



UNCITRAL
Working Group III
on ISDS Reform



Forum for Further Preparatory Work
on Investment Mediation

Practitioner's Perspective on Balancing Between Confidentiality and Transparency in Investment Mediation

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‘Unless there exist an agreement of the Parties on the issue of confidentiality/ transparency, the Tribunal shall decide on the matter on a case by case basis and, instead of tending towards imposing a general rule in favour or against confidentiality, try to achieve a solution that balances the general interest for transparency with specific interests for confidentiality of certain information and/or documents.’

Beccara v Argentina

Procedural Order No. 3 in ICSID Case No. ARB/07/5

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Lessons to Draw from

Investment Arbitration



Mediation

ICSID Arbitration

Commercial Mediation

UNCITRAL Arbitration

Investment Mediation

Suggestions

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Balancing Confidentiality & Transparency under ICSID Regime

Status Quo &
Trend

No general rule of confidentiality in ICSID arbitration

- ICSID jurisprudence established that no general obligation of confidentiality in ICSID arbitration, by distinguishing between the obligation of confidentiality in commercial arbitrations and in investor-State arbitrations.
 - Public interest and public awareness
 - Direct inquiry into a State's regulatory functions
- A number of ICSID awards acknowledged a general trend towards greater transparency but subject it to the integrity of the arbitration proceedings or non-aggravation of the dispute. This trend is reflected in the latest revisions to ICSID arbitration rules in which Chapter X is specifically intended for the transparency issue.

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Balancing Confidentiality & Transparency under UNCITRAL Regime

Status Quo Transparency as a general rule, subject to exceptions

- UNCITRAL Transparency Rules in Treaty-based Investor-State Arbitration (2013) which has application in SCIA and SCIAHK administered investment arbitration cases.
- Transparency is a general rule subject to exceptions:
 - Public registry (Art. 2) informing the public about the existence of ongoing investment arbitration.
 - Publication of documents (Art. 3) but subject to protection of confidential information.
 - Hearing shall be public (Art. 6) but also can be conducted in camera when need to protect confidential information.
 - Filing of amicus curiae (Art. 4).

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Balancing Confidentiality & Transparency in Mediation

China

No specific legislation, leaving to institution's rules

- No specific commercial mediation law, leaving various mediation or arbitration institutions' rules to regulate this issue. Confidentiality of mediation is generally recognised.
- Mediation sometimes is protected by more sophisticated arbitration rules.
- Example: SCIA's handling of China's ever largest arbitration and mediation case with 13.4 billion RMB in dispute.
 - Involving US company, Chinese company and local government.
 - Arb-Med-Arb, settled in 13 days.
 - Confidentiality was the key issue and protected by SCIA's Arbitration Rules (2012 edition).

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Balancing Confidentiality & Transparency in Mediation

Hong Kong

Confidentiality as a general rule recognised by Mediation Ordinance (HKMO) and CEPA Investment Mediation Rules

‘Object of this Ordinance is to ... protect the confidential nature of mediation communication’ (Section 3 of HKMO).
‘A person must not disclose a mediation communication’ subject to exceptions (Section 8 of HKMO).
‘This Ordinance applies to the Government.’ (Section 6 of HKMO).

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Confidentiality as a general rule

Article 10 of UNCITRAL Model Law on Mediation; and Article 6 of UNCITRAL Mediation Rules.
Except where disclosure is required under the law or for the purposes of implementation or enforcement.

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Contradictory Considerations

Confidentiality

Substantive justice

- I. To have dispute resolved
- II. Private and centralised forum
- III. Non-interference

Transparency

Procedural justice

- I. To hold the process accountable
- II. Disclosure to the public
- III. Participation of the public

Key difference between mediation and arbitration is the power of the neutrals

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Varying Degrees of Confidentiality in Different Aspects of Mediation



Detailed rules vis-à-vis Succinct rules

IBA Investment Mediation Rules (Art.10)
CEPA Investment Mediation Rules (Art.11)

ICSID Mediation Rules (Rule 10)
UNCITRAL Mediation Rules (Arts.6 and 8.4)

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Balancing Confidentiality & Transparency in Mediation

IBA

Rules for Investor-State Mediation (2012)

- Confidentiality of mediation process as a general rule, excluding public participation (Art.10.1).
- Subject to party autonomy and certain exceptions (Art.10.3):
 - Existence and result (including the terms) of mediation;
 - To comply with a legal obligation or court order, or to seek relief under applicable law;
 - Non-harmful disclosure (Information already in public domain or disclosed *ex parte*).
- Mediator is protected from being compelled to disclose or appear as witness unless dispute regarding mediator's fees or expenses (Art.10.5).
- Survival of confidentiality obligation upon the termination of mediation (Art.10.6).

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CEPA

Mediation Rules for Investment Dispute (2017)

- Confidentiality of mediation process as a general rule (Art. 11.1) excluding public participation (Art. 11.2).
- Subject to party autonomy and certain exceptions (Art. 11.4) :
 - Existence and result of mediation;
 - To comply with a legal obligation under HKMO.
- Mediator is protected from being compelled to disclose or appear as witness unless dispute regarding mediator's fees or expenses (Art. 11.6).
- Survival of confidentiality obligation upon the termination of mediation (Art. 11.7).

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ICSID

Mediation Rules (2022)

- Confidentiality as a general rule, established by Rule 10 which says that ‘All information relating to the mediation, and all documents generated in or obtained during the mediation, shall be confidential, ...’ and extends to the existence and result of mediation.
- Subject to:
 - Party autonomy;
 - No harmful disclosure (information or document independently available);
 - Disclosure required by law.

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Balancing Confidentiality & Transparency in Mediation

UNCITRAL Mediation Rules (2021)

- Confidentiality as a general rule (Art.6). 'All information relating to the mediation, including, if relevant, the settlement agreement, shall be kept confidential', which includes the existence and result of mediation.
- Subject to:
 - Party autonomy;
 - Disclosure required by law or seeking relief under applicable law.

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Balancing Confidentiality & Transparency in Mediation

UNCITRAL Working Group III Draft Model Clauses and Guidelines

Observations and suggestions:

- To establish a general principle of confidentiality (perhaps, and of privacy) of the investment mediation process.
- To consider the carve-out of the existence and result of mediation.
- To give due regard to party autonomy and domestic legal framework.

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Thank you!

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