

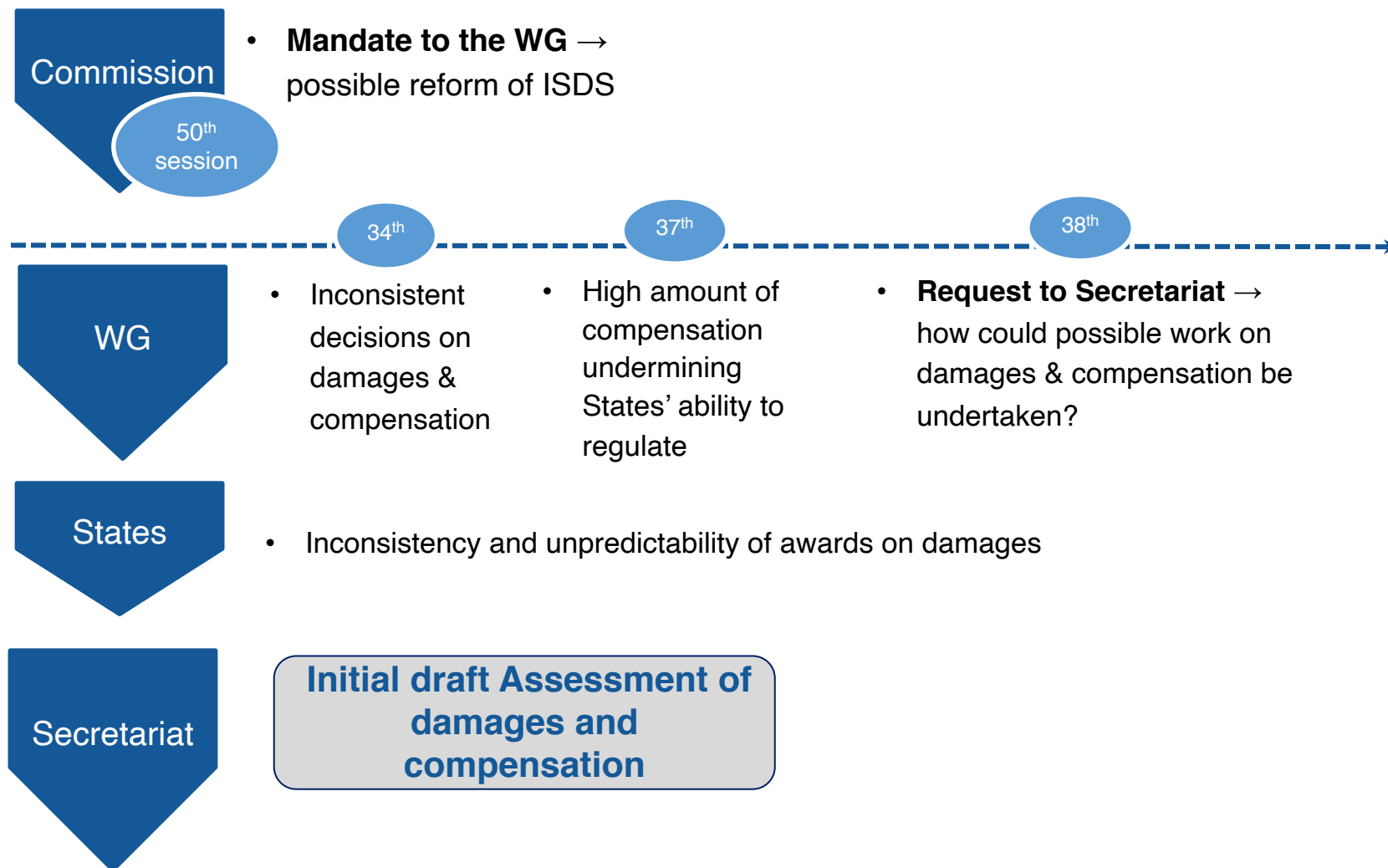


UNCITRAL Secretariat:

Draft note - Assessment of damages and compensation

Webinar on Damages in ISDS
26. August 2021

Previous Discussion



General Considerations



- Outline of the key issues relevant to the question of assessment of damages & compensation



- [Mandate?]



- Questions for the WG to consider:

→ **Could these issues be addressed by developing:**

- i. **relevant provisions**, possibly with a binding effect, on procedural rules related to the damages & compensation to be included **in investment treaties, arbitration rules or a multilateral instrument**
- ii. **guidelines and standards** on legal framework for damages & compensation and the application of calculation methods **for arbitral tribunals**

Complexity and uncertainty



- High degree of complexity and uncertainty of current practice



Development of treaty provisions, guidelines or standards, addressing the following issues:

1. Compensation standard
2. Valuation method
3. Valuation date
4. Potential limitations for compensation
5. Causation standards
6. Evidentiary requirements
7. Interest
8. Selection of experts and their ethical regime

Compensation standard

Substantive guarantees and standards in investment treaties:

- Protection against expropriation
- FET
- Non-discrimination

Claim for compensation by breach of these treaty obligations

Lawful expropriation

- Investment treaties
- Compensation as a condition for lawful expropriation
- **Fair market value (+)**
OR a **different standard**
including contextual factors

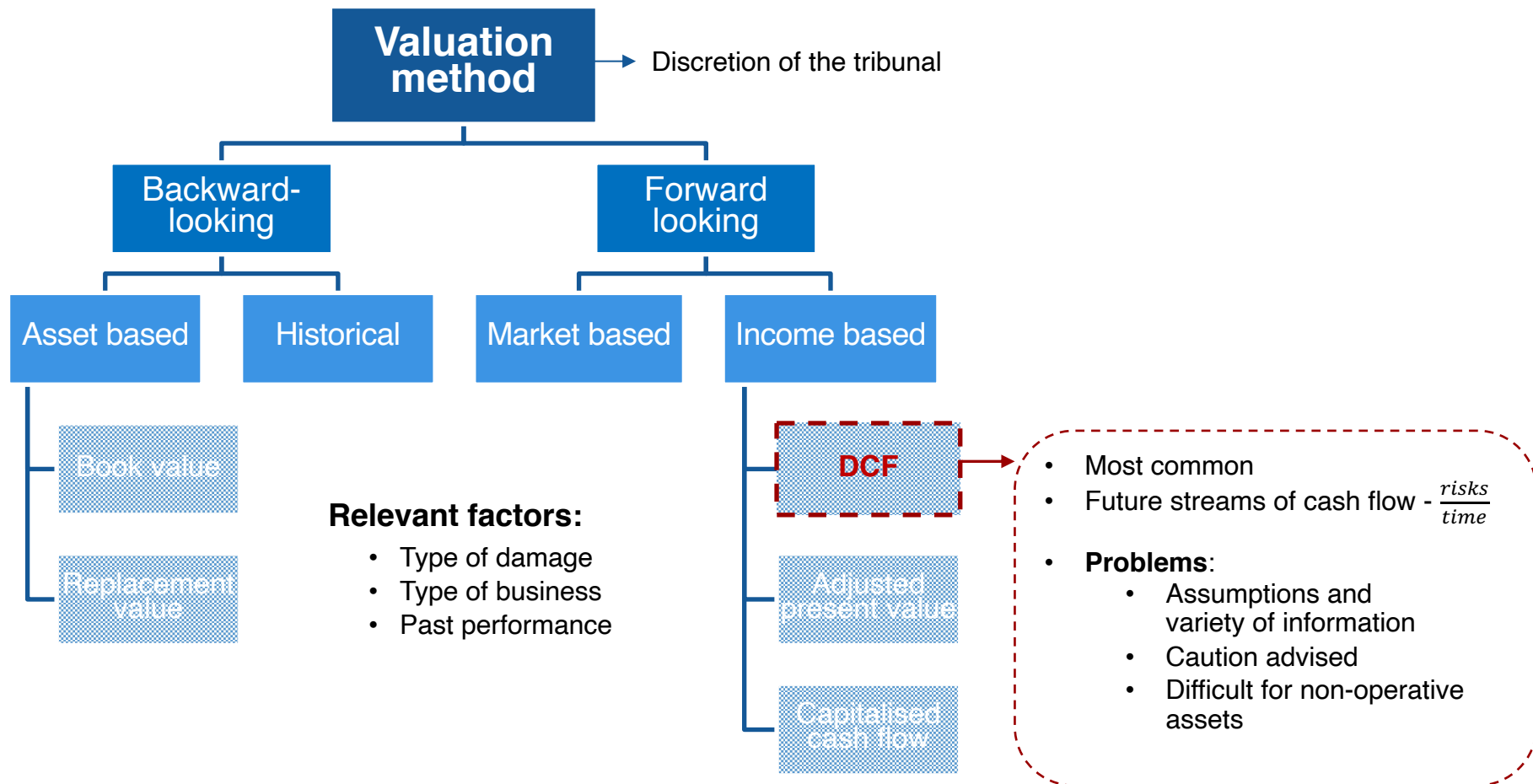
Unlawful expropriation

- Differing opinions
- **Full reparation standard**
 - PCIJ *Factory at Chorzów*
 - Art 31 ILC Articles
- No differentiation between direct and indirect expropriation

Other breaches

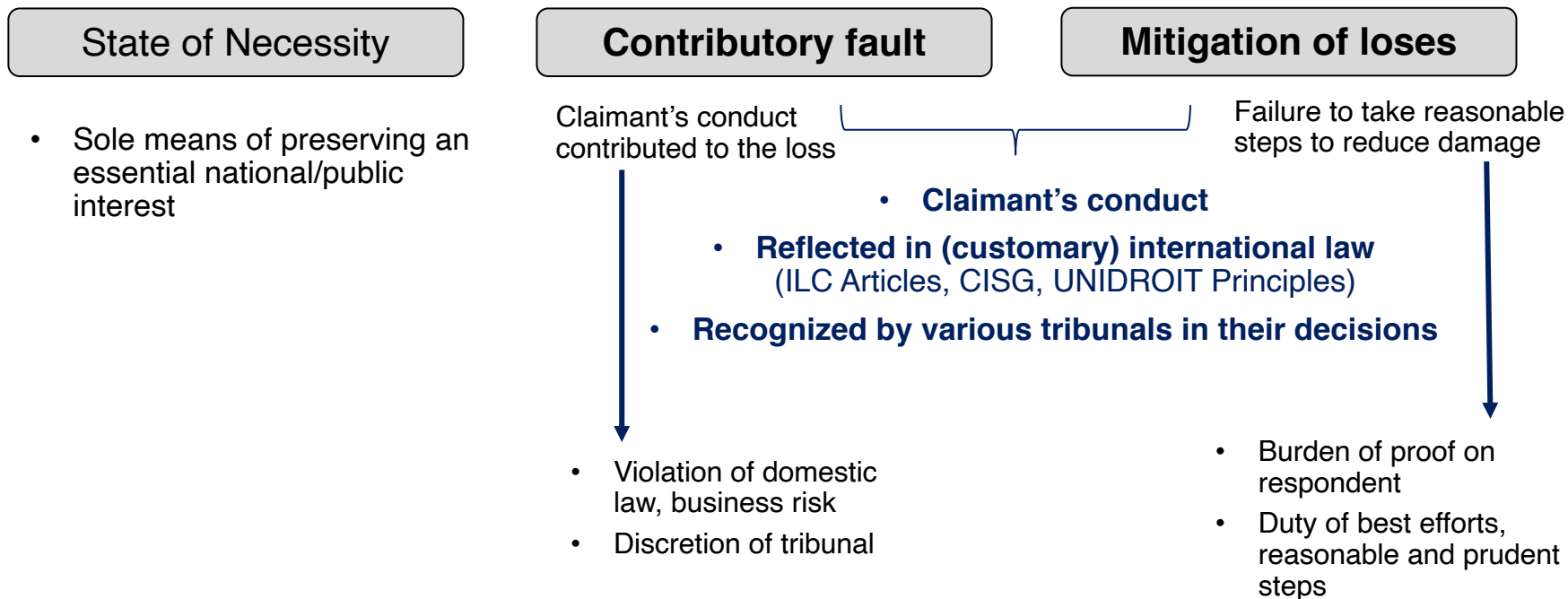
- *Chorzów* decision and ILC Articles OR “**full protection and security**” standard
- Problematic cases
- Recent investment treaties → provisions on damages aiming to potentially minimize damages

Valuation method and date



Limitations for Compensation

Different factors potentially limiting the amount of compensation:



Causation standards

Appropriate standards or tests for proving causation are generally not included in the investment treaties

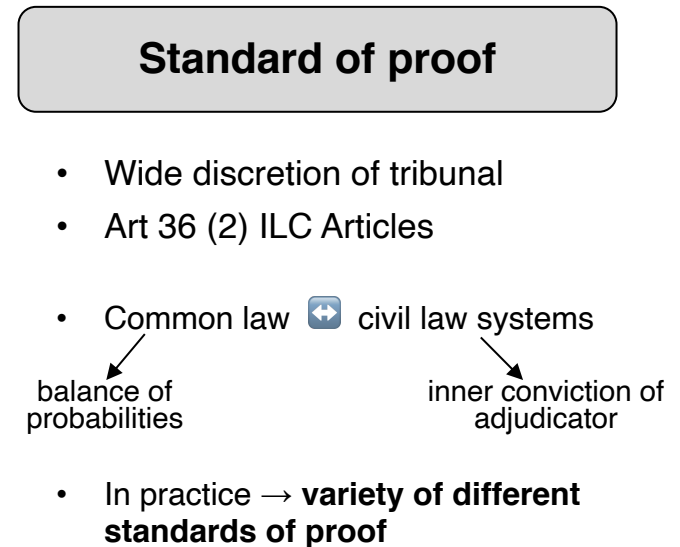
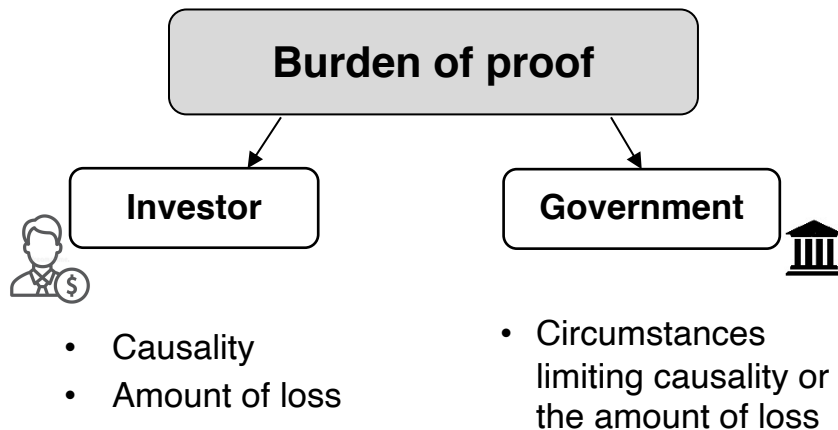
Standard?

Art 31 ILC commentary

- The loss claimed must not be too:
 - speculative
 - remote
 - Uncertain
- Not necessarily the same in every breach of an international obligation

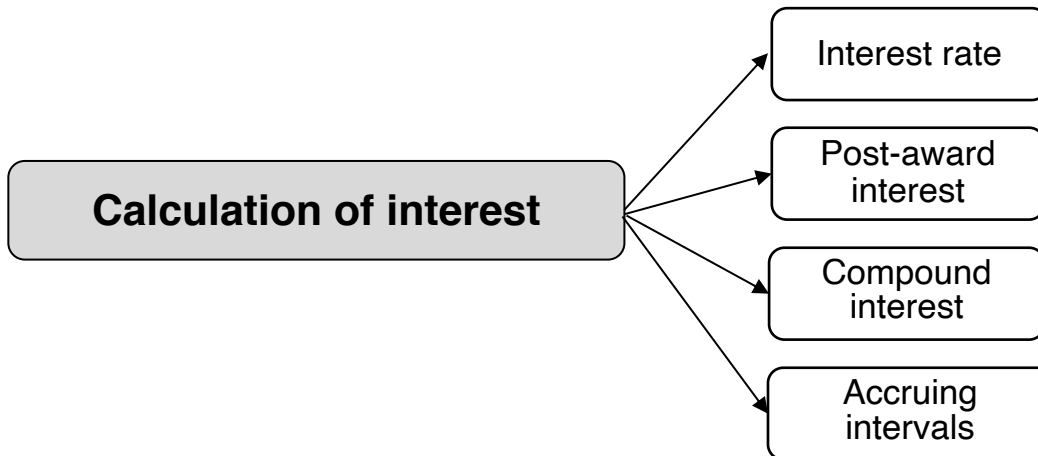
Evidence

- Burden of proof is governed by the generally accepted principle of international law;
- Standard of proof is rarely addressed in investment treaties and decisions



Interest

- Not all elements necessary for calculation of interest are regulated in the treaties



- different options
- potentially higher rates
- permissible?
- different approaches

Experts

There is a wide divergence of compensation presented by claimants' and respondents' experts

Role of experts

- Party- or tribunal-appointed
- Content of the expert report
- Statement of independence
- Possibility of a joint report of party-appointed experts

Development of treaty provisions or guidelines, for:

- **Setting up a generalized system of expert(s) appointed by the tribunal** to assist decision-making process and replace party-appointed quantum experts
- **Improving the current system of party-appointed experts:**
 - Harmonized methodology
 - Alternative calculations in case of disagreement
 - Joint statements in case of divergences
 - Teaming up of the party-appointed experts

High compensation and discrepancies



1. High and increasing amounts of compensation claimed by investors
2. Significant divergence between the amount of compensation claimed and the amount of compensation awarded
3. Wide divergence of compensation presented by claimants' and respondents' experts → already discussed



1. Development of treaty provisions or guidelines for ISDS tribunals on:

- Use of valuation methods and calculation of interest
- Capping of compensation for instance to the amount actually invested by the investor
- Consideration of contextual factors

2. Addressing manifest over- or under-statements through guidance:

- Guidelines on cost allocation
- Draft provision on cost allocation

Links to other reform options

- **Questions related to damages and compensations that arise in the context of other ISDS reform options**

- Mechanisms to address frivolous claims at an early stage of the proceedings and in an expedited process
- Regulation of third-party funding
- Reform of appellate and multilateral court mechanism
- Treaty parties' involvement in, and control mechanisms, on treaty interpretation
- Multiple proceedings, shareholder claims and reflective loss



Thank you for your attention!