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Critics Howl at Crowell, but PacRim v. El Salvador Hearings Run Smoothly

Luke Eric Peterson (Investment Arbitration Reporter) · Thursday, June 3rd, 2010

The preliminary hearings in the Pacific Rim v. El Salvador CAFTA arbitration went off without a hitch at the start of this week.

I'd like to report that I hung on every word via the live webcast that had been arranged by the International Centre for Settlement of Investment Disputes. However, I spent my Monday – a public holiday here in the United States – digesting nothing more challenging than the latest Stieg Larsson potboiler.

But, when I returned to the office on Tuesday I caught the second half of the on-line hearings. (For background on the case click here and here).

The arbitration is particularly noteworthy because the parties were bound – by the terms of the CAFTA – to conduct their arbitration in public. Under the Central American Free Trade Agreement's investor-state arbitration mechanism, legal pleadings and oral hearings are open to public scrutiny.

Thanks to the CAFTA's clear wording, the parties do not have the luxury of turning to the tribunal for a confidentiality order at the first sign of any public or media scrutiny of the proceedings. Thus, PacRim and El Salvador found themselves above-deck, tied firmly to the mast, in full view of the public and critics.

This made for an interesting experiment: would the arbitration's participants be able to steer the ship past the Scylla of the nosy media and the Charybadis of noisy environmental activists?

A first test came last week, when protesters organized a demonstration outside the Washington offices of Crowell and Moring – who represent PacRim in the arbitration.

A brief online video of the demonstration shows several dozen activists making speeches and holding posters. One activist tottered around rather precariously on a pair of stilts. Critics, in D.C. and elsewhere, are calling on PacRim to respect El Salvador's right to bar gold mining out of an abundance of environmental caution.

Ultimately, the protesters got to howl at Crowell, and the arbitration process seemed to emerge none the worse for wear.

In fact, when I called Crowell and Moring after the demonstrations, a Partner with the firm told me that he and his colleagues continued to work away on their last-minute hearing preparations. He added that the firm and PacRim "firmly believe that people have a right to demonstrate and make their views known, as long as it's done in a peaceful way."

Of course it remained to be seen whether the hearings themselves would come off without a hitch. But, come Monday and Tuesday of this week, there was nary a hiccup.

Of course, it's instructive to think what might have happened had the CAFTA *not* mandated full openness.

Perhaps at the first sign of media or public criticism, the claimant would have made an urgent request for provisional measures, ostensibly to protect the right to non-aggravation of the proceedings. Such orders have been issued from time to time in ICSID proceedings, perhaps most notoriously in the Biwater v. Tanania arbitration arising out of a particularly contentious water-privatization dispute.

In the Biwater case, the tribunal issued a Procedural Order which famously held that arbitrators could act pre-emptively – in the absence of actual harm – so as to lock-down the release of certain information about the case.

I'm not sure that this Order had much effect in terms of silencing interested observers or critics of Biwater. But, the Order has had a rather depressing knock-on effect in other ICSID cases, where tribunals have continued to crack down on public access and disclosure – in the absence of any real threat to the arbitration proceedings.

These days, tribunals are all too prepared to slam the door and lock all the windows at the first hint of public interest in a case.

Against this rather depressing backdrop, it was nice to see that a politically-charged arbitration like the PacRim v. El Salvador case is perfectly capable of being conducted in a highly-public manner without the arbitral proceeding falling into disarray.

Interested practitioners, wary activists, and the system as a whole were all winners this week.

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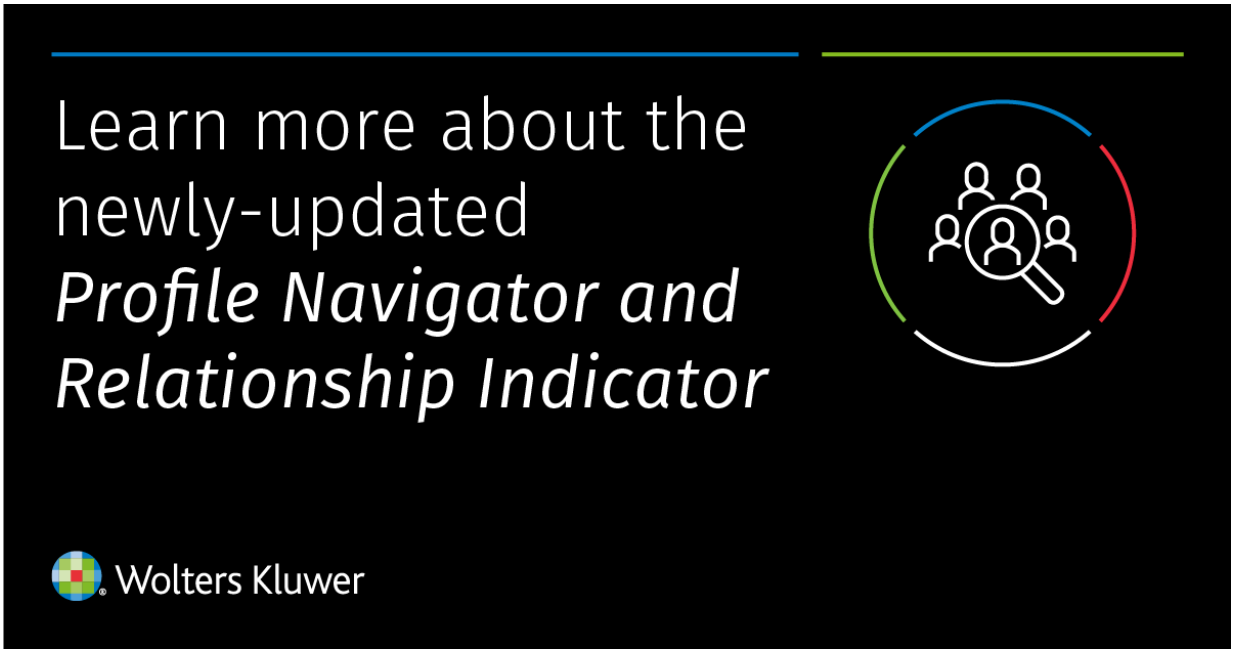

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