TILMA and the Environment

A report on the potential environmental effects of the BC-Alberta
Trade, Investment and Labour Mobility Agreement

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Summary

TILMA (which comes into force on April 1, 2007) expands upon the Agreement on Internal Trade (AIT)[1], which came into force across Canada in 1995. TILMA does three main things:

1. It diminishes the border between Alberta and BC with the aim of creating what might be called a new integrated economic zone. In particular, Alberta and BC are generally not allowed to discriminate by providing better treatment for goods, persons (including companies), services or investors within their borders versus comparable ones in the other province.
2. It sets the rules for that new integrated economic zone. For example, neither Alberta nor BC, nor any other government entities in those provinces (such as municipalities), can maintain or establish new measures that restrict or impair trade, investment or labour mobility unless the province can show the restriction or impairment is exempted or justified under TILMA.
3. It creates a dispute resolution procedure whereby individuals and business entities can challenge government measures, and if successful be awarded monetary damages (of up to $5 million for each successful challenge) unless the measure is eliminated or otherwise changed to conform to TILMA.

This opinion focuses on the second and third items, since they appear to have the most significant environmental implications. In particular, note that item 2 above does not appear to require discrimination (see, for example, TILMA Articles 3.1 and 5.3), contrary to government claims. In other words, even if BC or Alberta gives exactly the same treatment to individuals and businesses from the other province as it gives its own, it can still be found in violation of TILMA.

[1] Available at http://www.ait-aci.ca/index_en.htm.

TILMA includes some broad exemptions related to the environment, such as for measures relating to water, the promotion of renewable and alternative energy, the conservation of 'forests, fish and wildlife', and the management of 'hazardous and waste materials'. However, these exemptions do not appear to include measures related to a number of other critical environmental issues, such as the reduction of greenhouse gases, protection of endangered plants in some of the most endangered ecosystems in the country (such as BC's Garry Oak, grassland and wetland ecosystems), or the reduction of air pollution.

Measures to address such non-exempted environmental issues will likely breach the broad prohibitions in TILMA. These include a prohibition on measures that "operate to restrict or impair trade between or through the territory of the Parties, or investment or labour mobility between the Parties" (Article 3.1), and a prohibition on "new standards or regulations that operate to restrict or impair trade, investment or labour mobility" (Article 5.3).

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

Note that many of the words and phrases in TILMA are unclear and so the following can often only suggest what they 'likely' mean. We will have to wait for panel and court rulings, or for clarifications by the Parties under Article 34.4, to fully understand the meaning of TILMA. Of course, this makes it difficult to anticipate the full legal ramifications of TILMA, and will likely increase the concerns of government entities considering passing new environmental protection measures.

For other recent analyses of TILMA, see:

- Ellen Gould, *Asking for Trouble: The Trade Investment and Labour Mobility Agreement*, Feb 2007, Canadian Centre for Policy Alternatives (CCPA), available at http://policyalternatives.ca/Reports/2007/02/ReportsStudies1553/index.cfm?pa=A2286B2A.
- Steven Shrybman, *legal opinion re: Trade, Investment and Labour Mobility Agreement*, Feb 12, 2007, Sack Goldblatt Mitchell LLP, available at http://www.sgmlaw.com/AssetFactory.aspx?did=218.

Three basic steps to determine if a 'measure' violates TILMA

TILMA "applies to measures of the Parties and their government entities that relate to trade, investment and labour mobility" (Article 2.1)[2]. The 'Parties' are BC and Alberta, and 'government entities' is defined broadly to include municipal governments, ministries, boards and commissions (thus including tribunals such as the BC Environmental Appeal Board and the BC Forest Appeals

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[2] Note 'relate to' here likely does not mean 'primarily aimed at', but rather is likely to be interpreted as something like, 'having a material affect upon'.

Commission). 'Measure' is defined very broadly to include "any legislation, regulation, standard, directive, requirement, guideline, program, policy, administrative practice or other procedure". Thus almost any action by Alberta or BC or by one of their 'government entities' constitutes a 'measure' under TILMA. Note that TILMA applies not only to measures after they are put in place, but also to measures in the proposal stage[3].

Three steps are involved in determining if a measure might violate TILMA. First, does TILMA apply to the measure in question? Second, does the measure breach one of the TILMA prohibitions? And third, is the breach justified under Article 6?

Step 1: Does TILMA apply to the measure in question?

Article 8 says the measure is not subject to the key prohibitions in TILMA if it is listed in Part V. Part V includes some important environmental exemptions, including certain measures relating to water, energy (including hydro), forests (including requirements that timber be used or manufactured in the province), fish, wildlife, and hazardous and waste materials (each of these are considered in more detail below). Article 17.1(b) requires the Ministerial Committee appointed by the Parties to "review annually the exceptions listed in Part V with a view to reducing their scope." The exceptions in Part V are therefore more likely to shrink than to expand over time.

Similarly, Article 9 says the measure is not subject to the key prohibitions in TILMA during the transitional period (April 1, 2007 to March 31, 2009) if it is listed in Part VI. Part VI includes "Existing standards and regulations … not otherwise expressly addressed", "financial support and assistance provided to the agriculture and agri-food sectors", as well as any measures by municipalities, and so most of the TILMA prohibitions will not apply to such measures until April 1, 2009. However, Article 9.4(a) states that during the transitional period, Parties shall "ensure that no measure listed in part VI is amended or renewed in a manner that would decrease its consistency with this Agreement".

Step 2: Does the measure breach one of the TILMA prohibitions?

<u>Article 3.1 ('No Obstacles'):</u> "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." 'Investment' is defined broadly to include:

- financial assets, including inventories, capital assets and goodwill;
- the acquisition of such assets;
- any enterprise (essentially defined to be business entities, such as corporations, whose purpose is economic gain and which are established or registered in BC or Alberta – note that foreign corporations can register in BC or Alberta to carry on business there); and
- the establishment, acquisition or expansion of an enterprise.

The meaning of 'restrict or impair' in Article 3.1 is obviously key. The AIT Margarine case provides some insight – in interpreting the 'no obstacles to trade' provision in the AIT, the panel held that "an obstacle to trade is created when a measure impedes trade. It need not restrict or prohibit it

[3] Article 25.6(a) allows an existing or proposed measure to be challenged under the dispute resolution procedure, and Article 27.9(b) allows a panel to rule on whether a measure "is or would be" inconsistent with TILMA.

entirely; an obstacle is created simply when trade is impeded"[4]. The panel heard evidence that the measure in question had added to the costs of margarine producers, and concluded, "So long as a measure can be seen to have impeded or restricted competitive opportunities, it will offend such rules and it is not necessary for the complainant to adduce the detailed economic analysis in support of its complaint"[5]. Thus added costs imposed by new regulations, even in a case like this where Quebec's margarine rules applied to margarine producers both inside and outside of Quebec, amounted to a violation of the 'no obstacles to trade' rule in the AIT.

Article 3.1 also applies the 'no obstacles' rule to "investment … between the parties". This is a significant expansion beyond the AIT (AIT Article 600 makes it clear that 'no obstacles' does not apply to investment). Note the definition of 'investment' includes the 'expansion of an enterprise' (which presumably includes an enterprise expanding, or seeking to expand, its operations or assets), and so any environmental measure that limits such expansion (provided there is an element of investment from investors in Alberta) will breach Article 3.1.

Note there is no requirement for discrimination in Article 3.1. This is similar to certain provisions of the AIT: in the AIT case concerning the fuel-additive MMT, despite ruling that AIT Article 401 (which requires reciprocal non-discrimination) had not been breached, the panel ruled that AIT Article 403 (which prohibits obstacles to internal trade) had been breached[6], confirming that there need not be discrimination to violate other Articles in the AIT. There is no reason to expect that TILMA will be interpreted any differently.

Article 4.1 ('Non-discrimination'): "Parties shall accord to: (a) like, directly competitive or substitutable goods; (b) persons; (c) services; (d) investors or investments; of the other Party treatment no less favourable than the best treatment it accords, in like circumstances, to its own or those of any non-Party." Environmental measures that attempt to distinguish between similar goods based on the environmental impacts of their process and production methods, for example, may run afoul of this Article, depending on how panels interpret "in like circumstances".

Article 5.1 ('Standards and Regulations'): "Parties shall mutually recognize or otherwise reconcile their existing standards[7] and regulations that operate to restrict or impair trade, investment or labour

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[4] "Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Québec Regarding Québec's Measure Governing the Sale in Québec of Coloured Margarine", June 23, 2005, at page 26, available at http://www.ait-aci.ca/index_en/dispute.htm (the 'AIT Margarine case'). This case concerned a Québec regulation that prohibited the sale of margarine if it has a similar colour to butter. Québec claimed that it was protecting consumers who were in some cases being given margarine when they thought it was butter. Alberta contended that changing the colour of margarine would reduce its appeal and depress demand for it in Québec, with consequent losses for Albertan margarine manufacturers, and that the Québec measure was really to afford protection to Québec producers of butter.

[5] AIT Margarine case, at page 27.

[6] "Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Canada Regarding the *Manganese-Based Fuel Additives Act*", June 12, 1998, at page 7, available at http://www.ait-aci.ca/index_en/dispute.htm (the 'AIT MMT case') This case concerned a federal statute that prohibited the importation into Canada or the interprovincial trade of MMT, a fuel additive used to increase the octane levels in unleaded gasoline. In passing the statute, the federal government was responding to concerns from motor vehicle manufacturers that MMT damages vehicle emissions control systems and so means that stricter emission control standards cannot be attained. A majority of the panel concluded that the federal statute violated the AIT.

[7] Note 'standard' is defined to mean a "specification, approved by a Party or by a recognized body" (and a 'regulation' is defined as a standard that has been adopted into law). This is somewhat unclear. Given that 'Party' is defined to only mean the two signatories (i.e. Alberta and BC), 'standard' might be interpreted to not include municipal measures unless approved by the province in some way (such as required for bylaws in relation to protection of the natural environment under BC's *Community Charter,* S.B.C. 2003, c.26, s.8(3)(j) and 9), unless municipalities are considered 'recognized

mobility." Note that 'standards' include "goods or related processes and production methods", and thus includes a broad range of environmental measures aimed at reducing the environmental impacts of manufacturing and production industries. While Article 5.1 does not strictly require harmonization (i.e. that Alberta and BC change their standards and regulations to be identical), it does require some form of 'reconciliation' of standards and regulations, although what that means exactly is unclear. It is conceivable that an investor might challenge a standard or regulation that is higher in one province than the other for failure to reconcile, and that in the absence of such reconciliation the lower standard or regulation should apply in the spirit of 'mutual recognition'.

Article 5.3 ('Standards and Regulations'): "Parties shall not establish new standards or regulations that operate to restrict or impair trade, investment or labour mobility." As with Article 3.1, this is very broad and many new standards and regulations for environmental protection will likely breach this provision. As with Article 3.1, discrimination is not required for Article 5.3 to be breached.

Article 7.2 ('Transparency'): a Party that is proposing to adopt or amend a measure that may materially affect the operation of TILMA must, to the extent practicable, notify the other province and take into consideration comments from that other province.

Article 12 ('Business Subsidies'): Article 12.1(a) and (b) prohibit direct or indirect 'business subsidies' that result in discrimination, and Article 12.1(c) prohibits such subsidies that "otherwise distort investment decisions". Although it is unclear how broadly the latter would be interpreted, it likely encompasses measures that reduce taxes or royalties[8] and other subsidies for the purpose of encouraging environmentally-friendly behaviour, because such subsidies are purposefully intended to change investment decisions. Note, however, that 'business subsidy' is defined to mean any kind of financial contribution that results in a draw on the public purse (including loans or specific reductions in taxes or royalties) "that confers a benefit on a specific non-government entity" (except for generally available infrastructure etc). The implications of this definition are unclear – if it means to only include subsidies directed at a "specific non-government entity", such as an individually named company, then why would it need to exempt "generally available infrastructure"?

Article 12 allows a subsidy if it "is to offset a subsidy being offered by a non-Party or a government entity not subject to this Article". Environmentally-friendly subsidies are usually fairly explicit and easy to quantify (e.g. a financial rebate from government for purchasing a car with high mileage to help reduce greenhouse gas emissions), whereas environmentally-unfriendly subsidies are usually less explicit and less easy to quantify (e.g. a lack of charges for polluting the atmosphere with greenhouse-gas emissions, effectively requiring the environment and future generations to subsidize present-day activities). There is at least cause for concern that panels would recognize the explicit, quantifiable, friendly subsidy, but not the implicit, unfriendly one.

Step 3: Is the breach justified under Article 6?

Under Article 6.1, to justify a measure that breaches one of the TILMA provisions, the defending Party (i.e. BC or Alberta)[9] must demonstrate that the measure satisfies each of the following three

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bodies'. On the other hand, Article 2.1 says TILMA applies to measures of both the Parties and their government entities, suggesting that 'standard' might include municipal bylaws. Ellen Gould suggests the latter is the more likely interpretation: "In the treatment of subfederal jurisdictions under NAFTA, NAFTA obligations that just apply to a 'party' have also been used to challenge state and local government measures."

[8] Note that although taxes and royalties are included in Part V exemptions, they are explicitly still subject to Article 12.

[9] That the defending Party has the obligation to prove satisfaction of each of the three tests is confirmed by the wording of Article 6.1 ("provided that the Party can demonstrate that …") and by AIT panel decisions (see, for example, the AIT

tests:

1. "the purpose of the measure is to achieve a legitimate objective";
2. "the measure is not more restrictive to trade, investment or labour mobility than necessary to achieve that legitimate objective"; and
3. "the measure is not a disguised restriction to trade, investment or labour mobility".

Legitimate objective: Such objectives are listed and include "protection of human, animal or plant life or health", "protection of the environment", "conservation and prevention of waste of non-renewable or exhaustible resources', and "consumer protection". There are therefore broad 'legitimate objectives' related to the environment.

Panels will however scrutinize the measure and will require sufficient evidence to show that it is for a legitimate objective[10]. Further, the definition of 'legitimate objectives' says that consideration is to be given to "scientific justification", and there is no recognition of the precautionary principle, suggesting that panels might not accept a measure based on the precautionary principle as being for a legitimate objective.[11]

Also note the definition of 'legitimate objectives' means one of the listed objectives "pursued within a Party". This may be interpreted to mean that extra-territoriality is not allowed, such as when a municipality attempts to adopt an ethical purchasing policy that it will not purchase products whose process and production methods (which may have occurred outside of the municipality's province) causes unacceptable environmental impacts. The defending Party would likely also have to show that the measure was effective in attaining the legitimate objective, and that the legitimate objective was important enough to justify the severity of the measure[12].

Not more restrictive than necessary: As noted by Ellen Gould at p.25, in all six AIT cases where governments tried to claim their measures were justified, they failed on the AIT's 'not more restrictive than necessary' test. In the AIT MMT case, for example, the panel held that the defending Party must "demonstrate that no other available option would have met the legitimate objective".[13] Demonstrating such a negative can prove to be difficult. Similarly, in the AIT Accounting case, the panel held that the defending province must provide evidence that less restrictive means of meeting the legitimate objective were considered and found to be inadequate[14].

Ellen Gould at p.26 summarizes this requirement as follows: "If either the panel or the complainant can propose 'reasonably available' alternative measures that would meet the measure's objective but in a less restrictive way, then the measure is ruled to be unnecessary… Trade panels have ruled that

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MMT case at page 9).

[10] AIT MMT case, at pages 9-10; AIT Margarine case, at page 28, 30.

11 In contrast to TILMA, the AIT includes an explicit provision recognizing the precautionary principle. AIT Article 1505.8: "For greater certainty, an environmental measure shall not be considered to be inconsistent with this Agreement by reason solely of the lack of full scientific certainty regarding the need for the measure." Note that TILMA Article 1.2 states that in the event of an inconsistency between TILMA and the AIT, "the provision that is more conducive to liberalized trade, investment and labour mobility prevails". It is therefore possible that TILMA panels might question a measure based on the precautionary principle and find that it is not justified under Article 6.

[12] Ellen Gould's paper at p.26 and endnotes 41 & 42.

[13] AIT MMT case, at page 11.

[14] "Report of the Article 1716 Panel Concerning the Dispute Between the Certified General Accountants Association of New Brunswick and Québec Regarding Québec's Measures Governing the Practice of Public Accounting", August 19, 2005, at page 21, available at http://www.ait-aci.ca/index_en/dispute.htm (the 'AIT Accounting case').

the fact that an alternative measure would cost a government more is no reason why it should not have been adopted if it is less trade restrictive." Further, whether a Party has satisfied this 'not more restrictive than necessary' test will often be difficult to predict, given that the panel will speculate about the possibility of alternative measures. This was demonstrated in the AIT MMT case, where the majority of the panel found the defending Party had not satisfied the test, whereas the dissenting member(s) found that it had[15].

The Province defends: Note it is the Party (i.e. Alberta or BC) that must demonstrate the measure satisfies the three tests in Article 6.1. If the measure was put in place or proposed by a municipality, for example, the municipality would presumably have to convince the province to vigorously defend its measure when challenged. Provided the three tests can be satisfied, however, "Parties may establish the level of protection necessary to achieve a legitimate objective" (Article 6.2)[16].

The dispute resolution procedure

Part IV of TILMA describes the dispute resolution procedure. Any Party or a person who feels an "existing or proposed measure" violates TILMA may, after first exhausting all other reasonable means to resolve the matter (Article 24.2 and 25.2), complain and request the Parties consult to resolve the issue (Article 25). If such consultation is refused or if it fails, the complaining Party or person can have a panel established (Article 26). The panel, following UNCITRAL Arbitration Rules and after a public hearing, must publicly release its report with recommendations (subject to confidentiality concerns). Note that all of the prohibitions in TILMA, including the transparency provisions, can provide the basis for a proceeding[17]. TILMA does not include the explicit AIT provisions aimed at ensuring environmental considerations are adequately taken into account by panels[18], although the UNCITRAL rules implicitly grant panels the discretion to accept amicus briefs by environmental NGOs[19].

If the panel finds the existing or proposed measure violates TILMA but the defending Party does not

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[15] AIT MMT case, at pages 11, 14. Such difficulty in predicting the outcome of a panel proceeding might be compounded by the fact that decisions of prior panels are not binding on other panels (unlike the rule of *stare decisis* in the courts) – see the AIT Margarine case at page 15. In addition, TILMA does not partially clarify the least restrictive test when considering environmental measures, as does AIT Article 1505.7: "Further to Article 404(c) (Legitimate Objectives) and Annexes 405.1(5) and 405.2(5), an environmental measure shall not be considered to be more trade restrictive than necessary to achieve a legitimate objective if the Party adopting or maintaining the measure takes into account the need to minimize negative trade effects when choosing among equally effective and reasonably available means of achieving that legitimate objective."

[16] Again, this raises the question of what is meant by "Parties" here – it may mean just the two provinces, raising the question of whether a municipality could establish a higher level of protection in one of its environmental measures than its province agrees with (or would at least be prepared to vigorously defend).

[17] For example, the AIT MMT case (at pages 5-6) case confirms that the transparency provisions of the AIT can provide the basis for a proceeding. Note, however, TILMA Article 14.4 which states that the monetary award provisions do not yet apply to disputes relating to procurement measures.

[18] The AIT includes the following: Article 1505.6 "Where appropriate, the Parties shall take environmental considerations into account in the dispute resolution procedures and harmonization processes set out in this Agreement." Article 1510.2: "In order to facilitate the resolution of all disputes involving any significant environmental aspects, the Parties: (a) should make use of environmental experts in all conciliation and mediation proceedings as well as during panel hearings; and (b) may take appropriate steps to ensure that a sufficient number of environmental experts are nominated to the roster established under Article 1705 (Establishment of Panel) so as to be available for environmental disputes and other disputes involving environmental aspects.

[19] A. K. Bjorklund, "The Participation of Amici Curiae in NAFTA Chapter Eleven Cases", available at http://www.international.gc.ca/tna-nac/documents/participate-e.pdf.

move into compliance with the panel's recommendations within the time set by the panel, the complaining Party or person can seek a monetary award of up to $5 million (Article 29, 30). The provision for monetary damages is a significant expansion beyond the dispute resolution process in the AIT, under which monetary damage awards are not available. Finally, if a monetary award is granted by a panel, either the complaining Party or person, or the defending Party, can seek judicial review by a court (Article 31)[20].

Once a panel proceeding has begun, no one else can initiate such a proceeding (Article 34.2). However, Article 34.2 contemplates that once the original panel proceeding is complete, further proceedings regarding the same measures may be initiated[21]. This is significant because, as noted by Steven Shrybman (at page 24), while the panel process cannot actually require a government to rescind a law or regulation, "it is entirely unrealistic to expect that a government will maintain an offending measure for which it has had to pay damages under Part IV when there is a queue of other parties waiting in line to make precisely the same claim".

Curiously, 'person' includes corporations, including foreign corporations that are registered in BC or Alberta, but does not include non-profit organizations based in BC or Alberta (the TILMA definition of 'person' includes enterprises, which are in turn defined as entities created for economic gain). Non-profits do not therefore appear to have access to the TILMA dispute resolution process. In addition, Steven Shrybman (at pages 27-28) argues that the NAFTA guarantee of national treatment means that U.S. and Mexican investors will also be able to claim under the TILMA prohibitions and dispute resolution procedure, and that because this includes monetary damage awards they are likely to do so[22].

Examples of potential TILMA challenges to environmental measures

Given the vagueness of many of the TILMA provisions, potential challenges are necessarily speculative. But here are some possibilities.

Greenhouse gases (GHGs)

Global warming is one of, if not the key challenge of the twenty-first century. As recently noted by Sir Nicholas Stern, "Our actions over the coming few decades could create risks of major disruption to economic and social activity, later in this century and the next, on a scale similar to those associated with the great wars and the economic depression of the first half of the 20th century. And it will be difficult or impossible to reverse these changes"[23]. Stern notes that, "Climate change

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[20] Interestingly, there appears no provision for judicial review of the panel's initial report or in the case that a monetary award is denied by the panel.

[21] This appears clear from Article 34.2 which states, "A person may not initiate any proceeding under this Part regarding any measure that is already the subject of proceedings under this Part until such time as those ongoing proceedings have been completed." It also appears to be confirmed by Article 30.2, which states, "In no circumstances shall a monetary award exceed $5 million with respect to any one matter under consideration" – the use of 'matter' rather than 'measure' here is noteworthy, and suggests that another complaint concerning another matter, albeit the same measure, can also receive up to $5 million in damages.

[22] Although Article 2.3 states, "The benefits of this Agreement accrue only to the Parties and their persons", Shrybman points out that provincial governments cannot exempt themselves from international agreements in this way. In contrast, AIT Article 1809 nullifies any AIT Article found to confer a right on an international trading partner.

[23] *Stern Review: The Economics of Climate Change*, Oct 2006, Executive Summary at page ii, available at http://www.hm-treasury.gov.uk/media/8AC/F7/Executive_Summary.pdf (the 'Stern review'). Sir Nicholas Stern is head of the UK Government Economic Service, advisor to the UK Government on the Economics of Climate Change and

presents a unique challenge for economics: it is the greatest and widest-ranging market failure ever seen"[24]. In essence, we have treated the atmosphere as a dumping site, with minimal limitation or cost requirements. Will TILMA make it more difficult for Alberta and BC to address this failure?[25] The answer appears to be yes. Following the above three-step process:

Step 1: TILMA Part V has a number of exemptions relating to energy, but they likely only include some of the critical measures necessary for reducing GHG emissions in order to mitigate global warming:

- "Measures adopted or maintained to promote renewable and alternative energy". The promotion of energy sources such as wind, solar, geothermal and biofuels therefore appear to be clearly exempted from TILMA.
- "Measures adopted or maintained relating to … conservation of energy". It is unclear how this exemption will be interpreted. It might be interpreted to only include measures primarily aimed at avoiding the loss or waste of energy in the development and production of energy supplies, so as to maximize the recovery and associated revenues from energy sources and to slow their depletion. Although this might include measures aimed at reducing GHG emissions from fugitive emissions of fuels, it would not include measures aimed at reducing GHG emissions from the consumption of fuels. Alternatively, this exemption might be interpreted more broadly to include any measure aimed at reducing energy use (and thus 'conserving' energy). It is therefore unclear, but perhaps unlikely (given that there is no general exemption for the air or atmosphere as there is for water) that this exemption includes a range of critical GHG reduction measures aimed at improving energy efficiency during consumption (such as requirements that household appliances use less electricity or that cars have higher mileage), reduction of energy wastage by consumers (such as building code requirements to insulate homes), and other measures aimed at reducing energy consumption (such as disincentives to use cars, promotion of public transit, and the promotion of locally produced goods (such as food) to minimize transportation).

Development, and former Chief Economist and Senior Vice-President of the World Bank.

[24] Stern review, Executive Summary at page i.

[25] As background, the following table includes the primary sources of GHG emissions in Alberta and BC. Data is from Annex 12 of the *National Inventory Report, 1990-2004 – Greenhouse Gas Sources and Sinks in Canada*, April 2006, Environment Canada, available at http://www.ec.gc.ca/pdb/ghg/inventory_report/2004_report/toc_e.cfm.

Data for 2004	Alberta kt CO_2 equivalent (percentage of Alberta total)	BC kt CO_2 equivalent (percentage of BC total)
Energy	203,000 (86.4%) from stationary combustion sources: 136,000 (57.9%) from transportation: 33,000 (14.0%) from fugitive sources: 33,600 (14.3%) mostly from solid waste disposal on land	55,200 (82.6%) from stationary combustion sources: 22,600 (33.8%) from transportation: 27,000 (40.4%) from fugitive sources: 6,090 (9.1%)
Industrial	12,700 (5.4%) mostly from 'other and undifferentiated production'	3,170 (4.7%) e.g. from cement and aluminium production
Agriculture	17,000 (7.2%) from enteric fermentation, manure management, and agricultural soils	2,500 (3.7%) from enteric fermentation, manure management, and agricultural soils
Waste	2,200 (0.9%) mostly from solid waste disposal on land	5,900 (8.8%) mostly from solid waste disposal on land
TOTAL	235,000 (100%)	66,800 (100%)

- "Measures adopted or maintained relating to … development … or management … of energy". It seems unlikely these exemptions would be interpreted to include a number of other key measures relating to GHG emission reduction in the energy field, since 'development' and 'management' likely only refers to measures primarily aimed at energy supplies, rather than measures aimed at influencing consumption of energy or the environmental consequences of such consumption. For example, requirements related to carbon capture and storage (CCS), meaning the capture of greenhouse gases from a power plant or other significant point source and its injection underground, would likely not be included under this exemption.

The other TILMA Part V exemptions appear unlikely to cover GHG reduction measures:

- "Measures adopted or maintained relating to … the management and conservation of forests, fish and wildlife" (p.20). Global warming will certainly have some significant effects on forests, fish and wildlife, as well as a myriad of other things, including the weather, sea levels, etc. But it seems unlikely a panel would interpret the exemption for "forests, fish and wildlife" as exempting general GHG emission reduction measures, given that "forests, fish and wildlife" are just some of the many things that will be impacted by global warming. Rather, a panel would likely hold this exemption is for measures aimed primarily at "forests, fish and wildlife" whereas GHG emissions reduction measures are aimed primarily at mitigating climate change.
- "Measures adopted or maintained relating to the management and disposal of hazardous and waste materials" (p.20). It seems unlikely this would be interpreted to include measures aimed at reducing GHG emissions. GHGs are generally not toxic (the main GHG is carbon dioxide) and so are unlikely to be found to be 'hazardous materials'. Although GHGs might be thought of as 'waste materials'[26], the 'management and disposal' of waste materials is likely to be interpreted as meaning the collection, handling, recycling, storage and transportation of such materials as opposed to avoiding their generation in the first place[27].

The BC government seems to agree with the above limited interpretations of the TILMA Part V exemptions as they apply to GHG emission reduction measures. In a recent release, the BC Ministry of Economic Development responded to questions about how TILMA will apply to the Province's climate change action plan[28]. It emphasizes the importance of the justification process under Article 6, and briefly notes there are provisions regarding conservation measures. Although it lists some of the Part V exemptions (such as promoting renewable and alternative energy), it does not mention the other Part V exemptions considered above, suggesting it agrees they would not apply.

In summary, all that can be said for sure is that the basic TILMA prohibitions do not apply to the promotion of renewable and alternative energy. While that is important, it leaves a broad array of

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[26] For example, BC's *Environmental Management Act*, S.B.C. 2003, c. 53, s.1(1), defines 'waste' to include 'air contaminants', which in turn is defined to include substances introduced into the air capable of injuring health, property or any life form, or capable of damaging the environment.

[27] For example, BC's *Environmental Management Act*, S.B.C. 2003, c. 53, s.1(1), defines 'waste management facility' to mean a facility for the treatment, recycling, storage, disposal or destruction of a waste; it defines 'waste management plan' to mean a plan that contains provisions or requirements for the management of recyclable material or other waste or a class of waste within all or a part of one or more municipalities; and under Part V – Municipal Waste Management, s.23 defines 'manage' or 'management' to include the collection, transportation, handling, processing, storage, treatment, utilization and disposal of any substance.

[28] "For the Record: BC/Alberta Trade, Investment, and Labour Mobility Agreement (TILMA) and the Environment", Ministry of Economic Development, Feb 15, 2007, available at http://www.gov.bc.ca/ecdev/down/tilma_ftr_environment.pdf.

critical GHG emission reduction measures subject to the TILMA prohibitions.

Step 2: Most GHG reduction measures not on Part V will likely breach one of the TILMA prohibitions, regardless of whether they discriminate between Alberta and BC companies or individuals. For example:

- Measures requiring improved energy efficiency and reduced wastage during consumption will impose costs on manufacturers to redesign their products and on building owners or operators to buy new products, and will therefore likely be found to restrict or impair investment.
- Other measures aimed at reducing energy consumption (such as incentives to use public transit and disincentives to use cars, or the promotion of locally produced goods) will likely be found to impair investments (such as in car manufacture and in non-locally produced goods).
- Measures requiring carbon capture and storage (CCS) will impose additional costs and will therefore likely be found to restrict or impair investment.

In each case, the measures in question would likely breach Articles 3.1 and 5.3, and possibly others (such as Article 5.1 if Alberta and BC propose or implement differing measures). It is therefore difficult to reconcile Articles 3.1, 5.3, etc. with the BC Ministry of Economic Development's statement that: "Even if Article 6 were not in the agreement, the only way that B.C. could be subject to a dispute under TILMA is if B.C. were to discriminate actively against Alberta-based companies or individuals. If there is no discrimination, there is no dispute"[29].

Step 3: GHG emission reduction measures that are not included in Part V will therefore probably have to be justified under Article 6. Such measures will probably fall under the legitimate objective of 'protection of the environment', and presumably panels will not question the 'scientific justification' for addressing global warming. However, it is not hard to imagine difficulties in defending such measures under the 'not more restrictive than necessary' test. For example:

- Measures aimed at improving energy efficiency, reducing waste, or otherwise reducing energy consumption: complainants might argue it would be less trade- and investment-restrictive to implement measures to change our energy sources to renewable, alternative or nuclear, rather than trying to decrease the amount of energy we use.
- Measures requiring carbon capture and storage (CCS): complainants (who will be associated with a relatively small number of significant point sources of GHG emissions, such as those in the Alberta oil sands) might argue that the use of nuclear power or the public promotion of energy-efficiency improvements would be less restrictive.

Many other alternative measures might be raised by complainants in an effort to show there were less trade- and investment-restrictive measures that could have been taken, such as:

- the use of economic measures, such as tradeable permits or a green tax on carbon emissions, rather than absolute controls;
- the use of educational efforts or voluntary ecolabelling to inform people of how to reduce their GHG emissions; and
- the purchase of international credits under Kyoto, such as under the Clean Development Mechanism whereby Canadian governments can fund projects in other countries to reduce their GHG emissions.

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[29] Footnote 28 above.

Choosing the right combination of GHG reduction measures will be no easy task, and will likely involve some trial and error over the coming decades. It is possible that highly trade- and investment-restrictive measures will prove to be most successful. Granting individuals and business entities the right to challenge each new measure when proposed or implemented, and granting significant effective decision making power to trade panels constituted under TILMA, seems likely to more hinder than aid measures to mitigate global warming.

Endangered species

Although global warming has grabbed recent headlines, we are also suffering both locally and globally from a severe rate of species extinction. In BC, for example, out of a total of 4263 documented plants and animals, 583 (13.7%) are currently on the provincial red list (meaning extirpated, endangered or threatened), another 793 (18.6%) are on the blue list (special concern), and 5 (0.1%) are extinct[30]. As with GHG emission reduction measures, TILMA appears to provide opportunities for challenging measures to protect species at risk, in particular based on the 'not more restrictive than necessary' test.

Step 1: TILMA Part V exempts measures relating to "the management or conservation of forests, fish and wildlife". It is unclear how a panel might interpret this exemption. The word 'wildlife', for example, sometimes means all living organisms, but such an interpretation would make the separate inclusion of 'forests' and 'fish' superfluous. It is therefore possible, if not likely, that a panel would interpret the word 'wildlife' more narrowly to not include forests and fish[31]. Further, the BC *Wildlife Amendment Act*, 2004[32] defines the word 'wildlife' to mean "raptors and game and other species of vertebrates prescribed by regulation". Similarly, Alberta's *Wildlife Act*[33] defines 'wildlife' to mean "big game, birds of prey, fur-bearing animals, migratory game birds, non-game animals, non-licence animals and upland game birds". A TILMA panel is therefore likely to interpret the word 'wildlife' in TILMA Part V to mean 'animals' or perhaps just 'vertebrates'.

Interpretations of the words 'forests' and 'fish' are equally unclear. For example, 'forests' may be interpreted to mean only large contiguous forests, and so would not include clearings, wetlands, rocky slopes and riparian habitat that is surrounded by forests, nor sparsely treed areas such as parklands. Monique Ross, in her book *Forest Management in Canada*, offers this definition of 'forest land': "Land under natural or cultivated stands of trees intended for forest use, including land cleared of trees but which will be reforested. Permanent meadows and pastures with scattered trees and shrubs do not constitute forest land"[34].

It therefore seems likely that the phrase "forests, fish and wildlife" will be interpreted to exclude non-animal or non-vertebrate species that occur in grasslands, wetlands, marshes, alpine areas, beaches, sand dunes, deserts, parklands or other sparsely treed areas, etc. This list includes many

[30] Data from the *BC Species and Ecosystem Explorer*, BC Ministry of Environment, available at http://srmapps.gov.bc.ca/apps/eswp/.

[31] In the case of statutory interpretation, as described by R. Sullivan in *Sullivan and Driedger on the Construction of Statutes*, 4th ed (Butterworths, 2002) at page 159, "courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant."

[32] S.B.C. 2004, c. 56. Although not yet in force, this is a relatively recent definition for the word 'wildlife' by the BC legislature, and so will likely have persuasive force for a TILMA panel. Note the current BC *Wildlife Act* includes endangered and threatened species in the definition of 'wildlife'.

[33] R.S.A. 2000, c. W-10.

[34] Ross, M., *Forest Management in Canada* (Canadian Institute of Resources Law, University of Calgary, 1995) at page 350.

critical habitats in BC. Indeed, BC's non-forest ecosystems are its most endangered: the Southern Vancouver Island Garry Oak ecosystem[35] and the South Okanagan Antelope-brush grasslands[36] are the most endangered ecosystems in BC and are among the most endangered ecosystems in Canada, and wetlands in the Lower Fraser Valley have significantly declined resulting in numerous species being put at risk[37].

Another Part V exemption is for measures adopted or maintained relating to water. It seems unlikely this would be interpreted to include measures to protect wetlands, which consist of very much more than just the water in them (rather, the water exemption would likely be interpreted to mean measures related to water contamination, drinking water standards, and withdrawals of water from natural watercourses).

Step 2: BC's most endangered ecosystems, such as Garry Oak parkland, grasslands, and wetlands, are under continuing pressure from urban development, contamination, and agriculture. Measures to protect them therefore seem almost certain to breach the TILMA prohibitions on restricting or impairing investment in Articles 3.1 and 5.3.

Step 3: For those species or ecosystems not exempted by Part V, a measure will have to be justified under Article 6. TILMA includes relevant legitimate objectives, namely "protection of the environment" and "protection of human, animal or plant life or health".

There are many different ways to protect species at risk, such as absolute prohibitions on habitat destruction (with or without compensation), land purchases or swaps, voluntary stewardship by private landowners, restoration of habitat elsewhere, etc. As with the discussion on GHGs above, this opens up possibilities for challenges that a government entity did not choose the least trade- or investment-restrictive approach to protect a species.

Protected areas

Step 1: Measures related to protected areas, such as the creation and regulation of provincial parks or urban greenspace, are not separately exempted in Part V. That leaves the exemptions already considered above, in particular the management or conservation of forests, fish and wildlife. Although this would likely cover some important measures related to protected areas, as discussed above it would likely not cover measures to protect ecosystems such as grasslands, parklands and wetlands.

Step 2: Protected areas restrict what can occur on a piece of land, and are therefore likely to be found to restrict or impair investment. Consider, for example, an enterprise that operates hotels or provides all-terrain vehicle outings for tourists and wants to expand into a park. A measure limiting or forbidding that would operate to restrict or impair the expansion of the enterprise, and thus would likely be found to have breached Articles 3.1 and 5.3. Such a measure might include the initial creation of the protected area, or the regulation of that area.

Step 3: Once again, the primary difficulty is likely to be the 'not more restrictive than necessary' test

[35] This Garry Oak ecosystem is a matrix of open woodland and meadow and thus unlikely to be included in 'forests' under TILMA. It accounts for 58% (18 out of 31) of the BC plant species listed as Endangered under the federal *Species at Risk Act*.

[36] Grasslands of the Southern Interior, British Columbia Ministry of Sustainable Resource Management, available at http://www.env.gov.bc.ca/wld/documents/grasslands_si.pdf.

[37] *Environmental Trends in BC, 2002,* BC Ministry of Water, Land and Air Protection, at page 52, available at http://www.env.gov.bc.ca/soerpt/pdf/ET2002Oct221.pdf.

in Article 6. For example, a commercial enterprise might argue that a total ban on certain activities in protected areas is not necessary to protect the environment, but rather all that is needed is that those activities take place in a sensitive manner.

Air pollution

Step 1: As discussed above, it seems unlikely that the Part V exemption for measures "relating to the management and disposal of hazardous and waste materials" includes reducing air pollutants, such as nitrogen oxides, volatile organic compounds, fine particulate matter, sulphur oxides, ammonia, or CFCs and other ozone-depleting substances.

Step 2: Reducing air pollution will require reductions in emissions from vehicles, oil refineries, sawmills, cement plants, homes that burn natural gas or wood, etc. All of these are 'investments' (which includes, for example, "capital assets"), and so air pollution measures are likely to breach Articles 3.1 and 5.3.

Step 3: Once again, there is a large number of ways to tackle air pollution: major point sources (such as manufacturing plants) and/or diffuse or mobile sources (such as vehicles) might be addressed, and different regulatory tools might be used, including: outright prohibitions on certain types of equipment, processes, or fuels; temporal limitations (such as no driving once a week); prescriptive measures requiring certain clean technologies to be used; and more economic approaches (such as tradeable permits for specific types of pollutants, green taxes such as pollution or traffic congestion charges, and rebates for those who invest in cleaner technology). Given such a broad range of approach, challenges that a government entity did not choose the least trade- and investment-restrictive combination are possible.

Other potential challenges

A range of other environmental measures are potentially subject to challenge under TILMA, such as:

- Urban land use planning: Similar to protect areas, municipal bylaws to protect green space for non-'forest, fish and wildlife' biodiversity protection or recreation might come under challenge. So too might measures to prevent sprawl (a complainant might argue, for example, that if the purpose of preventing sprawl is to reduce vehicle use and thus emissions, rather than prohibiting new development on the outskirts of a town, a less restrictive approach would be to improve gasoline standards).
- ALR: See Ellen Gould's paper for a discussion of the difficulties BC would face if it had to justify the BC Agricultural Land Reserve (which clearly restricts investment in real estate development).
- Mandatory eco-labelling: If a province or government entity proposes mandatory eco-labelling, complainants might argue that voluntary labelling or other measures would be sufficient and less restrictive (or in the case of things like genetically modified organisms (GMOs), complainants might simply argue there is insufficient scientific justification for the measure to be considered as pursing a legitimate objective).
- Soil contamination: Although the Part V exemption for water presumably includes measures related to water contamination, there is no Part V exemption that covers soil contamination. Thus measures related to contaminated sites, the use of pesticides (for lawns in cities or for agriculture), and the promotion of organic farming might all be challenged and require justification under Article 6. Again, there are a broad range of tools to try to avoid soil contamination, ranging from

complete bans on the purchase or use of pollutants, to controls on their use, to economic incentives to reduce their use, to simple education to use them wisely. Thus complainants might try to argue that alternative measures were available and less restrictive.

- Limitations on the use of Crown land: Much of BC is Crown land, and the province grants a significant number of permits to private enterprises to carry out forestry, mining, grazing, and other activities on such land. One of the long-standing debates over Crown land is the duration of these permits – private enterprises argue that they longer they last for, the more incentive those enterprises would have to treat the land sustainably since the enterprise's long term financial health would be dependent on it. Ideally, some argue, the land should be privatised to create the greatest incentive for stewardship. Opponents to such ideas counter with examples of how private land has often been seriously degraded in the interests of short-term profit motives. Does TILMA have anything to say about this debate? Although this is well into the range of speculation, might a complainant operating on Crown land challenge the terms and conditions, or limited duration, of their permit to operate, arguing that it restricts and impairs their investments? Might they argue that a longer-term permit to operate, or perhaps even a permanent lease or land-sale, would be a less restrictive measure?

Might TILMA promote sustainability?

Does TILMA require sustainable development?

There are two mentions of sustainable development in TILMA. The first is in Part 1 ('Operating Principles'): BC and Alberta resolved to "promote sustainable and environmentally sound development". Such statements in the preamble provide assistance to panels and courts when interpreting ambiguous phrases in the body of the agreement[38]. Although this particular statement might support an environmentally-friendly interpretation of other parts of TILMA, there are numerous other statements in Part 1 that would have the opposite effect, such as to "Establish a comprehensive agreement on trade, investment and labour mobility that applies to all sectors of the economy", to "Eliminate barriers that restrict or impair trade, investment or labour mobility", and to "Minimize the impacts of other measures that may adversely affect trade, investment or labour mobility". It is therefore questionable whether this mention of sustainable development in the preamble would significantly support environmentally-friendly interpretations.

The second mention of sustainable development in TILMA is in Article 5.4 ('Standards and Regulations'): "Parties shall continue to work toward the enhancement of sustainable development, consumer and environmental protection, and health, safety and labour standards and the effectiveness of measures relating thereto." This might be used to inform the interpretation of other TILMA Articles, in particular the other paragraphs of Article 5 (such as indicating that the reconciliation of standards and regulations under Article 5.1 should not result in the lowest common denominator). It may not prove to be effective as a defence, however, given that environmental protection is a legitimate objective under Article 6, a panel would likely conclude that Article 6 should be used to justify a measure that breaches a TILMA Article rather than Article 5.4. Finally, Article 5.4 is a mandatory provision ('shall') and so an individual or enterprise might attempt to use the dispute resolution process to enforce it. However, the language here is relatively weak – Parties shall 'continue' to work 'toward' sustainable development. Contrast this with the more clearly mandatory language in Article 3.1 for example: "Each Party shall ensure that its measures do not …" Article

[38] AIT Margarine case, at page 20.

5.4 therefore seems to provide little that would actually impose sustainability as an enforceable objective.

Might green investors challenge perverse subsidies?

Government subsidies can operate to encourage the continuance or expansion of environmentally-unfriendly activities (and are therefore known as 'perverse' subsidies), such as intensive and/or chemical-based agriculture, individual transportation by cars, etc. Such subsidies might be direct in the form of financial aid, or indirect in the form of externalities (e.g. allowing individuals and companies to pollute for free), leading, in the case of global warming, to what Sir Nicholas Stern calls "the greatest and widest-ranging market failure ever seen"[39].

Article 12 prohibits Parties from directly or indirectly providing business subsidies. Might this be used to challenge perverse subsidies? For example, might a green-energy producer challenge the fact that fossil-fuel energy producers are allowed to pollute the atmosphere for free? Might an organic farmer challenge the fact that conventional farmers are allowed to contaminate the soil for free? Such challenges might be easier in the case of explicit subsidies, such as accelerated capital cost depreciation to reduce taxation for polluting industries, but more difficult in the case of implicit subsidies, such as environmental externalities.

'Business subsidies' are defined to mean a financial contribution, such as a reduction in taxation or royalties, or "any form of income or price support that results directly or indirectly in a draw on the public purse. This sounds promising – for example, there are general estimates for the future public costs to deal with global warming that is occurring because individuals and entities are allowed to emit GHGs for free today. However, Article 12 permits business subsidies if they are to "offset a subsidy being offered by a non-Party or a government entity not subject to this Article", and certainly many jurisdictions around the world are permitting environmental externalities to continue. In this sense, there is an element of 'lowest-common-denominator' in Article 12, because a perverse subsidy can be continued if it is to offset a similar perverse subsidy in some other jurisdiction.

[39] Footnote 24 above.