The Canadian International Trade Tribunal can be friend or foe and plenty have opinions about the way it works and the decisions it makes. Paul M. Lalonde from Heenan Blaikie LLP and Robert C. Worthington from Worthington and Associates Ltd. debate the issues.

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Potential reforms of the CITT

We don't see things as they are. We see things as we are. Anais Nin

MS. NIN'S WORDS capture my reaction on how the Lastewka report **(www.pwgsc.gc.ca/prtf/text/final_report-e.html)** deals with the tribunal – being disappointed in two principal ways: the factual findings and analysis are thin and one-sided, and the recommendations are so vague they are virtually meaningless.

The bid review process and the tribunal's role are complex and important issues. Unfortunately, the report merely observes certain opinions about the procurement climate the tribunal is believed to have produced without drilling down to the reality and analyzing the actual extent or the root causes of the so-called CITT chill, or any of the other concerns listed. Surprisingly, not a single complainant, or the tribunal itself, appears to have been interviewed about the bid challenge process.

The comparison with bid challenge processes abroad is also unsatisfying. We are told there are differences in implementation from one country to another and between the federal government and the provinces but not why this might be the case, what the actual measurable impacts of these differences are or how and why these differences are meaningful.

The government is urged, among other things, to review the existing mechanism in light of the report's findings (whatever that means), leaving us sensing that the government believes there are problems, but with no sense as to what the government should do – if anything. Some specific suggestions would offer at least a basis for debate.

The task force has accomplished much of merit and I hope its work fosters more discussion. Unfortunately its report does not provide a critical and balanced assessment of perceptions about the tribunal, or the detailed analysis to help the government develop effective reforms. *PL*

THE TASK FORCE'S final report contains intriguing, but somewhat vague (intentionally, perhaps?), references to reform the CITT. The report identifies areas of concern – ranging from the unreasonable nature of some CITT decisions, the inequality of application of the *Internal Trade Agreement* among signatories, and the inability of the federal government to use limited tendering (i.e., sole source) due to CITT rulings, to the perception of a "CITT chill" stifling and unduly delaying procurement initiatives – a clear recognition that, from the government's point of view, the current system of bid complaint redress is neither optimal nor necessary. However, when recommending change, the report is more circumspect suggesting the government review the existing dispute resolution system in light of the report's findings; that the procurement officer remain the first point of contact to resolve disputes; and that there be a robust, government-wide approach to dispute resolution.

Assuming the report is both accepted by Parliament and acted upon, changes will be made. However, what those changes entail remains elusive. Speculating wildly, I suspect we will see changes to the standard by which the CITT judges a procurement moving from: pure compliance with the widest of the trade agreements' language, to a standard of reasonableness in light of the individual procurement; how it judges decisions (from the current judicial review standard of "patent unreasonableness" towards a pure "reasonableness" standard); and away from anyone being able to file a complaint about a 'technical breach' whether they bid or not, towards "only those bidders who would have succeeded 'but for' the breach by the government of the trade agreement's provisions."

The government cannot eliminate the CITT altogether, but it appears ready to adjust its more onerous obligations toward a system more in line with other trade agreement signatories. *RW*