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The promise of collaborative problem solving in enhancing IAM effectiveness

Gina Barbieri

Overview

As a junior human rights lawyer in the mid-1990s in South Africa, I represented a client who had been shot by his employer. We sued the employer for damages, won the case, and my client received compensation. After the trial, he asked me whether I knew why he had been shot, what drove the employer to do what he had done. He wanted to reconcile himself with the outcome and needed this explanation to do so. He also wanted an apology. You don't sue for an explanation or an apology. Recognizing that judicial mechanisms may not always meet all our clients' interests, my mentor at the time recommended that I develop my knowledge of alternative dispute resolution and, in particular, mediation or "collaborative problem solving". This would have required that I spend more time understanding the harmed employee's expectations and, while not being able to adjudicate the criminal act, may have been able to address his needs for deeper understanding, and perhaps even reconciliation. And so began my passion for, and practice of, collaborative problem solving, with a focus on mediation.

The promise of collaborative problem solving

Most accountability mechanisms offer two alternatives to addressing complaints: dispute resolution or problem solving (which I will refer to as "collaborative problem solving"), and compliance (which I view as being akin to independent fact finding and will use these terms interchangeably). The former typically engages the use of mediation as a process structure to address the complaint. Mediation may be defined as "the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power, who assists the involved parties to voluntarily reach a mutually acceptable settlement of the issues in dispute." Further, "(i)n addition to addressing the substantive issues, mediation may also establish or strengthen relationships of trust and respect between the parties or terminate relationships in a manner that minimizes emotional costs and psychological harm."¹

While there are many different definitions of collaborative problem-solving processes, I am going to focus on the use of mediation for this perspective, primarily as it seems that mediation is the process typically being used by IAMs to carry out their dispute resolution or problem solving mandates. According to Menkel-Meadow et al (2006) "Theorists and practitioners of mediation claim a central core of functions for mediation:

- that it is a consensual process, both in participation and in agreements reached;
- that it is, at its core, voluntarily engaged in;
- that it is participatory by the principles engaged in whatever problem or issue is presented at the mediation (who may have representatives who appear as well);

¹ CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (Jossey-Bass 3rd ed. ed. 2003).

- that it is “facilitated” by a third party “outside” the immediate dispute or conflict (the “neutrality” principle reframed to reflect some of the recent developments in use of expert facilitators”);
- that it seeks to develop solutions to problems or resolutions of conflicts or disputes on terms of mutual agreement and fairness to the parties;
- that it seeks to facilitate mutual understanding and apprehension of the other parties’ needs, interests and situations.”²

Many also argue that confidentiality is a key function or principle underpinning the mediation process. While views differ in this regard, offering confidentiality can undoubtedly be very helpful in creating the safe space necessary to bring parties together to discuss complex disputes. Western models of mediation practice provide an explanation regarding confidentiality as being “[on] two levels: the entire mediation is in confidence. It is held in private. What is discussed remains private and the outcome is only publicized if the parties agree. The private meetings between the mediator and parties work at a deeper level of confidentiality. No private information shared with the mediator in a private meeting with one party can be passed to the other party without express permission.”³

The definition of these functions or principles certainly influences many IAMs in the way in which mediation processes are conducted. They exert a heavy influence on the way in which ground rules are both negotiated between the parties, and ultimately form part of the process design. It is unlikely that these principles are meant to be considered exhaustive and, even if they were, it is doubtful that they alone are sufficient to ensure fair and equitable outcomes result from the kinds of development disputes being mediated by IAMs.

During a collaborative problem solving process, relationships and power dynamics can shift, often in a direction that provides communities who have been harmed with a clear and direct channel toward having a voice in the manner in which harms will be addressed, and through a process that builds the capacity of community representatives, fostering closer working relationships between the parties to enable a more obvious landscape for those parties to use in future disputes. The process lends itself to the creation of trust and a deeper understanding between the parties of what their interests are beyond stated positions and demands. And importantly, it enables development of a full suite of outcomes that can address those interests, rather than just stated positions, hopefully rendering more sustainable and effective outcomes.

But the benefits of this approach are hard to come by in situations where the scale of the power imbalance between the community that has been harmed and the private sector actor is far greater than in many other situations in which problem solving is being used as a response to a defined dispute. I would argue that the basic principles of the western mediation model outlined earlier are insufficient for the kinds of development disputes IAMs are engaging in, and that we are obliged to consider ways to scaffold the process further if we are to achieve fair and equitable outcomes.

² CARRIE MENKEL-MEADOW ET AL., *MEDIATION: PRACTICE, POLICY, AND ETHICS* (Aspen Publishers 2006)..

³ The CEDR Mediator Handbook, Fourth Edition, October 2004.

The effectiveness criteria for non-judicial grievance mechanisms⁴ (effectiveness criteria) are useful and relevant in this regard, and arguably should also form part of any mediator's framework

Effectiveness Criteria for Non-Judicial Grievance Mechanisms and More

The effectiveness criteria require a process utilized by non-judicial recourse mechanisms to be:

- Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of the grievance process;
- Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms (this includes the capacity building);
- Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and to meet a public interest at stake;
- Rights compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;
- A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and prevent future grievances and harm.

Application of the principles of mediation, along with the effectiveness criteria, will go a long way to building rights-compatible processes that lead to fair and equitable outcomes. But many challenges still remain, given the complexity of the disputes IAMs are being required to address and the grave inequity that exists between the parties.

I therefore advocate for additional building blocks in the collaborative problem-solving process which include:

- an analysis of the power imbalance and assessment of what each party may be required to do to attempt to level the playing field as much as possible, considering whether this can be done transparently and in discussion with both parties – for instance, whether complainants will need to continue an advocacy campaign during a mediation process; capacity building requirement of all parties; assessment of which other actors should be invited to participate;
- encouraging thorough storytelling by the parties as part of an initial assessment of the complaint by the IAM;

⁴ United Nations Human Rights Office of the High Commissioner, Guiding Principles on Business and Human Rights, (2011), https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

- the crafting of ground rules akin to pre-mediation agreements that take into account any power imbalance and try as far as possible to ensure adherence to the effectiveness criteria outlined above⁵;
- establishing community feedback loops for ongoing communication through the process; and
- establishing a monitoring mechanism to ensure proper implementation of any agreements reached.

The early “story-telling” phase of mediations in the development context often reveals disputes of fact that lie at the core of the problem. Communities impacted by project operations and the private sector operators are often at odds about the nature of the harm, whether there has been any policy noncompliance, and who is responsible for the harm. With limited baseline data to make a determination, and where third-party actors may not be bound by agreements obligating participation in the complaints handling process, these disputes of fact can present obstacles to finding solutions. They also contribute toward power imbalances, with the party that has access to more resources being able to procure “expert” opinion to support their position. To further complicate matters, determination of disputes of fact is not an automatic process point for mediation. It is important to consider what collaborative problem solving tools can be deployed in these circumstances, and whether these same tools, used to resolve disputes of fact, could apply more broadly to independent fact-finding processes.

Joint fact-finding – a silver bullet?

Where disputes of fact become an insurmountable obstacle preventing parties from moving forward with the mediation process, collaborative problem solving can be used to embark upon a joint fact-finding exercise. This is where I believe the promise of mediation can really come to life for accountability mechanisms, not only in resolving disputes of fact for the purposes of moving a mediation process forward, but also to help imagine a new tool for mechanisms to consider.

So what is joint fact-finding? “Joint Fact-Finding (JFF) is a collaborative process in which parties in conflict work together with experts to address disputes of fact, differing expert opinions, or disputable scientific information. Typically, the parties jointly identify the issues, define the scope of the engagement, select the experts, provide inputs to the design of the process, and participate in fact-finding activities.”⁶ Applications of this approach across different sectors abound, particularly where the analysis of scientific or technical data requires consensus as part of negotiations concerning a wider basket of issues. “[JFF] brings experts, policymakers and stakeholders together to analyze scientific or technical data and try to draw conclusions. Instead of each party or participant generating evidence or arguments to support their prior assumptions (and political interests), the stakeholders jointly select one or more qualified advisors to help them sort through various sources of evidence ... JFF requires face-to-face dialogue and movement toward consensus by continually narrowing areas of scientific disagreement. It usually precedes

⁵ For another perspective on additional building blocks, see Compliance Advisor Ombudsman [CAO], *Reflections from Practice: Getting Started with Dispute Resolution*, https://www.cao-ombudsman.org/sites/default/files/2021-05/CAO_1_GettingStarted.pdf (last visited Oct. 20, 2023).

⁶ Compliance Advisor Ombudsman [CAO], *Reflections from Practice: Joint Fact Finding*, (Jan. 1, 2018), <https://www.cao-ombudsman.org/resources/reflections-practice-series-3-joint-fact-finding>.

or is part of a larger collaborative decision-making process in which the results are agreements in the form of recommendations to elected or appointed decision-makers”⁷.

Joint fact finding draws on many of the principles of collaborative problem-solving practice to answer questions that require the determination of a set of facts. This process can be used to overcome negotiation obstacles as part of a problem-solving intervention, or mediation. It can also be used as a standalone intervention. Susskind et al writes that “... experience around the world demonstrates that effective JFF efforts can: i) increase participation in, understanding of, and support for ... decision making by stakeholders; ii) reduce or manage conflict that is inevitable in the face of conflicting interests; iii) possibly prevent litigation; iv) integrate the insights from multiple scientific disciplines; v) incorporate local or “non-traditional” knowledge into public decision making; and vi) lead to the creation of ongoing adaptive management efforts that help decision makers deal with uncertainties and unavoidable knowledge gaps.”⁸

There are some examples of where JFF has been used by IAMs in their dispute resolution processes. A case in point is a complaint brought to the IFC’s IAM, the Compliance Advisor Ombudsman (CAO), regarding the Oyu Tolgoi project in Mongolia. Here, Khanbogd soum herders and the company engaged in a joint fact finding process to conduct an assessment of, *inter alia*, the impacts on livelihoods of a copper and gold mine operated by Rio Tinto Plc. The aim of the JFF was to generate independent information regarding the impacts of company’s operations on herders’ livelihoods and the adequacy of the company’s compensation processes. These recommendations were then the subject of a mediated negotiation in terms of which the parties agreed to jointly develop an implementation plan. JFF in a case like this will help to level the playing field and go some way toward ensuring a fair and equitable process. Rather than leaving the parties to carry the burden of establishing as fact their bargaining platforms, the JFF in this context would remove that burden, create equal access to information, and the determination of fact will facilitate negotiation regarding how to address the finding.

Many key collaborative problem-solving principles are in play where a JFF process is utilized – for example, capacity building for the parties, development of trust and relationship building, and discussion of the interests in the complaint beyond articulated positions so that the JFF terms of reference can be appropriately defined. And community agency becomes a driving force in the conduct of the process. The ultimate result of a JFF process is that independent fact finding is taking place, but through the use of collaborative problem-solving principles. No longer is independent fact finding a process that happens to the parties. It is a process driven by the parties.

Collaborative problem solving in compliance investigations

The question that arises is whether it is possible for an IAM to use a process such as JFF to address questions of compliance. Generally speaking, compliance investigations are akin to an

⁷ Shafiqul Islam & Lawrence Susskind, *Using Complexity Science and Negotiation Theory to Resolve Boundary-Crossing Water Issue*, JOURNAL OF HYDROLOGY 589 (2018), <https://susskindreader.mit.edu/sites/default/files/Using%20Complexity%20Science.pdf>.

⁸ Lawrence Susskind et al., *Towards a More Humble Enquiry: The Practice of Joint Fact-Finding*, in MASAHIRO MATSUURA & TODD SCHENK, JOINT FACT-FINDING IN URBAN PLANNING AND ENVIRONMENTAL DISPUTES (Routledge, an imprint of the Taylor & Francis Group 2017).

independent fact-finding process. The IAM is considered an independent entity tasked with making determinations of fact, reviewing institutional compliance with relevant environmental and social policies, assessing harm, and recommending remedial actions where appropriate. While IAMs themselves are structured and staffed differently, at the core of their compliance or independent fact-finding mandate is the ability to consider disputes of fact and through various means answer those disputes of fact on behalf of the parties. The IAMs will typically engage with the complainants, Bank staff and other relevant stakeholders to gather information regarding the complaint. Experts may be appointed by the IAMs to assist in analyzing data and developing findings on behalf of the IAM. There are also examples of where the IAMs may enable complainants and the institution to comment on draft findings and participate in the development of institutional action plans that respond to the findings.

It is time to consider whether the independent fact-finding mandates of the IAMs can be carried out through the use of collaborative problem-solving principles, thereby capitalizing on the strengths of both tools rather than remaining a binary choice that requires parties to elect one or the other.

I have mentioned the obvious benefits of using the collaborative problem-solving process in this context, but there are a few less obvious ones:

- Using collaboration to develop the terms of reference and appointment of experts may result in less institutional reluctance to embrace findings and recommendations;
- Helping to provide a counterbalance to the ever-present, and one could argue inevitable, natural tension that exists between an IAM and its institutional home by moving away from a “battle of the experts” to a joint process of determining a set of facts;
- Avoiding a situation where Boards are asked to “arbitrate” disputes between an IAM and management regarding determination of noncompliance and resultant remedial actions;
- Avoiding the “battle of the experts” scenario, where management hires its own experts to dispute the findings of an IAM;
- Providing a clear pathway for complainant and management engagement in determining action plans to ensure compliance with recommendations; and
- Placing community agency at the heart of the process.

While use of the JFF in a compliance context may sound resource-intensive, the actual costs may not be much greater than the resources already deployed to conduct typical independent fact-finding processes. And even if they do, the other benefits mentioned earlier may make it worthwhile.

This approach will also pose process and outcomes risks. For example, where there is an imbalance of power, sufficient resources would need to be allocated to the process to ensure parties can participate on an equal footing. This may mean the appointment of legal advisors, highly skilled process facilitators with relevant expertise, and extensive capacity building for the parties prior to commencement of the process. Guardrails may need to be established and agreed to upfront to ensure there is no “watering down” of the compliance function. For example:

- acceptance by all parties of the binding nature of the findings that result from the JFF process;
- a clear determination regarding the terms of reference for the JFF process, including whether recommendations will be made to the institution to remedy any non-compliance;
- whether a mediated approach will be used to negotiate implementation of any resultant recommendations; or
- whether the IAM should be vested with the discretion to decide which approach to use, or whether an opt out model should be encouraged.

It may also be necessary to determine an “exclusions list” for those types of complaints that would not or could not be addressed through processes such as this. For example, where complainants raise issues of ongoing physical harm, criminal acts of violence or gender-based violence. The risks certainly require more analysis and consideration than I am providing in this perspective. But their consideration is equally important.

Innovation to enhance effectiveness – but no silver bullet

There is currently much discussion regarding the sequencing of dispute resolution and compliance processes. Some mechanisms enable a parallel process, or full discretion regarding which process to use as a starting point. Others have flexibility to catalyze one or the other at any time. And there are also those mechanisms that have a stricter process flow, typically requiring parties to choose one or the other. While the discussion of which tool to use, and when to use it is important, it is equally important to start considering whether a more hybrid approach to addressing complaints would be valuable in strengthening IAM effectiveness in a context where this is becoming more and more difficult to secure. And so, just like that young human rights lawyer seeking alternative ways to address as many of my clients’ needs and interests as possible, my hope is that IAMs continue to consider the tools they are using to achieve maximum effectiveness for communities who have been harmed, and the institutions they seek to hold accountable.