SGEU Brief

Saskatchewan Standing Committee on the Economy

TILMA Hearings

June, 2007

BRIEF

SGEU

Saskatchewan Government and General Employees' Union

Presentation to the TILMA Hearings by the Saskatchewan Government and General Employees' Union

The Saskatchewan Government and General Employees' Union represents over 22,000 people working in a range of diverse sectors across the province, including healthcare, education, community services, the provincial public service, Crown Corporations, and the retail and regulatory industry.

SGEU is pleased to have the opportunity to appear before the Saskatchewan Standing Committee on the Economy to express our opposition to the BC/Alberta Trade, Investment, and Labour Mobility Agreement (TILMA).

SGEU urges the Saskatchewan government not to sign TILMA. We have three principle objections to the agreement:

- TILMA poses a fundamental threat to public policy and public services through its far-reaching, unprecedented provisions. While the extreme restrictions TILMA places on government are clear, the exemptions to protect valued public policies and institutions are weak, badly worded, and likely to be of little use in the event the Saskatchewan government is challenged.

- TILMA's dispute process creates new, enforceable rights for private interests to challenge governments and get compensation. But TILMA excludes the right to appeal panel decisions in any meaningful way.

- TILMA is a disproportionate response to a problem that is relatively minor.

I. TILMA's Unprecedented Restraints on Government

1) TILMA's Threat to Public Services and Crown Corporations

TILMA asserts unequivocally that no government measure -- whether it is a program delivered in the public sector or a regulation or anything else government does -- can pose obstacles to investment.[1] This is a broadside challenge to government without any parallel in existing investment agreements.[2]

The NAFTA and WTO agreements already reach far into domestic policy, enabling governments to be successfully challenged even when they are

[1] Article 3

[2] The Alberta and BC governments are claiming that they intended this article only to apply to discriminatory measures, but that is not what the article says and panels are required to interpret an agreement according to its plain meaning.

applying the same rules to foreign and local businesses and even when they are regulating activities that have nothing to do with cross-border trade.[3] But TILMA's Article 3 "no obstacles" rule goes much further than these agreements in creating grounds for government programs and regulations to be challenged.

NAFTA says that governments cannot "expropriate" an investment unless they pay compensation. NAFTA panels have interpreted "expropriation" to mean governments have to substantially deprive someone of their property. But TILMA's Article 3 states that all a government has to do to violate the agreement is to "impair" or "restrict" an investment. Virtually everything governments do could be challenged using this TILMA article. Provincial regulations to curtail private health businesses are, by definition, restrictions on investment in the health care sector. Local government bylaws preventing the establishment of big box stores are restrictions on investment.

Saskatchewan's Crown Corporations would be at risk if the province signed TILMA. SGEU has taken a strong stand against the privatization of liquor sales in Saskatchewan. However, a TILMA panel could rule that publicly-run liquor stores create an obstacle to BC and Alberta private investment, in violation of Article 3. The recent consolidation of Alberta's large private liquor retailers, with their increased corporate power, means there is an even stronger likelihood that the Saskatchewan Liquor and Gaming Authority (SLGA) could face a TILMA challenge.

TILMA provides multiple grounds for challenges to Crown Corporations. In addition to TILMA's "no obstacles to investment" rule, the agreement's requirement that investors from BC and Alberta be granted the "best treatment" accorded to the province's own businesses[4] could also be used to challenge Crown Corporations.[5] TILMA's exemption for public monopolies[6] could not protect SLGA in the event of a challenge, since it does not enjoy a complete monopoly in the retail distribution of alcohol.

Other highly valued Saskatchewan Crown Corporations -- SGI, SaskPower, and SaskTel -- are also at risk under TILMA. They do not exercise full monopolies over the services they provide, and they could be challenged both because they pose obstacles to further private investment - in violation of Article 3 - and because Saskatchewan could be seen as giving them preferential treatment - in violation of Article 4.

[3] For example, in the NAFTA Metalclad decision, the panel ruled that Mexico should not have prevented establishment of a waste disposal site within its territory.
[4] Article 4
[5] TILMA's Article 4 is similar to "non-discrimination" provisions in NAFTA and WTO agreements.
[6] Article 11.4

2) TILMA's Threat to Public Interest Regulations

TILMA requires that no new standard or regulation can be introduced if it "restricts or impairs" investment, effectively closing the door on future government regulatory initiatives. For example, regulations introduced to improve the quality of childcare could be challenged as restriction on the investments of private childcare operators seeking to become established in Saskatchewan.

While TILMA currently allows an exemption for "social policy", all of the agreement's exemptions are subject to annual negotiations with a view to reduce their scope. TILMA's negotiators also left it up to dispute panels to determine whether critical policies regarding childcare, healthcare, and education can be defined as "social policies."

Saskatchewan's democratic process would also be hamstrung by TILMA if the province wanted to introduce new regulations. Signing on to TILMA would mean Saskatchewan would have to consult with BC and Alberta in advance on any proposed regulation that affects investment, trade, or labour mobility - which would cover most regulations. BC and Alberta's views on proposed regulations would have to be taken "into consideration."[7]

This TILMA requirement is no mere formality. Using a similar provision in the existing Agreement on Internal Trade (AIT), Alberta has already challenged and won a case against the federal government for not consulting with it before introducing banking regulations. Unlike the AIT, however, TILMA creates a dispute process where panel decisions are binding, and monetary penalties can be imposed. So if the Saskatchewan government did not give Alberta and BC advance notice of proposed regulations and take their views into account, it could be taken to a TILMA dispute panel and be forced to pay monetary awards.

TILMA would require that Saskatchewan "reconcile" its regulations with those of Alberta and British Columbia, or else opt for "mutual recognition," which would mean businesses from the other provinces could operate under whatever regulatory system suited their interests. The federal minister of trade, Maxime Bernier, has praised TILMA for its mutual recognition provisions. He sees mutual recognition as creating a competition among regulators for the most business-friendly regulations, since businesses can pick and choose which province's regulations they want to apply. In other words, the federal minister endorsed TILMA because it will create a regulatory race to the bottom.

[7] Article 7.2.

As the City of Vancouver's report on TILMA states:

"The Agreement provides an incentive for reconciliation at the lower of the two standards in question."

Enabling private interests to take complaints to dispute panels guarantees TILMA will result in deregulation. TILMA's negotiators also made sure the agreement would result in deregulation by eliminating the wording in the Agreement on Internal Trade that prevents downward harmonization of regulations.[8]

3) TILMA's Weak, Badly Worded Exceptions

TILMA provides no general exemption for governments that are acting in the public interest, nor for providing services in the public sector. Misleading statements have been made that suggest that as long as governments have what could be considered "legitimate objectives," they are safe from a TILMA challenge. This is a fundamental mistake, one that seriously underestimates the legal jeopardy governments expose themselves to when they sign TILMA.

Governments can try to defend their actions using TILMA's "legitimate objectives" clause,[9] but their objective has to fit one of those explicitly defined by TILMA as legitimate. For example, TILMA does not define the provision of a service *in the public sector* as a legitimate objective for governments. So this objective cannot be used by governments to justify publicly-delivered programmes if they are challenged under TILMA. And even if a government's objectives matches one of those defined by TILMA as legitimate, it is obligated to pursue this objective in the way that is the "least restrictive" to investment.

Taking the case of public healthcare as an example, TILMA does define "provision of social services and health services" as a legitimate objective for governments. But is Saskatchewan delivering these services in ways that are "unnecessarily" restrictive to business? In the event of a challenge it would be up to a panel to decide whether Saskatchewan should provide social and health services in less "restrictive" ways -- such as by contracting with for-profit health suppliers.

TILMA currently does list areas in Part V that are carved out of the agreement, but these are subject to ongoing negotiations to reduce their scope.[10] So year after year, Saskatchewan would have to debate with

[8] The AIT states: "In harmonizing environmental measures, the Parties shall maintain and endeavour to strengthen existing levels of environmental protection. The Parties shall not, through such harmonization, lower the levels of environmental protection."
[9] Article 6
[10] Article 17.1(b)

Alberta and BC trade ministers whether critical areas like water and aboriginal policies should be covered by the agreement.

TILMA's drafters have also left it up to panels to determine what is meant by key exemptions, such as the exemption for "social policy." The examples listed of a "social policy" do not include health, education, or childcare.

Other exemptions in TILMA are so qualified that they basically would be worthless in the event of a challenge. The exemptions for procurement, for example, say that TILMA's non-discriminatory requirement (Article 4) does not apply when governments purchase goods and services from "a public body or a non-profit organization."

But the exemption undercuts itself by stating procurement procedures cannot be used "to avoid competition, discriminate between suppliers, or protect its suppliers." So Saskatchewan government preferences for purchases from non-profit agencies or public bodies could be challenged as "avoiding competition", "discriminating between suppliers," and/or "protecting its suppliers."[11]

II. TILMA's Dispute Process

The main reason why TILMA was created according to its supporters was that governments were not complying with Agreement on Internal Trade decisions. There have only been eight cases that have been decided by AIT panels, almost all dealing with dairy or accounting issues against Atlantic provinces, Ontario and Quebec. In response to the reluctance of eastern provinces to change their policies in these areas, should Saskatchewan burden itself with a new, quasi-judicial process that:

- Allows private investors to take complaints and be heard by independent panels whose decisions are binding and enforceable through Saskatchewan courts;
- Makes governments liable for up to $5 million in penalties as well as court costs;
- Has virtually no appeal process. Review of TILMA panel decisions is extremely restricted by provincial Commercial Arbitration Acts, which do not allow decisions to be overturned even if panels have made errors of fact or law.
- Enforces the position that acting legally under domestic law and according to a province's constitutional authority is no defence.

[11] While monetary awards cannot be given out for violation TILMA's procurement provisions, procurement complaints can still be taken to panels and their decisions are binding.

BC and Alberta's decision to create TILMA stands in stark contrast to the position that US states and county governments have taken. These have declared they are completely opposed to new trade agreements that include provisions for investors to sue governments.

TILMA eliminates the AIT screening process, which was designed to prevent "frivolous" and "vexatious" complaints from being launched to harass governments. One such AIT complaint against Saskatchewan was screened out when the Alberta firm, the Gimbel Eye Centre, tried to challenge Saskatchewan restrictions on paying for eye surgery done by their firm in Alberta. Under TILMA, though, this case would have gone forward.

III. Lack of Demonstrated Need for TILMA

There is no evidence that there are huge barriers to trade between Saskatchewan, Alberta, and BC. Supporters of TILMA have had difficulty naming any concrete examples of such barriers. In his report on TILMA for the Saskatchewan government, Professor John Helliwell has noted that "trade is essentially unfettered already among provinces…" Restrictions on trade or labour mobility that do exist can - and have - been resolved through voluntary negotiation among provinces.

There are no pressing problems for Saskatchewan that TILMA provides an answer to. On the other hand, the agreement will put many of the province's most valued policies at risk, and expose the government to virtually unlimited risks for litigation.

For these reasons, SGEU urges the Saskatchewan government to reject signing TILMA.

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