

Report of Panel: Alternative Tools for Effective Investment/Investor Protection

5th EFILA Annual Conference: Investment Protection in the EU: Alternatives to Intra-EU BITs
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- Chair: Nassib G. Ziadé, Chief Executive Officer, Bahrain Chamber for Dispute Resolution
- Panelists: Mark Appel, Arbitrator, Mediator, ArbDB Chambers
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Mélida N. Hodgson, Partner, Jenner & Block LLP
Gerard Meijer, Partner, Linklaters
- Rapporteur: Salim S. Sleiman, Senior Case Manager, Bahrain Chamber for Dispute Resolution

In his introduction, Professor Nassib G. Ziadé observed that, for many practitioners, mediation has become a preferred method of resolving disputes. Many international and regional arbitral institutions had adopted new mediation rules in recent years, including the London Court of International Arbitration (LCIA) in 2012, the International Chamber of Commerce (ICC) and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) in 2014, and the Bahrain Chamber for Dispute Resolution (BCDR) in 2019. He noted also the development of mediation rules or guidelines specific to Investor-State Dispute Settlement (ISDS), including the 2012 International Bar Association (IBA) Rules for Investor-State Mediation; the 2016 Energy Charter Treaty (ECT) Guide on Investment Mediation; and the new mediation rules of the International Centre for Settlement of Investment Disputes (ICSID).

Professor Ziadé invited the panelists to reflect on whether, and if so how, ISDS mediation was different from other kinds of mediation, particularly international commercial mediation.

Mark Appel noted that in investor-State mediation, commercial interests are overlaid with the State's political interests and other community and third-party interests. The intertwining of such interests, he said, is not always conducive to resolving disputes and may give rise to heated public attention. Thus, investor-State mediation should carefully balance the competing policy needs of transparency on the one hand and confidentiality on the other. Investor-State mediation is often newsworthy, and for Mr. Appel, "negotiating through the press is not a recipe for success." Mr. Appel also addressed what he described as "the elephant in the room" of the real fear of criticism and even loss of office of State officials who must seek to negotiate a settlement under the close scrutiny and publicity of investor-State mediation.

Mr. Appel noted various State-related difficulties that do not arise in commercial or other types of mediation: for example, State representatives being uncertain as to whether they can, or indeed should, engage in mediated negotiations at all. State representatives may also be unsure as to the right time to engage in the mediation process: pre-dispute; during the cooling-off period envisaged by the investment treaty; post-dispute but pre-filing of a request for arbitration; concurrently with an arbitration process; or even post-award. There might also be uncertainty regarding the relevant agency of the State with authority to bind the State by the outcome of the mediation. This was not, he said, an issue exclusive to developing States, giving the example of the first case to be brought under the North American Free Trade Agreement (NAFTA) where there was an issue as to which State agency should represent the United States.

Furthermore, it might not always be clear which State agency should bear the cost of the mediation process, especially if the State had not budgeted for this in the first place.

Eloïse Obadia agreed that investor-State mediation would usually involve a highly political context. States would, therefore, often demand a more formal process with detailed procedures and more time to ensure due process and to preserve State interests.

Ms. Obadia believed that commercial mediation rules might be used as a starting point for the mediation of investor-State disputes, as the broad process remains the same. She noted, however, that commercial mediation rules may lack some of the specific elements that would make mediation more predictable for States and would guarantee due process. It would, therefore, be sensible, she said, to develop ISDS-specific mediation rules as was done with the 2012 IBA Rules and the upcoming stand-alone ICSID mediation rules. She noted, however, that in the absence of these, it was still open for parties to investor-State mediations to agree on additional aspects not directly addressed by commercial mediation rules, or

adapt the existing provisions to respond to the specificities of investor-State disputes, such as communications, caucuses, confidentiality, non-disputing party participation, transparency, and the implementation of the settlement.

Given that investor-State disputes are often complex, Ms. Obadia stressed the importance of choosing qualified and competent mediators with the requisite knowledge of investment and public international law, coupled with a creative attitude conducive to a settlement. In her view, co-mediation could be particularly suited in investor-State mediation, allowing a combination of complementary skills and knowledge, and a more assured approach to the cultural nuances and complexities of investor-State disagreements.

Professor Ziadé asked whether mediation rules specific to ISDS, such as the 2012 IBA Rules for Investor-State Mediation and the 2016 ECT Guide on Mediation, had led to an increase in ISDS mediation.

Mélida Hodgson thought that these rules had not yet led to an increase in the use of mediation in ISDS. She gave examples of investor-State arbitrations, including *Systra v. Philippines* and *Achmea*, in which the parties had been encouraged to attempt mediation, with no success.¹

Available statistics, she said, showed that since the implementation of the ICSID conciliation rules, and up until the end of 2019, there had been only twelve conciliation cases registered with ICSID, just 1.5% of the total disputes administered by ICSID. Of those 12 cases, 22% had been discontinued, and out of the 78% that had proceeded, only 14% had reached a settlement. Statistics from the PluriCourts Investment Treaty Arbitration Database² showed that of a total of 1,056 investment cases, only 186 had been settled, and 104 discontinued.

Ms. Hodgson noted, however, that there was a growing tendency for States to encourage ISDS mediation in trade agreements such as the EU-Canada Comprehensive Economic Trade Agreement (CETA) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) between Canada, Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.

In Ms. Hodgson's view, the most significant factor deterring parties from resorting to mediation was the absence of enforcement mechanisms comparable to those available in arbitration. That said, with the recent adoption of the United Nations Convention on International Settlement Agreements Resulting from Mediation ("the Singapore Convention on Mediation"), this obstacle to the development of investor-State mediation might be removed.

¹ See Kun Fan, *Mediation of Investor-State Disputes: A Treaty Survey, Time to Take the Horses to the Trough?*, *Journal of Dispute Resolution* (2020), at 2 and 11, available at <http://unsworks.unsw.edu.au/fapi/datastream/unsworks:64856/binf7876f7c-7173-44de-a73b-84d7282da021?view=true&xy=01>.

² <https://pitad.org/index#welcome>, last visited on January 3, 2021.

Turning to ICSID's latest draft mediation rules,³ Professor Ziadé invited panelists to reflect on how these draft rules compared with the little-used ICSID Conciliation Rules and with current ISDS mediation, and whether the draft rules were likely to stimulate increased use of mediation in ISDS. He asked panelists to suggest ways to ensure the take-up of the ICSID mediation rules.

Comparing ICSID's draft mediation rules to the Conciliation Rules under the ICSID Convention, Ms. Obadia identified three main differences.

First, in their respective scope of application, the draft mediation rules are broader, as opposed to the Conciliation Rules of the ICSID Convention that parties may invoke only if the requirements of Article 25 of the ICSID Convention are met, namely, the establishment of the existence of a "legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre." The draft mediation rules, by comparison, envisage allowing parties to invoke the ICSID mediation rules even in the absence of a legal dispute, and do not require that the disputing parties be of different nationalities. The draft mediation rules even allow regional economic integration organizations to be parties.

Second, under the current ICSID Conciliation Rules, the parties may appoint a sole conciliator or any uneven number of conciliators, with the default rule, in the absence of party agreement, being for three conciliators, with the inherent risk of creating a quasi-adversarial process closer to arbitration. Under the ICSID draft mediation rules, on the other hand, the mediation process would be conducted either by a sole mediator (the default position) or by two co-mediators, potentially encouraging greater cooperation between the mediators and the parties.

The third main difference relates to the role and power of the conciliators/mediators. Both the conciliation commission under the Conciliation Rules and the (co-)mediator(s) under the draft mediation rules would assist the parties in reaching a mutually acceptable resolution of all or part of the issues in dispute. However, while the conciliation commission may make recommendations *sua sponte* regarding the specific terms of settlement or provisional measures, the (co-)mediator(s) may make recommendations only if requested to do so by the parties.

That said, both the ICSID draft amended conciliation rules and the ICSID draft mediation rules include specific features likely to increase parties' confidence in the conciliation and mediation processes. So, for example, both sets of draft rules

³ ICSID's Working Paper #3 entitled "Proposals for Amendment of the ICSID Rules," August 2019, available at https://icsid.worldbank.org/sites/default/files/amendments/WP_3_VOLUME_1_ENGLISH.pdf.

require a written statement from each party, before the first session, to inform the conciliator(s) or (co-)mediator(s) of the nature of the dispute and issues arising to enable them to tailor the process accordingly; provide for a detailed list of matters to be addressed during the first session; allow parties to agree on how to organize caucuses; require disclosure of any third-party funding; provide for a detailed declaration of independence, impartiality and availability of conciliators and mediators; and permit the parties to agree to allow non-disputing parties to participate in the process.

However, in contrast with the current ICSID Conciliation Rules, which provide for a more formal process with some characteristics of arbitration proceedings, potentially resulting in delays and high costs, the ICSID draft mediation rules seamlessly blend flexibility and structure. This flexible yet well-structured process, Ms. Obadia said, combined with an increased awareness of mediation in general, are likely to make the ICSID mediation rules more appealing to disputing parties than the current ICSID Conciliation Rules.

Mr. Appel said that the ICSID draft mediation rules play an important role in legitimizing the process of mediation in the eyes of stakeholders. Not only do they reflect common expectations regarding the mediation process, but also set out new best practices. He gave the example of the provision for an organizational conference, which, while common in arbitration, is not as common in mediation. A well-managed organizational conference could, he said, prove to be critical for the success of the mediation.

Mr. Appel also noted that the ICSID draft mediation rules provide for discussions about confidentiality, which is particularly important in the context of investor-State mediation, where policy concerns for transparency and confidentiality need to be balanced. Discussions between the parties regarding confidentiality may, he said, pave the way for better handling of these two policy interests and might, for example, result in an agreement regarding the release of information to media outlets. Mr. Appel joined Ms. Obadia in highlighting the benefits of co-mediators in complex, multi-cultural investor-State mediations.

Professor Ziadé then invited the panelists to reflect on the obstacles preventing effective use of mediation in ISDS and the measures that might be adopted to encourage its greater use.

Professor Gerard Meijer suggested that States might be more inclined to delegate the decision-making power over a dispute to a third-party adjudicatory body in the person of an arbitral tribunal, than to mediate, adding that mediation focused more on parties' interests than on their rights and obligations.

Mediation with a State party also raised such issues as the authority of the State's nominated representative to negotiate and to sign off on a final settlement; the law applicable to the mediation and the underlying contract or investment; the

enforcement of the mediated settlement agreement; and a potential conflict between confidentiality and transparency.

There are not, he said, proper mediation clauses in most bilateral and other investment treaties, which are most likely only to include mandatory negotiation clauses. While it is true that one could make use of a mediator in the context of a mandatory negotiation, such clauses have not, in practice, contributed to the successful use of mediation in ISDS. Further, whilst a new generation of investment treaties was moving towards the adoption of mediation clauses, these currently provided only for optional mediation.

Professor Meijer called for greater promotion of successful mediation experiences to raise awareness and encourage greater up-take. He also highlighted the importance of identifying good mediators capable of ensuring an efficient investor-State mediation process and suggested that experienced arbitrators with complementary mediation skills and experience might be suitable candidates. He disagreed with the view that mediation was a “soft skill” and encouraged lawyers acting as counsel to develop their mediation skills and knowledge and to adopt a more positive attitude towards mediation. He also favored mandatory mediation, requiring a genuine attempt to resolve a dispute, rather than a token attempt aimed only at meeting a formal requirement before being able to proceed to arbitration.

Professor Meijer said that mediation should not be viewed only as a precursor to arbitration. Arbitration and mediation may also be combined, with mediation proposed by the tribunal at an appropriate stage, for instance, after the last submission, and before the merits hearing. Many dispute resolution service providers, he said, now offer a combination of mediation and arbitration: for example, the “Concurrent Med-Arb” (CAM) proposed by Jack Coe, by which one or more mediators shadow an arbitration and, in consultation with the tribunal, intervene at various junctures in an effort to settle the dispute. In the event of settlement, the terms of the agreement may be laid down in a consent award.⁴

Professor Ziadé then asked whether States necessarily faced more difficulties than private parties in the mediation process, putting them at a disadvantage.

Ms. Hodgson believed that mediation could offer an efficient alternative to arbitration for States for small value disputes. She was, however, more skeptical

⁴ Jack J. Coe, *Towards a complementary use of conciliation in investor-State disputes—A preliminary sketch*, U.C. Davis Journal of International Law & Policy, 2005, Vol. 12:7, at 8–44, available at <https://jilp.law.ucdavis.edu/issues/volume-12-1/coe1-27.pdf>. See also Jack J. Coe, *Concurrent Med-Arb (CMA)—Some Further Reflections on a Work in Progress*, in *Investor-state disputes: Prevention and alternatives to Arbitration II*, Proceedings of the Washington and Lee University and UNCTAD Joint Symposium on International Investment and Alternative Dispute Resolution, held on March 29, 2010 in Lexington, Virginia, United States of America, eds. Susan D. Franck and Anna Joubin-Bret, United Nations—New York and Geneva, 2011, at 43–48, available at https://unctad.org/system/files/official-document/webdiaeia20108_en.pdf.

about mediation as an efficient tool for resolving high-value investor-State disputes because:

- Mandatory mediation clauses often do not lead to settlement, but instead result in increased costs by adding a wasted step to the proceedings.
- Investors may rely on unsuccessful mediation to allege that the host State failed to mediate in good faith, in breach of their treaty obligation to afford fair and equitable treatment.
- A binding arbitral award upholding the rule of law might be a more effective tool to oblige an arm of government to reform or adopt changes.
- Government officials might find it easier to obtain buy-in or budgetary approval for a binding award than for a voluntary settlement.⁵
- Successive governments may be unwilling publicly to accept responsibility for the actions of previous governments that have settled investor-State disputes.
- Mediation is still perceived as lacking transparency, which is already a source of criticism of the ISDS system involving millions of dollars in State funds.
- Mediation would not necessarily contribute to combating corruption on either the investor side or the State side.
- Mediation might not be suitable or appropriate for all types of disputes, particularly where State litigators have little discretion with respect to regulatory measures relating, for example, to healthcare or the environment.
- The enforcement of mediated settlement agreement may prove problematic.

Professor Ziadé said that the ISDS community had taken significant steps in recent years to increase the legitimacy of ISDS through increased transparency. The United Nations Commission on International Trade Law (UNCITRAL) had adopted Rules on Transparency in Treaty-based Investor-State Arbitration (also known as the “Transparency Rules”). More recently, the UN Convention on Transparency in Treaty-based Investor-State Arbitration (also known as the “Mauritius Convention on Transparency”) had come into force. There was a growing use of technology to increase transparency, including live streaming of

⁵ In some States, often to avoid corruption, entering contracts, including settlement agreements, above a certain threshold (which is sometimes very low, *e.g.*, USD 2 million) may require cabinet-level or legislative approval. Thus, it is unlikely that a mid-level government official will agree to a mediated settlement of a multimillion-dollar dispute. Moreover, mid-level government officials would rather avoid the risk that the mediated settlement agreement be considered by the relevant Department of Finance to involve misuse of government funds that would potentially expose them to criminal prosecution.

hearings. Nonetheless, the success of mediation, he said, was heavily dependent on confidentiality, and participants might be reluctant to talk openly about the central issues if they do not feel confident that these discussions cannot and would not be disclosed to others. He invited the panelists to reflect on whether the confidential nature of mediation could be reconciled with transparency, and whether it would be possible to regulate mediator caucusing.

Ms. Obadia said that, even though transparency provisions in investment treaties often do not apply to mediation, and even though the Mauritius Convention on Transparency is limited to arbitration, States are still expected to be transparent regarding the mediation of their disputes with foreign investors.

She saw confidentiality and transparency as two distinct, but not necessarily mutually-exclusive concepts, and advocated the introduction into the mediation process of some aspects of transparency while adequately preserving confidentiality, which she described as the cornerstone of mediation.

The ICSID draft amended conciliation rules and ICSID draft mediation rules, she said, allow transparency and confidentiality to coexist. Under these rules, the parties may agree on the treatment of confidential or protected information; the disclosure of any settlement agreement resulting from the conciliation or mediation; the participation of third parties (such as non-governmental organizations); and the treatment of information disclosed by one party to the mediator during caucuses. In practice, skilled mediators could facilitate the negotiation of media and information protocols, allowing for the transparency required in the public arena while preserving the confidentiality of the negotiations.

Agreeing with Ms. Obadia, Professor Meijer noted that confidentiality is not a matter of “all or nothing,” referring by way of example to Rule 9 of the ICSID draft mediation rules,⁶ and Article 10 of the IBA Rules for Investor-State Mediation.⁷ It might be advisable, he said, that certain information surrounding

⁶ *Supra* note 3, at 215, Rule 9 (Confidentiality of the Mediation): “(1) All information relating to the mediation, and all documents generated in or obtained during the mediation shall be confidential, unless: (a) the parties agree otherwise; (b) the information or document is independently available; or (c) disclosure is required by law. (2) The fact that the parties are mediating or have mediated shall not be confidential.”

⁷ IBA Rules for Investor-State Mediation, Article 10 (Privacy and Confidentiality): “[...] 3. The confidentiality obligation described in Article 10(2) shall not extend to: a) the fact that the parties have agreed to mediate or a settlement resulted from the mediation, unless the parties otherwise agree in writing; b) the terms of a settlement or partial settlement, unless and to extent that the parties otherwise agree in writing; c) the disclosure of documents or information: i) prepared by the disclosing party in connection with the mediation, if they contain no information provided by any other party or the mediator and do not refer to the mediation; ii) as evidence that a settlement agreement was reached when any other party disputes it; iii) for the purpose of enforcing or homologating a settlement agreement, subject to any requirement provided in the agreement; iv) to comply with a pre-existing legal disclosure obligation that was made known to the other parties in the

the mediation process, such as its existence, the existence of a settlement or even the terms of the resulting settlement, be made public in the interest of transparency.

Professor Ziadé then asked whether mediation presented a risk of infringing ethical rules; whether an individual acting as a mediator in an ISDS mediation, thus gaining access to confidential information, could serve as an arbitrator in an arbitration relating to the same dispute or involving the same parties.

Mr. Appel said that different cultures have varying appetite for combining the role of mediator and arbitrator, and that, in any case, parties should have full knowledge and a clear understanding of the mediator's potential role as an arbitrator. Mediators should always possess the competencies that would make them suitable for service in investor-State mediation, referring to the Investor-State Mediation Competency Criteria,⁸ which are provided by the International Mediation Institute (IMI). He said that neither mediation skills alone, nor experience and expertise in investor-State relations and arbitration alone were sufficient. He applauded ICSID, ECT, UNCITRAL, the Centre for Effective Dispute Resolution (CEDR), and IMI for cooperating to deliver a series of investor-State mediator skills training programs around the world.

Mr. Appel said that, in case information regarding some illegality (e.g., corruption) surfaced during a mediation, the mediator should always look to their mediator code of conduct or other applicable codes of ethics to determine how best to handle such illegality.

For his part, Professor Meijer expressed his doubts about allowing mediators to act as arbitrators after a failed mediation process. Mediators cannot, he said, simply “think away” information obtained through the mediation process, particularly during caucuses. While he acknowledged that the applicable mediation rules might allow parties to agree otherwise, he believed that mediation rules should prohibit a mediator from serving as an arbitrator to protect the parties and the mediator-turned-arbitrator against its necessary downsides. Allowing a mediator to serve later as an arbitrator in the same dispute could create imbalance

agreement to mediate or at the Mediation Management Conference, provided that the disclosure shall be as limited as permissible; v) to comply with a court order or similar instrument requiring disclosure, provided that the disclosure shall be as limited as permissible and shall be made only after written notice to the other party or parties and the mediator, and an opportunity to contest the disclosure under such order or instrument; vi) required to prevent a serious crime or eminent threat to public safety, provided that the disclosure shall be as limited as is reasonable in all circumstances; and vii) that, at the time of disclosure, has demonstrably entered into the public domain through no direct or indirect breach of the confidentiality obligations set forth above. Except with respect to Article 10(3)(c)(i) and (vii), any disclosure made shall be in a manner that protects the confidentiality of information to the greatest extent feasible and permissible.” Available at <https://www.ibanet.org/MediaHandler?id=C74CE2C9-7E9E-4BCA-8988-2A4DF573192C>

⁸ Available at <https://www.imimmediation.org/about/who-are-imi/ism-tf/>.

on a three-member tribunal, with one arbitrator necessarily knowing more about the case than the other two.

Professor Ziadé then turned to examine the enforcement process of a mediated settlement agreement. He recalled that one of the main advantages of arbitration was the seamless process of enforcement of arbitral awards. This is ensured by Article 54(1) of the ICSID Convention, which allows the winning party to have pecuniary obligations recognized and enforced in the courts of any ICSID Member State as though it were a final judgment of that State's courts, and by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which establishes a pro-enforcement legal framework for arbitral awards. Professor Ziadé was of the view that any mediated settlement agreement also needed to be easily enforceable if mediation were to be perceived as an equally useful means of dispute settlement. He observed that the Singapore Convention on Mediation has been touted as the mediation equivalent to the New York Convention and has been said to mark a pivotal moment for the growth of mediation as a method of dispute resolution. Professor Ziadé invited panelists' views on whether they anticipated any issues with the enforcement of mediation settlement agreements in investor-State disputes in the light of the Singapore Convention.

Ms. Obadia said that the Singapore Convention on Mediation refers to mediated settlement of commercial disputes, with investor-State mediated settlements neither expressly excluded from, nor, regrettably, included within the Convention's scope of application. She said, nonetheless, that some States had made reservations on the Convention's applicability to investor-State mediated settlements, which, she suggested, implied that the Convention did apply to investor-State mediated settlements.

The ICSID's draft amended conciliation rules and draft mediation rules both take account of the Singapore Convention on Mediation, as they both provide for the option for parties to record their mediated settlement in a signed agreement. Parties could, therefore, benefit from the multilateral framework being established to recognize and enforce mediated settlements. She concluded that the Singapore Convention on Mediation was, therefore, likely to increase recourse to mediation in investor-State disputes.

The other panelists agreed that it would have been preferable for the Singapore Convention on Mediation to refer expressly to investor-State mediated settlements. They believed, however, that investors and host States would be able to rely on the Convention to enforce their mediated settlements and that the Convention would likely encourage a greater up-take of mediation in investor-State disputes.

Professor Ziadé then asked panelists to reflect on whether mediation was not just a tool for conflict resolution, but also a tool for conflict prevention.

Ms. Obadia said that mediating an issue only after it had escalated into a full-blown dispute may sometimes prove to be too late. Mediation could also be used as a tool to prevent the crystallization of the dispute. She gave the example of the World Bank's Systemic Investment Response Mechanism (SIRM), also called Investor Grievance Mechanism (IGM), which aims to deal with issues faced by investors due to government conduct early on before these issues escalate. She said that these systems are not mere conflict prevention tools; they also aim to achieve the retention and expansion of existing investments in the host State and are thus a primary source of new foreign direct investment.

Ms. Obadia noted that the European Commission was intensifying discussions with its Member States to ensure complete, strong and effective protection of investments within the EU following the adoption of the plurilateral treaty to terminate intra-EU bilateral investment treaties (BITs). Those discussions include assessing existing processes and mechanisms of dispute resolution and the need to create new, or improve relevant existing tools and mechanisms under EU law to prevent disputes. Ms. Obadia suggested that the EU Commission would likely be inspired by the IGM/SIRM systems, especially considering that the World Bank has written a report on this topic with the European Commission's support.⁹

Ms. Obadia described the SIRM as an early-warning and tracking mechanism to identify and resolve complaints about, and issues arising from, government conduct. The SIRM ensures that governments respond to investor grievances in a timely and appropriate manner and in accordance with the State's laws, regulations, and international investment agreements. The SIRM's focus is to identify specific patterns and origins of government conduct generating political risks; to measure affected investment as "evidence" to advocate for timely changes and resolutions of issues; and to strengthen relevant institutions' capacity to minimize the recurrence of these events. A lead agency is set up in the host State to receive notifications of complaints and issues from aggrieved investors and to alert other State agencies to the State's obligations; so essentially acting as a mediator between the investor and the State agency at the origin of the problem.

The World Bank has, Ms. Obadia said, worked on 18 SIRM projects so far: three were already closed; nine were still active; and six were in the pipelines. Data shows that three of these pilot projects have so far preserved USD 229 million in

⁹ *Retention and Expansion of Foreign Direct Investment: Political Risk and Policy Responses*; available in full at <http://documents.worldbank.org/curated/en/387801576142339003>. A summary of the report is available at <http://documents.worldbank.org/curated/en/528401576141837231/>.

investments in host States, expanded investments by USD 20 million, and saved up to USD 10 million in costs.

Professor Ziadé then turned to the Model Instrument on Management of Investment Disputes, which was approved by the Energy Charter Conference on December 23, 2018. This instrument seeks to encourage the prevention and de-escalation of foreign investment disputes before formal dispute resolution becomes necessary. Professor Ziadé invited panelists to outline this instrument and explain its significance.

Mr. Appel recalled that in 2017, the Energy Charter Secretariat had surveyed its member States to identify obstacles to the use of mediation in investor-State disputes. It quickly became apparent to the Secretariat that there was a lack of clear domestic legal frameworks for addressing investor-State disputes. Mr. Appel added that it was against this background that the Energy Charter Secretariat, working with a subcommittee of the IMI Investor-State Mediation Taskforce, had drafted the Model Instrument on Management of Investment Disputes.

Mr. Appel described how the Model Instrument, a domestic legislative model, embraces a set of important lessons learned by States in effective conflict management and dispute resolution. Among other things, the Model Instrument embraces early and effective conflict management tools (e.g., early warning mechanisms; early preliminary assessments/map-out strategy; obtaining early expert and/or counsel advice); addresses the scope of matters that can be referred to alternative dispute resolution methods (i.e., contracts, investments or both); proposes identifying a lead State agency or entity (e.g., a special commission or a designated ministry) that would develop a body of expertise within the State to address investor-State dispute issues; addresses budgetary matters relating to investor-State dispute resolution; and adequately balances the competing needs of transparency and confidentiality.

Professor Ziadé then addressed the European Commission's apparent eagerness to move towards an international permanent investment court system and to abandon arbitration as a method of resolving ISDS disputes. He recalled that the EU intended to terminate all intra-EU BITs in the wake of the *Achmea* judgment.¹⁰ Professor Ziadé invited panelists to reflect on whether, if it came into being, a permanent investment court would be the go-to choice for investors, or whether national courts could become an attractive alternative to a permanent investment court, and domestic courts of EU Member States an attractive alternative to intra-EU investment arbitration.

¹⁰ *Slovak Republic v. Achmea B.V.*, Case C-284/16, Court of Justice of the European Union (CJEU), March 6, 2018, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=404057>.

Ms. Hodgson thought it likely that investors would prefer to go to an investment court, even though much remains unknown about its final composition and its *modus operandi*. Domestic courts, she said, tend to adopt a stricter approach to determining and proving damages than international tribunals, likely awarding lower-value damages than would be awarded by international tribunals, thus making domestic courts less attractive to investors.

Professor Meijer observed that, in practice, clients were already enquiring about the possibility of resorting to domestic courts, which may or may not present an appealing alternative, depending on the host State concerned. He said that, nonetheless, some countries have reasonably impartial courts that aim to apply and develop EU law to protect investors. He also noted that investors were beginning to bring their cases before the European Court of Human Rights, which could eventually bolster the legitimacy and credibility of the process, making it more predictable.

As to damages awarded by domestic courts, Professor Meijer observed that the so-called *Chorzów Factory*¹¹ full reparation principle could also be found in many national legal systems, adding that it would be interesting to follow developments closely regarding the award of damages by domestic courts.

Professor Meijer added that it might be possible to submit disputes to specialized domestic commercial courts, in those countries in which these had been established (e.g., Amsterdam, Frankfurt, London, Paris). Given their specialization in dealing with investor-State type disputes, he thought these English-language courts were reminiscent of arbitral tribunals. Further, the enforcement of the judgments of these courts could be carried out through European regulations, international conventions, and national law. He also noted that some States, such as the Netherlands, allow parties to submit a dispute to the State courts if the otherwise competent court could not be considered impartial.

Finally, Professor Ziadé asked whether the panelists anticipated that parties would try to maintain the option of resorting to arbitration through contractual mechanisms by inserting arbitration clauses in their contracts.

Professor Meijer stated that he did, indeed, anticipate parties doing so, but that the insertion of this option in investment contracts was contingent on the bargaining powers of the foreign investor. He thought that smaller investors might, therefore, find it more challenging to agree such arbitration clauses in their contracts when negotiating with sovereign States. In contrast, larger investors, such as major multinational corporations, might have more success. He noted also that not only arbitration clauses, but also other clauses typically found in BITs, such as

¹¹ *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgment, Permanent Court of International Justice (PCIJ), July 26, 1927, available at http://www.worldcourts.com/pcij/eng/decisions/1927.07.26_chorzow.htm.

fair and equitable treatment and the principle of compensation for expropriation, may find their way into specifically-negotiated investment contracts. Ms. Hodgson agreed that investors would be tempted to maintain the option of resorting to arbitration in their contracts, and suggested that even States could be interested in such an option.