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What can conciliation learn from other forms of ADR?

Topic 1: Negotiation

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CIL Working Conference on Conciliation
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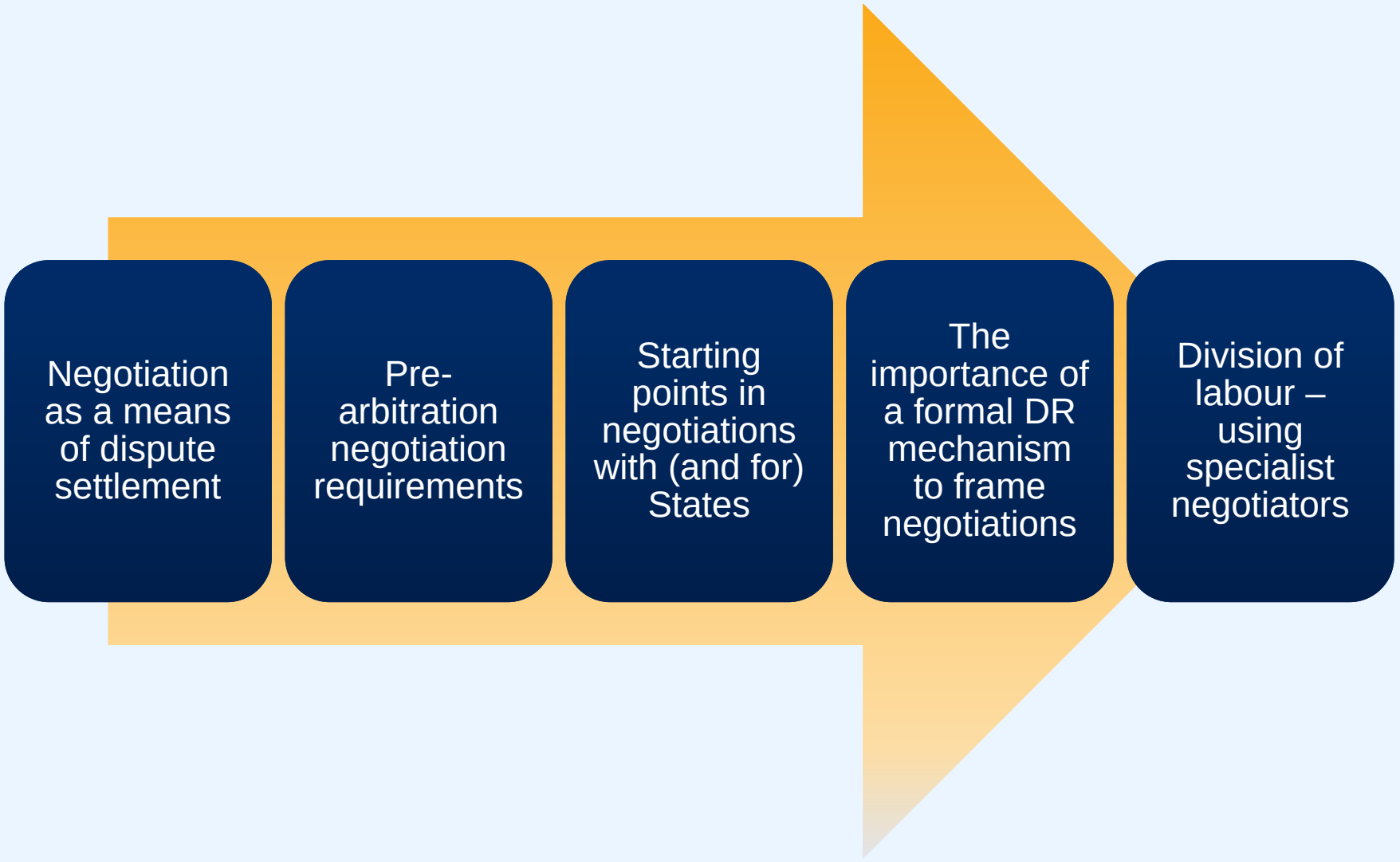
Agenda


Negotiation as a means of dispute settlement
Pre-arbitration negotiation requirements
Starting points in negotiations with (and for) States
The importance of a formal DR mechanism to frame negotiations
Division of labour – using specialist negotiators

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Negotiation as a means of dispute settlement

Section 1

Negotiation as a means of dispute settlement

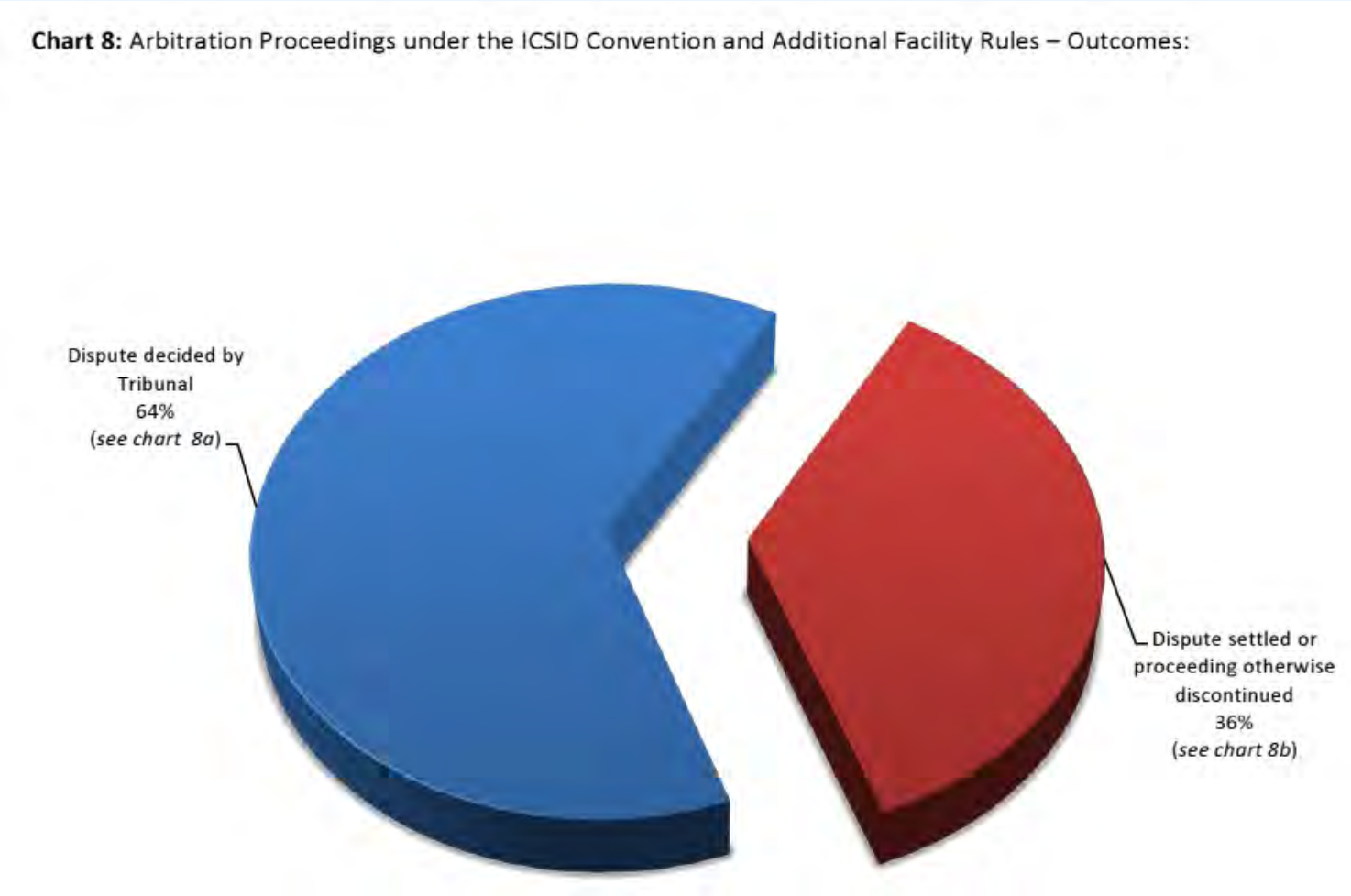
1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

UN Charter, Art. 33(1)

There is no need to insist upon the fundamental character of this method of settlement, except to point out that it is emphasized by the observable fact that judicial or arbitral settlement is not universally accepted.

***North Sea Continental Shelf* cases [1969] ICJ Reports 3, p 47**

Negotiation as a means of dispute settlement



ICSID Caseload Statistics, Issue 2016-2

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Pre-arbitration negotiation requirements

Section 2

Investment treaties – cooling-off periods

2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. […]

3. **(a)** Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the data on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration: […]

United States-Ecuador BIT, Art. VI(2) & (3)

Investment treaties – cooling-off periods

315. Second, by imposing upon investors an obligation to voice their disagreement at least six months prior to the submission of an investment dispute to arbitration, the Treaty effectively accords host States the right to be informed about the dispute at least six months before it is submitted to arbitration. The purpose of this right is to grant the host State an *opportunity* to redress the problem before the investor submits the dispute to arbitration. In this case, Claimant has deprived the host State of that opportunity. That suffices to defeat jurisdiction.

Burlington Resources Inc. v Republic of Ecuador
(ICSID Case No. ARB/08/5), Decision on Jurisdiction, 2 June 2010

Investment treaties – cooling-off periods

346. […] In the Arbitral Tribunal's view, however, properly construed, this six-month period is procedural and directory in nature, rather than jurisdictional and mandatory. Its underlying purpose is to facilitate opportunities for amicable settlement. Its purpose is not to impede or obstruct arbitration proceedings, where such settlement is not possible.

347. In this case, the course of events amply demonstrated that any further delay on BGT's part would not have served any useful purpose. By the time the Request for Arbitration was filed, a long process of negotiation and renegotiation had already failed, and the Republic's position was entrenched

Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania
(ICSID Case No. ARB/05/22), Award, 24 July 2008

Compromissory clauses requiring negotiations

In the present case, the Court is therefore assessing whether Georgia genuinely attempted to engage in negotiations with the Russian Federation, with a view to resolving their dispute concerning the Russian Federation's compliance with its substantive obligations under CERD. Should it find that Georgia genuinely attempted to engage in such negotiations with the Russian Federation, the Court would examine whether Georgia pursued these negotiations as far as possible with a view to settling the dispute. To make this determination, the Court needs to ascertain whether the negotiations failed, became futile, or reached a deadlock before Georgia submitted its claim to the Court.

***Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russia)* [2011] ICJ Reports 70, p 134**

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Starting points in negotiations with (and for) States

Section 3

Negotiation – what can be achieved?

Negotiation

- Are investors interested in negotiating?
- Is there any incentive for investors to negotiate?
- Will their demands be reasonable?
- Can it be detrimental to negotiate?

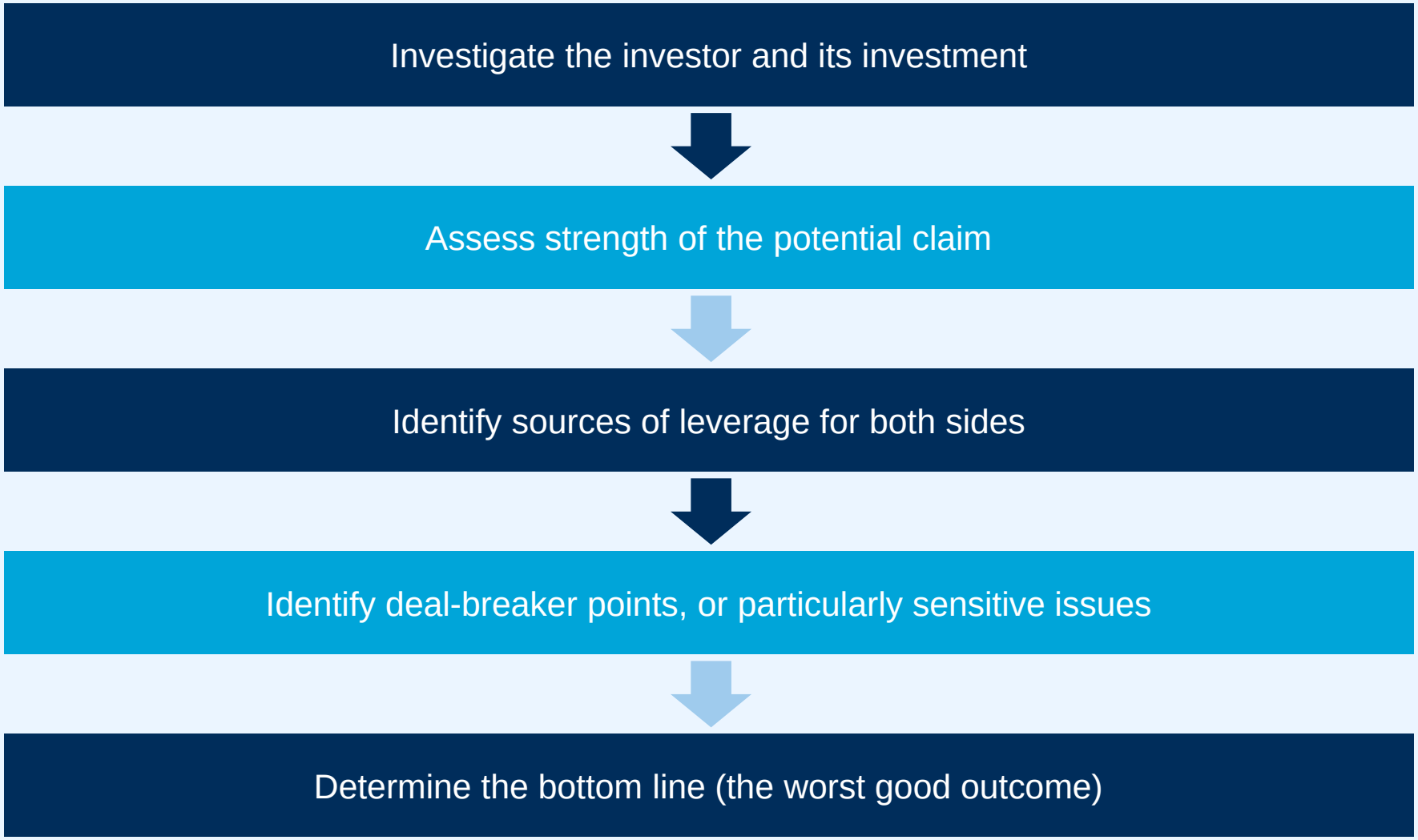
How to develop a negotiation plan

Developing a strategy

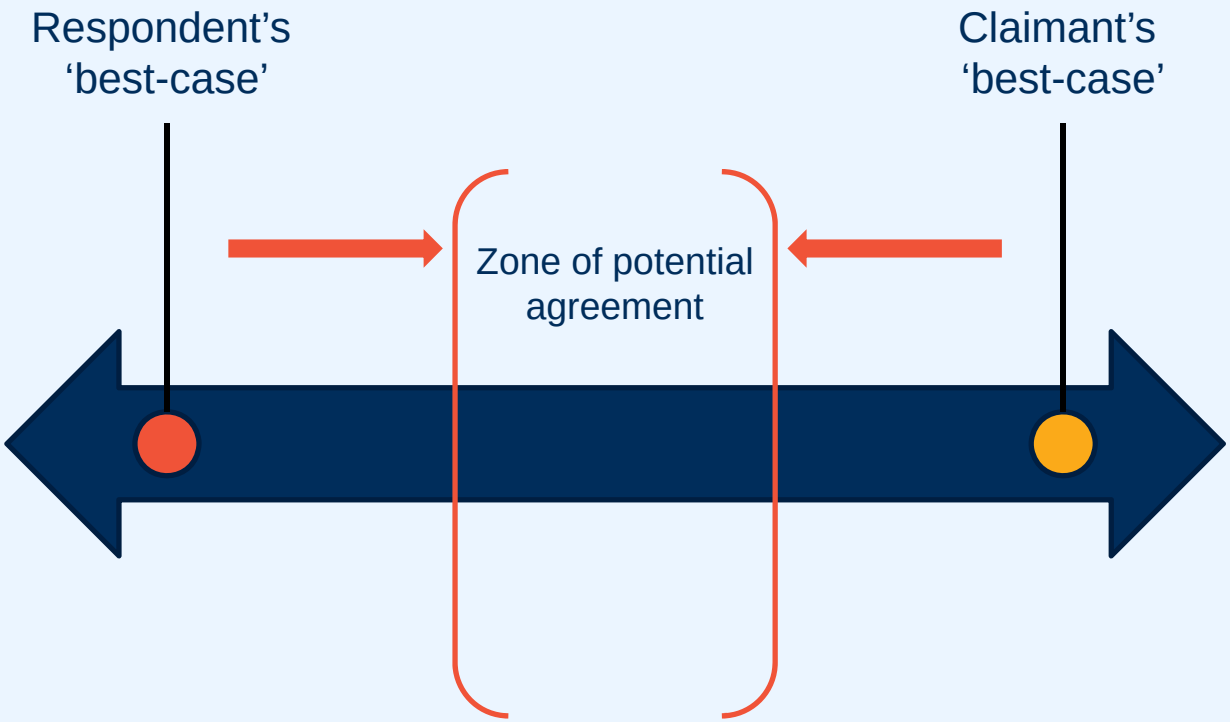
Develop negotiation strategy proactively rather than reactively

Assume the investor is receiving good advice

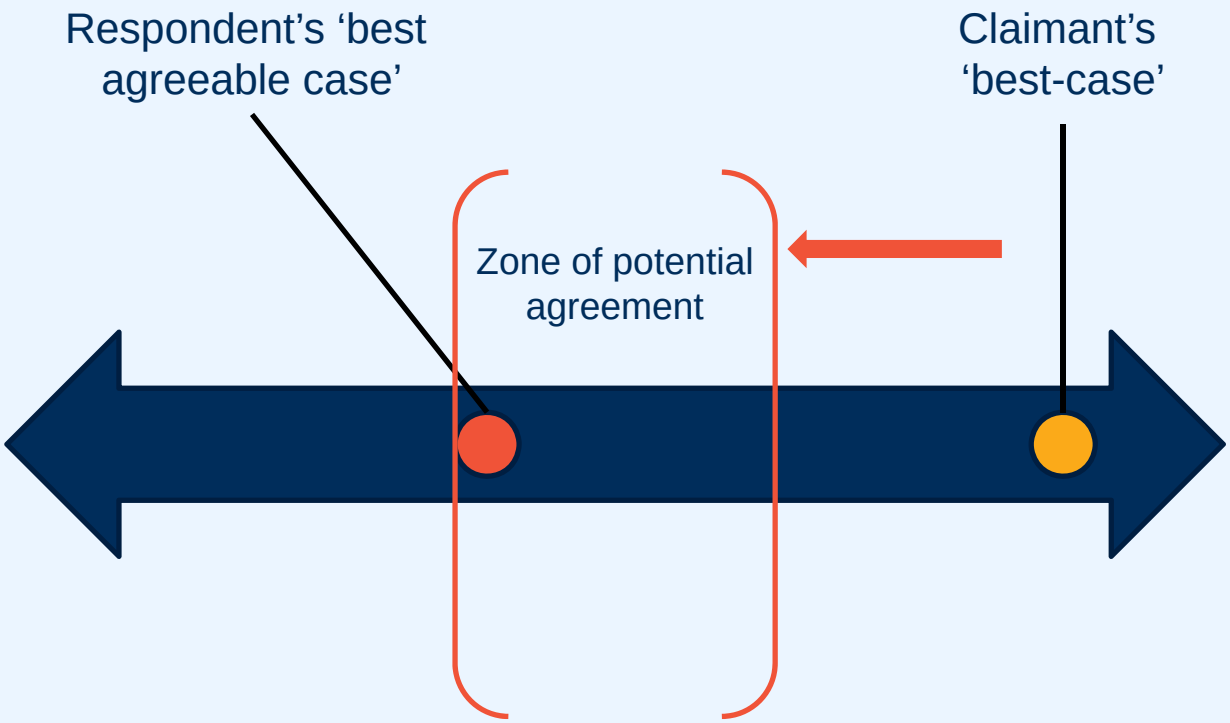
How to develop a negotiation plan



Negotiation strategy model 1



Negotiation strategy model 2



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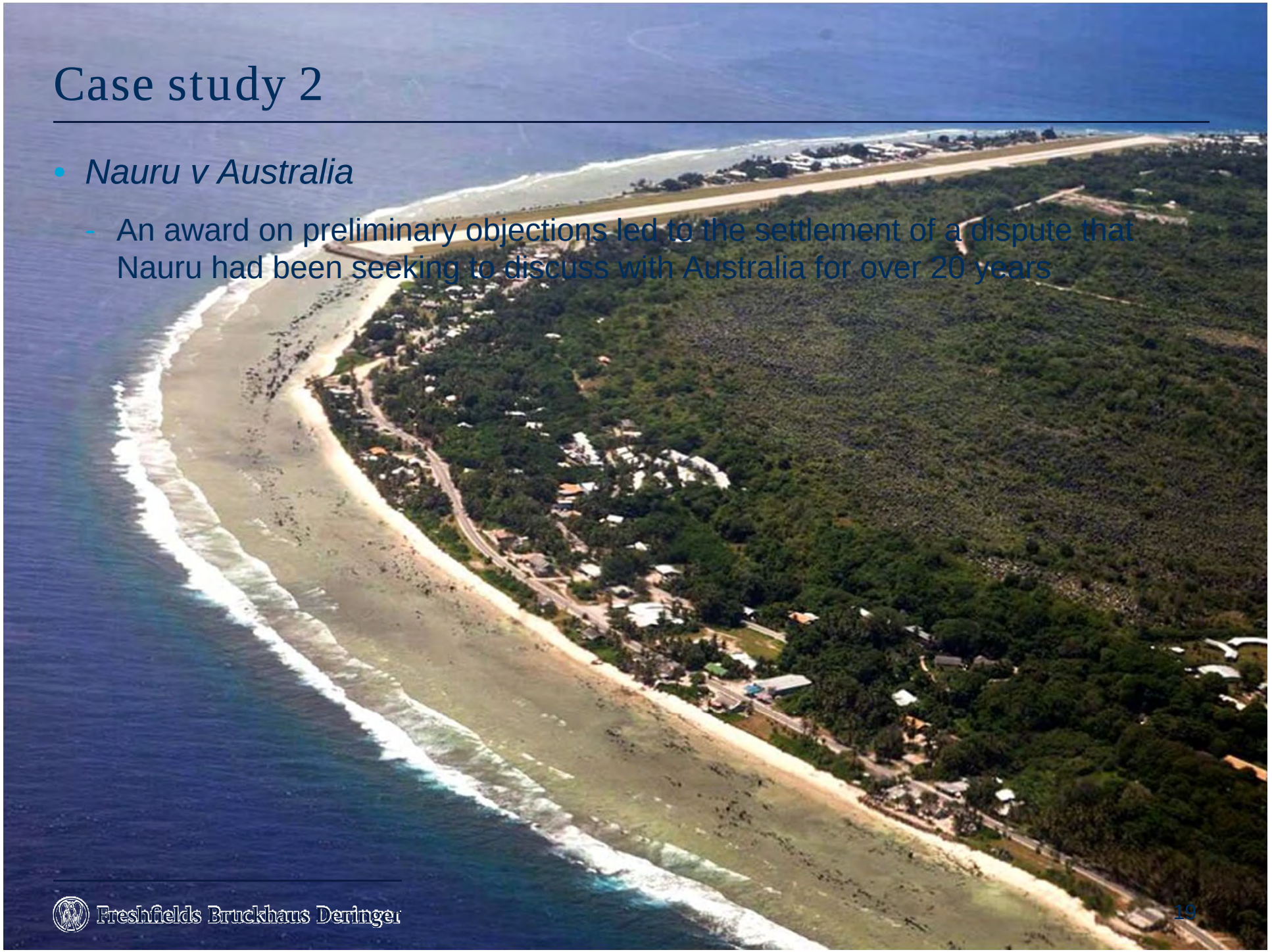
The importance of a formal DR mechanism to frame negotiations

Section 4

Case study 1

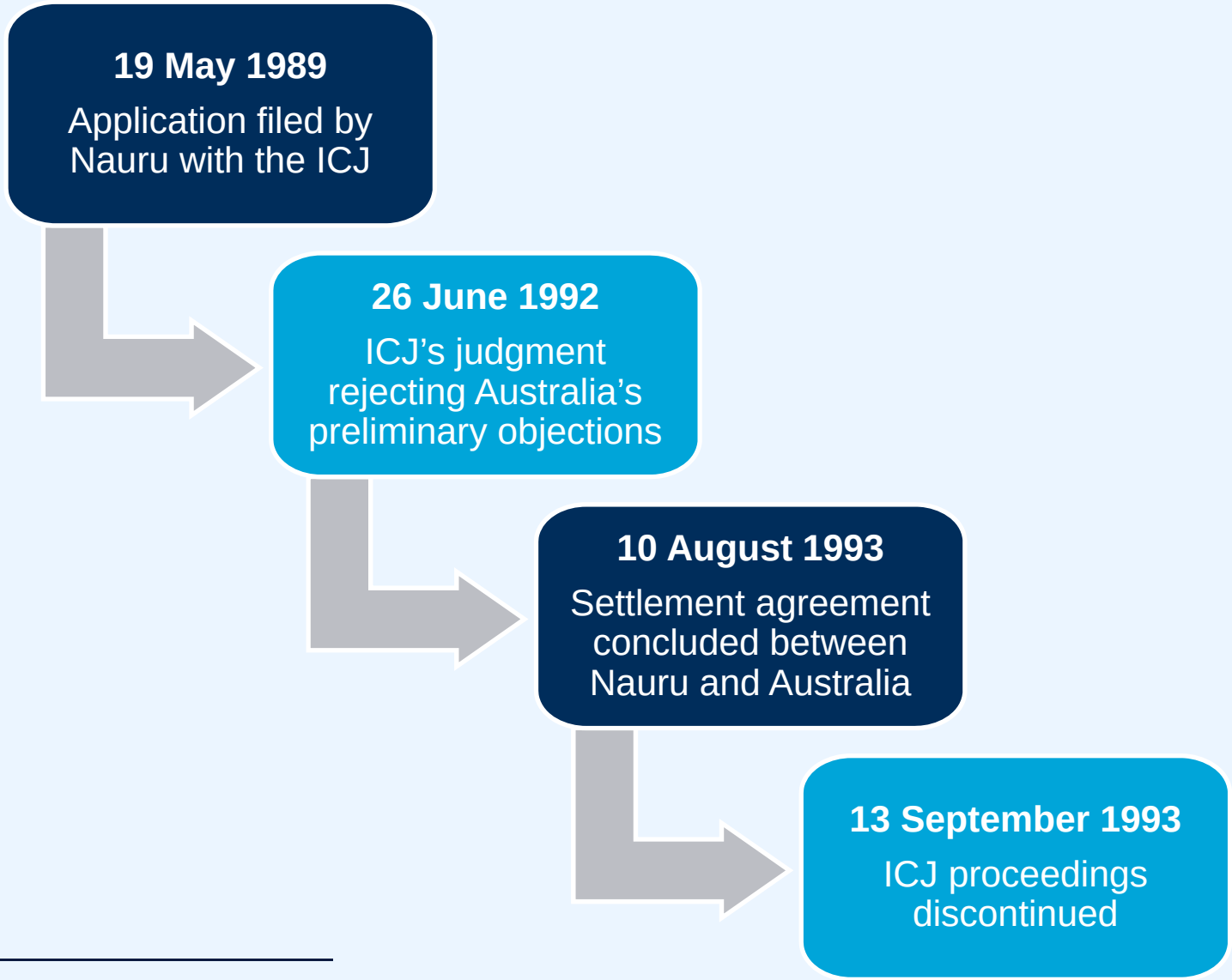
- Representing a claimant (a consortium of Japanese investors) against a Southeast Asian State
  - Intensive negotiations led to a negotiated settlement that disposed of the matter

Case study 2



- *Nauru v Australia*
  - An award on preliminary objections led to the settlement of a dispute that Nauru had been seeking to discuss with Australia for over 20 years

Nauru v Australia



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Division of labour – using specialist negotiators

Section 5

Settlement counsel

Role

- Negotiate and seek to settle a dispute or case on optimum terms
- Partisan (in contrast to mediators)
- Focus on the future: “What are the interests of the parties?”; “What does the client want to happen?”

Timing of appointment

- Should be brought into a dispute even before litigation starts
- Creates more options for early settlement

Collaboration with litigation counsel

- Often operate in parallel
- Do not directly participate in the litigation process and typically do not appear as counsel of record
- Nonetheless, must stay fully up to speed on litigation developments which could impact negotiation strategy or timing of settlement negotiations

Thank you

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