.

For the record, the lowest estimate of the cost of barriers to the Canadian economy is about 0.05% of the GDP per year. In 2007, the total GDP in Canada was $1.531 trillion. One half of one tenth of a percent of this amount is $766 million, or about $23 per Canadian in 2007. This is effectively a tax on each of us because we lack the discipline to ensure we remove unproductive restrictions and impediments to trade. Since the ineffective AIT came into force in

1995, we have "spent" roughly $9.1 billion in inflation-adjusted 2007 dollars on essentially nothing (Statistics Canada, 2008; calculations by the authors).[16]

Myth #2

TILMA, once fully implemented, will lead to the adoption of the lowest occupational standards.

Fact: Nowhere in TILMA does it say that the lowest occupational standards have to be adopted. TILMA calls for the mutual recognition of existing occupational standards so that trade workers and other professional occupations in British Columbia and Alberta can practice in both provinces regardless of where they received their certificate or professional recognition.

It is important to mention that neither one of the two provinces has a say in the decisions made by the other province. In other words, neither one of the two provinces can dictate what standards the other province adopts.

Regulatory competition between the two provinces is unlikely to take place and to lead to a "race to the bottom" for occupational standards. For those occupations and trades that have similar standards in the two provinces, they would be mutually recognized as many of them already have. For those occupations and trades that have different standards, the two provincial governments and their respective licensing authorities would work on a common standard satisfactory to both provinces. The new standard will be the result of what the two provincial governments agree on and not necessarily the lowest standard.

Myth #3

TILMA applies to intraprovincial measures.

Fact: This is not true. Those who argue that TILMA applies to intraprovincial measures, in addition to measures related to the flows of trade and investment between the two provinces, usually refer to article three of TILMA. Article three states that "Each Party shall ensure that its measures do no operate to restrict or impair trade between or *through* the territory of the Parties, or investment or labour mobility between the Parties" (BC-MED, 2006f: art. 3, emphasis added).

The word "through" in article three may imply that TILMA applies to measures within the two provinces (i.e., intraprovincial measures). However, British Columbia's Ministry of Economic Development responsible for TILMA clarified on its website that article three is intended to apply to the flow or

16 Note that the cost estimate includes the compounding effect as well. For example, the costs of interprovincial barriers was $554 million in 1997 (0.05% multiplied by the GDP in 1997 of $1.108 trillion in 2007 dollars) which was then multiplied by the real rate of GDP growth over the next 10 years.

movement of trade and investment and not intraprovincial measures.[17] Furthermore, if the dispute panel interprets any of the provisions in TILMA differently than the two parties have intended, the two provincial governments have reserved a right to issue a joint decision clarifying their interpretation of TILMA which is binding on the panels (BC-MED, 2006f: art. 34(4)).

The only restriction that TILMA places on intraprovincial measures is that those measures cannot discriminate against a business or individual in another province (BC-MED, 2006f: art. 4). For instance, British Columbia's municipal and provincial governments and their respective agencies have to treat individuals and businesses from Alberta the same as those that reside in British Columbia.

Myth #4

Municipal laws such as zoning and land use laws, municipal bans on billboards, and provincial prohibition on the sale of junk food in schools and hospitals could potentially violate TILMA.

Fact: This myth is related to Myth #3 but it is more specific as it pertains to the application of TILMA to certain intraprovincial measures only.

First, TILMA does not cover all government measures, only those that relate to trade, investment, and labor mobility between Alberta and British Columbia. The first test to determine if TILMA applies to a measure is to determine if it is connected to a transaction between the two jurisdictions involving trade, investment, or labor mobility.

Second, TILMA only applies to measures that actually restrict or impair trade, investment, or labor mobility. "Restrict" means that a measure actually prevents a transaction or does not let a qualified person work in his or her occupation. "Impair" means to damage or weaken trade, investment, or labor mobility. The second test is that even if a measure might be connected to trade, investment, or labor mobility, TILMA would not apply unless the measure actually prevented a transaction or made the transaction unnecessarily more difficult or expensive.

Third, if a measure was connected to trade, investment, or labor mobility and treated goods, services, investors, investments, and workers from the other province differently than those from within the province and restricted or impaired trade, investment, or labor mobility as a result, TILMA would apply to that measure.

Fourth, if a measure is connected to trade, investment, and labor mobility between the two provinces and restricts or impairs trade or discriminates

17 This was also confirmed to us by Brock McLeod, Senior Advisor, Trade and Competitiveness Branch, Ministry of Economic Development, Government of British Columbia, in personal communications, March 30, April 18, May 4, and July 3, 2007.

against goods, services, investment, or workers from the other provinces, TILMA would not apply if the measure is necessary for a legitimate reason such as consumer protection, public health and safety, the environment, or public order.

Most of the issues mentioned above involve normal local planning and administration and would not be connected to trade, investment, or labor mobility with another province; if they were, they would not restrict or impair trade and probably could be justified as necessary to accomplish a legitimate objective if they did.

Zoning and land use bylaws establish the conditions for investment that apply equally to everyone. They do not restrict or impair trade, investment, and labor mobility. A provincial ban on the sale of junk food in schools does not restrict trade in junk food between Alberta and British Columbia, but establishes that schools cannot sell it no matter where it comes from.

TILMA does not cover all the laws and regulations related to doing business within the two provinces. It has a much narrower scope. The agreement covers measures pertaining to interprovincial trade, investment, and labor mobility.

There is nothing in TILMA that would prevent municipalities or provincial government from implementing zoning and land use laws, billboards laws or any provincial measure regarding junk food as long as those same laws do not discriminate against a business or individual from the other province. In other words, TILMA does not cover any laws or regulations which relate to doing business within a province except that those laws or regulations cannot discriminate against a business or individual in another province.

Myth #5

Under the dispute resolution mechanism as outlined in TILMA, businesses will be able to sue municipalities for up to $5 million dollars and multiple complaints can be filed for what is essentially the same violation.

Fact: First, TILMA does not allow anyone to be sued for anything. If Alberta or British Columbia does not comply with a panel finding, the other party to the dispute can ask the panel, at its discretion, to penalize the government that is the subject of a dispute for non-compliance. The penalty is intended to act as incentive for compliance and cannot exceed $5 million.

Second, only the governments who are parties to the agreement can be the subject of dispute settlement proceedings. Each provincial government is responsible for the compliance of municipalities and other government entities.

Multiple complaints are unlikely but not explicitly prohibited under TILMA. The agreement does not limit the number of individuals who can make a complaint against a measure which is thought to be in violation of TILMA. TILMA, however, imposes two restrictions. First, as article 34(1)

in TILMA indicates, there is a two-year time limit on issuing a complaint from the date on which the person first acquires knowledge that a measure is restricting or impairing trade, investment, or labor mobility. Second, no complaint may be issued against a measure that is already subject to proceedings until those proceedings have been completed (BC-MED, 2006f: art. 34(2)). If one combines these two provisions with the time it takes to initiate and go through the entire dispute resolution process, it is unlikely multiple complaints could be initiated and completed given the specified time constraint.[18]

Moreover, even if more than one complaint were made within the specified time, there is an additional issue to overcome. If a measure has been found to violate TILMA once, then there would be no issues to be heard by another panel and no award can be made without a panel finding. That is, if one panel found that one of the parties violated TILMA, then there would be no issue to be heard by another panel. Without panel's findings of the violation and subsequent non-compliance with the panel's decision by one of the disputants, the monetary award cannot be issued.

It is also important to mention that TILMA does not explicitly prohibit a party representing a number of persons/businesses to bring a complaint against the other party. However, in these circumstances, the monetary award would be issued to the party representing the persons/businesses and not to the persons/businesses directly. Furthermore, only one award would be issued per violation, regardless of how many persons/businesses the party was representing (Brock McLeod, Senior Advisor, Trade and Competitiveness Branch, Ministry of Economic Development, Government of British Columbia, personal communications, March 30, April 18, May 4, and July 3, 2007).

Myth #6

US states will soon join TILMA.

Fact: Article 20(1) of TILMA states that any Canadian province, territory, or the federal government may accede to the agreement given they accept its terms. The rights of Canadian jurisdictions to join additional interprovincial trade-enhancing agreements are spelled out in article 1800 of the AIT. There is nothing in TILMA which would oblige the governments of British Columbia and Alberta to allow a US state to join the agreement.

Furthermore, and more importantly, it is unlikely a US state could join TILMA given that international trade is in the purview of the federal governments in the United States and Canada. The only way for US states to join TILMA would be if Canadian and US federal governments sign onto

18 Dispute resolution process can take up to one year depending on how fast or how slow the parties go through different stages of the process (BC-MED, 2006f: articles 25, 26, 27).

TILMA. Only then would US states and Canadian provinces be able to meet TILMA obligations such as eliminating barriers to trade, investment, and labor mobility.

Canadian provinces and the US states can sign agreements such as those related to energy and, in fact, they have been doing so for years. However, these agreements have to be within the existing agreements and arrangements between the two national governments.

Recommendations and conclusion

Recommendations

As mentioned at the beginning, TILMA has the potential to be a model for national and international agreements.

One of the crucial features of TILMA is the use of new architecture. TILMA applies to all measures unless they are specifically excluded from the agreement. Most of the international and national agreements use the reverse structure which covers only those measures that are specifically included and omits those measures which are excluded from the trade agreements.

International trade would certainly benefit from the new architecture used in TILMA. It would make international trade agreements, in addition to being more comprehensive and broader, much simpler and easier to understand for individuals, businesses, and government officials enforcing the agreements. Furthermore, the new architecture would make the trade agreements more transparent since all exceptions would be visible and exposed to scrutiny. This is especially true for special interest groups. For trade agreements using TILMA's architecture, the influence of the special interest groups would be exposed through the list of exceptions rather than being hidden or completely omitted from the agreements as has been the case traditionally.

Second, TILMA has the potential to be a model for national agreements in federal countries like Canada. Most international trade agreements apply to the elimination of tariff barriers and have not progressed very far into the realm of non-tariff barriers, let alone to the small differences in standards, regulations, and administrative practices that do not necessarily restrict trade but might impede trade or make it inefficient. TILMA deals specifically with these issues. Therefore, TILMA covers measures not covered by international trade agreements like NAFTA.

Given the shortcomings of the AIT outlined in the paper, TILMA seems like the move in the right direction for the rest of Canada. Rights of Canadian jurisdictions to join additional interprovincial trade-enhancing agreements are stated in article 1800 of the AIT and are also confirmed in article 20(1) of TILMA, given that those jurisdictions accept its terms. So far, it seems that TILMA has made the issue of the interprovincial trade barriers surface once again, but it is not clear if and when any other provinces will join TILMA.

Saskatchewan appears to be the first province which considered the possibility of joining TILMA but rejected it at the end due to concerns over Crown corporations and government investment (Wood, 2007, August 3). Ontario expressed some interest initially as well but it is not clear if the province is still considering joining TILMA (Munro, 2007, March 19).

There is some indication that other provincial and federal governments are thinking about TILMA like trade agreements. Ontario, for example, signed a deal with the provincial government of Quebec which marks a start of the negotiations between the two provinces "to eliminate red tape and unnecessary regulations that restrict business and labour and make it harder to compete in global markets" (Leslie, 2007).

But perhaps more importantly are the indications from the federal government. In June 2007, then Minister of Industry Maxime Bernier proposed to the Canadian provincial and territorial governments at the meeting of the Committee on Internal Trade that "the Agreement on Internal Trade (AIT) be strengthened to ensure that Canadians enjoy the benefits of full labour mobility by April 1, 2009." (C-IC, 2007b). In October 2007, the federal government committed in the throne speech to use its trade and commerce powers to tackle interprovincial trade barriers (Canada, 2007). This commitment was confirmed at the meetings in July and December 2008.

Moreover, at the annual meeting of the Council of the Federation in July 2008, premiers announced that they have agreed to adopt similar kinds of penalties as those outlined in TILMA for non-implementation of panel findings in government-to-government disputes. This decision was confirmed by all AIT parties, except Ontario, at the December 2008 meeting as well.

What exactly will come out of these recent developments is hard to say. What is certain is that TILMA reminded the rest of the provincial and federal governments that the interprovincial barriers are still present, however few and insignificant some argue they might be, and that something can be done about them.

We certainly hope that the other provincial and federal governments would consider joining TILMA since it would reduce and eliminate some of the remaining interprovincial barriers. TILMA, as already mentioned, will not eliminate all interprovincial trade barriers, due to its numerous exceptions, but it is, without a doubt, a step in the right direction towards a more open and predictable domestic market that is free of unnecessary restrictions and impediments.

Conclusion

TILMA, an extension of the AIT, aims to eliminate or reduce many of the interprovincial barriers between British Columbia and Alberta that are not covered by the AIT.

The AIT is complex, inaccessible, and ultimately unenforceable. TILMA addresses most of the shortcomings of the AIT, the most important of which involve labor mobility and the dispute resolution mechanism. In addition to setting the deadline for mutual recognition of remaining professional occupations and trades between British Columbia and Alberta, TILMA also provides a simpler dispute resolution process with consequences for non-compliance.

Furthermore, TILMA allows businesses broader access to government procurement and eliminates duplicate business registration and reporting requirements so that businesses registered in one province are automatically recognized in the other.

It is important to mention that TILMA is an improvement over the AIT but it is not a perfect trade agreement. It has many exceptions, such as taxation and social policy (including labor standards and codes, minimum wages, employment insurance, social assistance benefits, and workers' compensation), as well as regulated marketing and supply management of poultry, dairy, and eggs in Alberta.

Most of the current criticisms of TILMA are not focused on its exceptions but instead result from a broad misinterpretation and misunderstanding of the agreement.

One of the major criticisms is related to the scope and coverage of TILMA. Specifically, those opposed to TILMA argue that the agreement relates to intraprovincial measures, suggesting that TILMA applies to provincial and municipal measures such as zoning and land-use laws. This is, of course, not true. The only restriction TILMA imposes on intraprovincial measures is that they do not discriminate against businesses and individuals from the other province.

Appendix: Agreement on Internal Trade (AIT) case studies

Chapter 7: Labor mobility [19]

The AIT is intended to eliminate or reduce barriers to labor mobility within Canada. The labor mobility chapter is generally considered to be one of the more effective chapters in part four of the AIT. It is comprehensive and governments have invested considerable effort in applying it, but barriers to mobility persist.

The chapter establishes that any employee qualified for an occupation in one jurisdiction should have access to employment in other jurisdictions according to the terms established by the chapter (C-ITS, 1995: art. 701).

The chapter says that licensing, certification, and registration of employees should be competency-based, recognizing that competence and abilities can be acquired through different combinations of training and experience. It also provides for mutual recognition of occupational qualifications and the reconciliation of occupational standards (C-ITS, 2001: 15–16).[20]

In addition to regulated occupations, there are 65 trades that are regulated in some jurisdictions in Canada (LMCG, 2001: 6). The 65 trades were not included in the 1999 agreement titled A Framework to Improve the Social Union for Canadians (otherwise known as the Social Union Framework Agreement or the SUFA). Of the 65 regulated trades, 49 are currently covered by the Red Seal program (ISRSP, 2007).

19 Canadian governments are amending the labor mobility chapter. This is planned for January 2009. It will come into force in April 2009 and will have many of the features of TILMA, especially the mutual recognition principle that will allow a person qualified for an occupation in one jurisdiction to be recognized in all others without additional training, testing, or assessment.

20 A panel that considered a complaint by the Certified General Accountants' Association of Manitoba (CGA Manitoba) concerning Ontario's system for licensing public accountants describes Canadian governments' labor mobility obligations.

The AIT relies on the Red Seal Program as its primary method to achieve interprovincial/territorial recognition for regulated trades (LMCG, 2001: 6).[21]

The Red Seal allows tradespersons to practice in any province or territory. However, to get a Red Seal certificate one has to pass an interprovincial exam after one obtains a provincial certification. It is true that passing one interprovincial exam is less burdensome than passing a provincial exam for each province in which one wishes to practice. However, the Red Seal Program is not the same as mutual recognition or reconciliation of trade certifications. For the remaining 16 trades, tradespersons have to obtain certification in each province or territory in which they wish to practice, given that this province or territory regulates the trade.

Most tradespeople tend not to apply for the additional Red Seal certification at the time they are being certified (Brendan Walsh, Manager, Labour Mobility and Immigration Portal, Human Resources and Skills Development Canada, personal communication, February 27, 2007). Instead, they usually wait until they wish to work in another province and then the need to qualify for a Red Seal certificate becomes a disincentive to mobility.

Even though the AIT's labor mobility appears comprehensive and reasonably straightforward, there are still unresolved barriers to mobility in Canada.

In February 1999, all governments except Quebec signed SUFA in which they committed to full compliance with the labor chapter of the AIT by July 1, 2001 (LMCG, 2001: 1). Governments asked all regulatory bodies to voluntarily complete a mutual recognition agreement (MRA) in order accomplish SUFA's objectives. The Labour Mobility Coordination Group, reporting on the progress of the labor chapter of the AIT, noted that by the 2001 deadline, governments and regulators had substantially met their labor mobility obligations or were well underway to doing so for 42 of 51 regulated occupations covered by the AIT.[22]

The reality is that few of the occupations were fully mutually recognized by the 2001 deadline and problems remain with many trades. For example, as

21 More than 45 years ago, the Interprovincial Standards Red Seal Program, or more commonly known as the Red Seal Program, was established to facilitate the mobility of trade employees throughout Canada. The Red Seal allows tradespersons to practice anywhere in Canada. To obtain the Red Seal certification, a tradesperson has to, in addition to obtaining a provincial trade certificate, apply for and pass the Interprovincial Standards Red Seal Examination. For additional information on the Interprovincial Standards Red Seal Program, see <http://www.red-seal.ca/Site/index_e.htm>.

22 Professional occupations are usually regulated by non-government bodies which are delegated regulatory authority by governments (LMCG, 2001: 5). Trades, in contrast, are regulated directly by provincial and territorial governments.

of April 1, 2007, British Columbia and Alberta, under TILMA, identified 85 occupations and regulated trades that required reconciliation before mutual recognition could apply between the two provinces (BC-MED, 2006f, 2007).

The problem for the AIT is that there is no default mechanism to force regulating bodies and governments to resolve outstanding differences among the regulated occupations and trades and, as a result, these differences are never really resolved.

The best default mechanism is the true mutual recognition principle used by TILMA. It establishes that anyone qualified for an occupation or skilled trade in one jurisdiction will be considered qualified in the other.

By contrast, the AIT's undertaking is to provide access to employment for workers qualified in another jurisdiction based on an assessment of competence or a process requiring a comparative analysis of qualifications and standards. This process can be onerous and time consuming, unlike the immediate acceptance of a qualified worker based on the mutual recognition principle.

Despite the labor mobility chapter's innovation and good intent, it will never be effective until it includes mandatory recognition and reconciliation of occupational qualifications and standards among all professions and trades between all jurisdictions, reinforced by an undertaking by all governments to accept that anyone qualified in another province or territory is also qualified in their own.

Recent developments indicate that the AIT chapter on labor mobility is moving in this direction, as discussed elsewhere in this paper.

Chapter 9: Agricultural and food goods

If the AIT's labor mobility chapter is a strong and well-intentioned chapter that has not been as successful as Canadian governments might like it to be, the agriculture and food goods chapter (chapter nine) is limited and has been even less successful than anyone ever thought it could be.

The agriculture and food goods chapter has three elements:

- **Scope and coverage for existing measures relating to trade in agricultural and food goods**: Articles 900 and 902(1) establish that any existing measure that restricts interprovincial trade in agriculture and food goods would be subject to the AIT, but articles 902(2) to 902(5) establish that no existing measure is covered unless it is specifically included in the chapter by agriculture ministers or officials.

  The only things that have been included in the chapter since it came into force in July 1995 are measures related to shipping horticultural products in bulk containers, small grade potatoes, margarine coloring, dairy blends

and imitation dairy products, and fluid milk standards and distribution. All other existing agriculture and food measures that may restrict trade in agriculture and food products are excluded from the AIT.

- **Undertaking to broaden coverage:** Articles 902(4) and 903 commit governments to broaden the scope and coverage of the chapter by September 1, 1997, and carry out other initiatives to eliminate barriers to interprovincial trade in agriculture and food goods. This process is continuing with no apparent hope of reaching a consensus. In 2007, six provinces and one territory signed an interim agreement to broaden the scope of the chapter, but Quebec and Ontario remain outside this arrangement.

- **Undertaking not to introduce new trade restrictions:** Through articles 904, 905, and 907, Canadian governments are committed not to introduce new restrictions to trade in agricultural and food goods and to consult other governments if they propose to adopt or amend measures that may affect trade in agricultural or food goods. These commitments have been generally ignored.

An example of an amended measure that will restrict trade in a food good is the federal government's proposed amendment to the cheese standards in the Food and Drug Act regulations and the dairy products regulations that were published in December 2007 and will come into force in December 2008. This amendment will require the main dairy protein in cheese to be sourced directly from milk in fluid form during the cheese production. Currently, most cheese manufactured in Canada and in the rest of the world uses protein and other milk ingredients derived from milk before it is used in the cheese making process.

Cheese produced either way is exactly the same product and consumers could not tell the difference except that cheese made according to the old standard will no longer be sold as cheese in Canada. The only thing that consumers will notice is that cheese and products made from cheese will cost more. These new regulations are not necessary to protect consumers or their health and safety.

This amendment, which is intended to increase dairy farmers' income, is inconsistent with article 905 and can and should be challenged under the AIT.

It is interesting but not surprising that of the eight disputes considered by panels under the AIT, four of them relate to agricultural and food goods and all of these concerns deal, directly or indirectly, with dairy products or non-dairy products that compete with other dairy products. All panels found that the measures in dispute were protecting dairy products from competition one way or another and were barriers to trade. Only one panel report has been fully implemented and only after a year's delay. The recommendations

of two panels have not been implemented—one six years after the recommendations were issued by the panel and the other three years.[23] There is no sign that either will ever be implemented.[24]

Chapter 17: Dispute resolution procedures [25]

The fact that the AIT's dispute resolution process is ignored and unenforceable is the AIT's most important failure.

The AIT is a government-to-government agreement. Therefore, its dispute resolution procedures are based on governments engaging other governments to resolve disputes either on their own behalf or on behalf of people, businesses, or other groups.

In 2007, changes were made to simplify the AIT's dispute resolution procedures so that it no longer includes two sets of protracted and often ineffective consultations to try to resolve issues without reference to panels. The process remains cumbersome and inaccessible and closed to those who are actually affected by barriers and impediments to trade. In large part, this is a direct result of the complex, ambiguous, and opaque nature of the AIT itself.

People and businesses, that is, "private parties," as opposed to governments who are capital "P" Parties to the AIT, can make a direct complaint themselves, but only if their government decides not to make the complaint on their behalf.

If private parties make a complaint they must: (1) have suffered an injury or a denial of benefit as a result of the measure that is the subject of the complaint; (2) make the complaint within two years of knowing about the measure that is the subject of the complaint and of the injury or denial of benefit that is the basis for the complaint; (3) seek the permission of a screener who will ensure that the complaint is not frivolous and that there

23 The Quebec government removed its regulations preventing the manufacture and sale of colored margarine in July 2007. This leaves New Brunswick as the only jurisdiction which has not implemented a panel's findings; a report issued in September 2002 found the province's fluid milk distribution licensing system operates as a barrier to trade. While Ontario revoked its Edible Oil Products Act as recommended by a panel in November 2004, it immediately reintroduced restrictions on dairy blends contrary to the panel's recommendations.

24 Internal Trade Panel reports can be found on the Agreement on Internal Trade web site at <http://www.ait-aci.ca/index_en/dispute.htm>.

25 At the annual meeting of the Council of the Federation in July 2008, premiers agreed to further changes to the AIT's dispute resolution chapter to strengthen the enforceability of panel findings in government-to-government disputes. It remains to be seen how effective this will be and if governments will fix systemic problems with the person-to-government dispute process.

is a reasonable case of injury; and (4) try to resolve the complaint through consultations that can last as long as 120 days.

If a person or a business meets all these requirements and cannot resolve the issue, they can make a request for a panel to consider the issue. Proceeding to formal panel hearings will require about 120 days for submissions, counter-submissions, and presentations, and another 45 days for the panel to make its report. If the measure is found to be a barrier to trade then the government that is the subject of the complaint has 60 days to fix it.

If a government fails to comply with the panel's findings, then … nothing. The panel has no power or authority to enforce its decision by issuing fines or through other formal channels. The lack of a mechanism to enforce the panel's decision makes the entire dispute resolution process ineffective.[26]

Governments have been working under a mandate from the Council of the Federation (provincial and territorial governments) to find a way to penalize those who ignore panel findings. On June 10, 2008, internal trade ministers announced that they had reached a consensus on a dispute resolution enforcement mechanism. They met by the end of 2008 to sign off on the amendments to the dispute resolution chapter of the AIT. All parties, except Ontario, approved the draft text on the proposed amendments to the AIT's dispute resolution chapter (Committee on Internal Trade, 2008). Apparently, the changes involve monetary penalties in government-to-government disputes that reflect the size of a jurisdiction's populations. The changes also establish the time that must pass before a measure can be rechallenged. Ministers also agreed to establish a mechanism to deal with outstanding disputes under the AIT.[27]

These developments are promising but somewhat puzzling since the amendments appear to accommodate governments who ignored panel findings and it appears that governments who have ignored panels in the past can continue to do so.

It is not clear how much will change as a result of this development, but the significance of an ineffective dispute resolution in the AIT cannot be emphasized enough. It not only frustrates the entire dispute resolution process but also prevents the AIT from being fully implemented.

Enforceability is not the only disincentive to applying the AIT's dispute resolution procedures. Other disincentives include complexity, inaccessibility, and the cost and time necessary to make complaints. Probably the biggest deterrent to applying the AIT to challenge a government measure is trying

26 The AIT's dispute resolution process is also complicated and time-consuming, which further reduces its effectiveness (see, for example, Beaulieu et al., 2003: 32–33).

27 The communiqué announcing the agreement can be found on the Agreement on Internal Trade website at <http://www.ait-aci.ca/index_en/news.htm>.

to figure out if the measure is actually covered by the AIT and then getting governments to pay attention.

The question remains: Why would a person or government use the AIT if there is no way to ensure that governments comply with their obligations? Assuming the measure is covered by the AIT, it has to be an act of faith that governments will comply with it, and not many businesses or non-governmental groups have the resources, time, or interest to act on faith alone.[28]

28 Certified General Accountants (CGAs) are one of two "private parties" who have used the AIT to attempt to resolve barriers to trade or labor mobility. CGAs appeared to have gained access to public accounting in Quebec and Ontario, which was their objective, but there it has taken a long time—more than six years in the case of Ontario and about two years for Quebec and still waiting. Farmers Dairy of Nova Scotia has waited five years to be allowed to sell its fluid milk products in New Brunswick and is still waiting. CGAs' experiences can be found in a paper that the organization published in 2006, *Making Trade Dispute Resolution in Canada Work*. It can be found at <http://www.cga-online.org/servlet/portal/serve/Library/News+and+Media/_Product/ca_rep_2006-05_ait.pdf>.

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