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Investor-State Arbitration Meets Mediation: Potential Problems?

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In their reform discussions, States and arbitration institutions have been exploring the potential for investor-State mediation to work alongside arbitration, or even to replace it altogether for some disputes. While investor-State mediation has strengths relative to arbitration, any reform must carefully integrate mediation with existing processes and reform efforts.[1)] In this post, I explore one potential problem associated with a move to the settlement of investor-State disputes via mediation: the confidentiality of mediation as a dispute settlement process.

The Confidentiality of Investor-State Mediation

Confidentiality is often considered to be part and parcel of mediation procedures. In fact, commentators often cite confidentiality as a particular potential benefit for the disputing parties of opting for mediation over arbitration. Confidentiality allows mediating parties to discuss their dispute candidly. Without confidentiality, parties to a mediation may be hesitant to make the admissions, concessions, or compromises that are necessary to produce a settlement. As the ICSID Secretariat notes, confidentiality 'creates a sense of security for the parties … allowing the parties to engage freely and creatively'. Confidentiality also allows for discussions to take place without prejudice to any future dispute settlement process like arbitration. It may further reduce potential reputational damage or entrenched (performative) argumentation. As UNCITRAL's Working Group II notes, 'requiring the parties to provide information about their disputes might inadvertently exacerbate the differences'.

Most treaties that contemplate investor-State mediation do not regulate issues of confidentiality/transparency. This means that such issues will typically be regulated by applicable procedural rules. Most investor-State mediation rules adopt a default position of confidentiality. This is also the approach adopted in recent reform efforts. ICSID's proposed Mediation Rules, for example, provide that investor-State mediations 'shall remain confidential, except to the extent that disclosure may be required by law or for purposes of implementation and enforcement'. The proposed Rules further make no provision for the 'attendance of third parties at fact-finding and mediation sessions'. ICSID's (Additional Facility) Administrative and Financial Regulation 4 could enable the disclosure of 'benchmark information' about ICSID investor-State mediations. Yet, the ICSID Secretariat has noted that '[i]f Member States are concerned by the prospect of such publication, this provision could be revised with respect to mediation proceedings to limit

information published, either at all, or at least during the pendency of the mediation'.

The Transparency vs. Confidentiality Debate: Mediation and Arbitration Compared

The broad acceptance of confidentiality in investor-State mediation can be contrasted with the calls for increased transparency in investor-State arbitration. The latter form of dispute settlement has been the subject of extensive transparency reform efforts in recent years. The submissions received as part of ICSID's reform process illustrate this disjunct. In the first round of consultations, some 20 submissions were filed by stakeholders seeking increased transparency in investor–state arbitration, one submission was filed concerning increased transparency in conciliation, and no submissions were filed concerning transparency in fact-finding or mediation. More submissions were received in a later round, with at least one State calling for mediation registers to be published 'as a default'. The ICSID Secretariat, however, noted that '[g]iven the nature of mediation, no change has been made to this rule'.

While arbitration does not rely on confidentiality to foster party candour and settlement, many of the reasons cited in support of greater transparency and less confidentiality in investor-State arbitration are also applicable to investor-State mediation (and vice-versa). Investor-State mediations, like arbitrations, can concern the settlement of important public policy questions with far?reaching potential impacts for State regulatory choices and fiscal responsibilities. This indicates that the goals of transparency reforms in the arbitration setting – including to enhance public confidence, accountability and legitimacy – could apply also to investor-State mediation.

In fact, the flexibilities associated with mediation procedures might mean that confidentiality carries particular risks for investor-State mediation. One potential advantage often linked to mediation is the capacity for parties to produce different outcomes than would be reached through arbitration. Mediations could result in the renewal of investor licences or permits, the alteration of State regulatory measures, or the restructuring of an investment to address regulatory concerns. Where such outcomes are produced without some form of transparency, they are particularly unlikely to have been 'informed by, and responsive to, a wide range of interests'. For investor-State disputes in particular, such settlements carry particular accountability and legitimacy issues and may produce complexities at the enforcement stage. As Johnson and Guven note, this might be the case, for instance, where a settlement 'authorize[s] a mining project resisted by local communities; offer[s] a tax exemption depleting funds available for social services; approve[s] electricity tariffs out-of-reach for consumers; or guarantee[s] privileged access to water, land, or other natural resources over competing claims'.

The Knock-On Effects of Confidential Investor-State Mediation

Confidential investor-State mediations might also undermine other goals associated with investor-State dispute settlement reform efforts. Confidentiality can undermine, for example, attempts to improve diversity in third-party neutral appointments. Confidentiality makes it more difficult for individuals to gain experience or knowledge in managing investor-State mediations, and may limit the pool of individuals perceived by States and investors as qualified to act as mediators. Confidentiality at the same time makes it difficult for such parties to themselves identify individuals with the requisite skills and experience to facilitate a mediation. Confidentiality may

mean that even appointing authorities may struggle to identify diverse mediators. As Leoveanu and Era report, statistics from the mediations facilitated by the International Chamber of Commerce (ICC) International Centre for ADR indicate that between 2007 and 2017 'the top three nationalities of mediators acting in ICC cases were British, Swiss, and French, and accounted for almost half of the mediators acting in ICC mediations'. They further report that female mediators acted 'in only 23 percent of cases administered by the Centre in 2017', and that '[t]he average age of mediators appointed in 2017 was 61'. Nitschke reports to similar effect that ICSID conciliators have predominantly been male and from western European States. Diversity might be particularly beneficial in mediations, given that for this form of dispute settlement the identity and experience of the mediator is particularly important. Yet, as commentators note, 'mediators who have developed substantial reputations and standing seem (at least marginally) better placed to inspire trust and confidence'.

Any increased use of investor-State mediation must also engage with questions related to the nature and function of investor-State dispute settlement. Confidential mediation might, for instance, cut against efforts to increase predictability and consistency between the outcomes of investor-State disputes. Mediation allows States and investors to reach confidential settlements without reference to the settlements reached for analogous disputes. Parties might even opt for mediation to avoid creating 'unsatisfactory precedent for the future'. While this might be beneficial in some instances, it produces inconsistencies and may exacerbate inequity, including through pressure placed on particular States or investors to settle behind closed doors. Confidentiality might also reduce the uptake of investor-State mediation because disputing parties may be particularly hesitant to refer their disputes to procedures with which they have little experience.

The Need for Holistic Reform

Where mediation is used to supplement or replace more public forms of dispute settlement like arbitration, its procedural features warrant additional scrutiny and reflection. This highlights the need to pursue reforms to investor-State dispute settlement holistically. Reforms to one procedure may produce unintended consequences for others.[2)] This is likely to be particularly relevant to the ongoing discussions in UNCITRAL's Working Group III, where it will become increasingly necessary to reflect on how the investor-State dispute settlement system can leverage the strengths of different dispute settlement techniques whilst minimising their weaknesses. Such integration may occur best through an iterative reform basis as stakeholders gain greater experience with different dispute settlement options (and notice the unintended effects of particular reforms). Without reflecting on how mediation procedures can enhance other efforts to improve investor-State dispute settlement, there is a risk – as Schill has noted – that increased investor-State mediation will simply generate 'an exit valve' for States and investors seeking to resolve their disputes without 'public scrutiny'.

This post is part of a series on the relationship between investor-State arbitration and mediation. To see our full series of posts on this topic, click here

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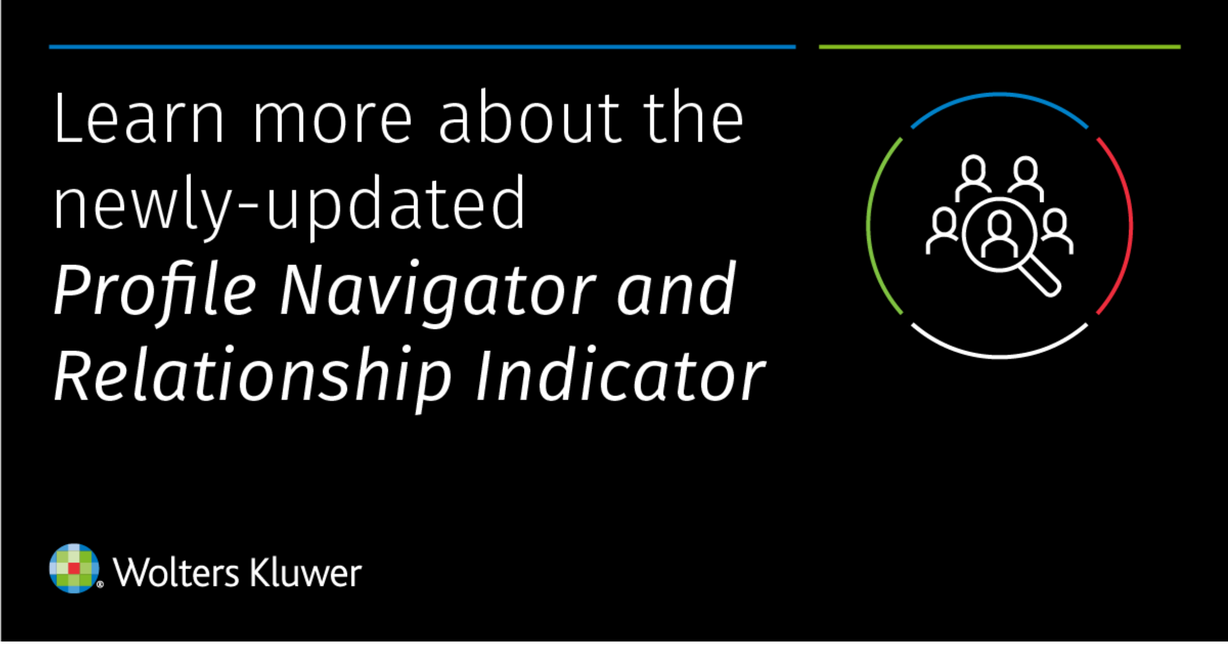

References

?1 This post builds on: Esmé Shirlow, 'The Promises and Pitfalls of Investor-State Mediation' (2020, forthcoming) Yearbook on International Investment Law and Policy; and Esmé Shirlow, 'Back into the Shadows? Public Participation in the Peaceful Settlement of Investment Disputes through Non-Arbitral Means' in Avidan Kent, Eric de Brabandere and Tarcisio Gazzini (eds), Public Participation and Foreign Investment Law: From the Creation of Rights and Obligations to the Settlement of Disputes (Brill, forthcoming).

?2 See, further, David Caron and Esmé Shirlow, 'Dissecting Backlash: The Unarticulated Causes of Backlash and its Unintended Consequences' in Andreas Føllesdal and Geir Ulfstein (eds), *The Judicialization of International Law: A Mixed Blessing?* (Oxford University Press 2018).

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