



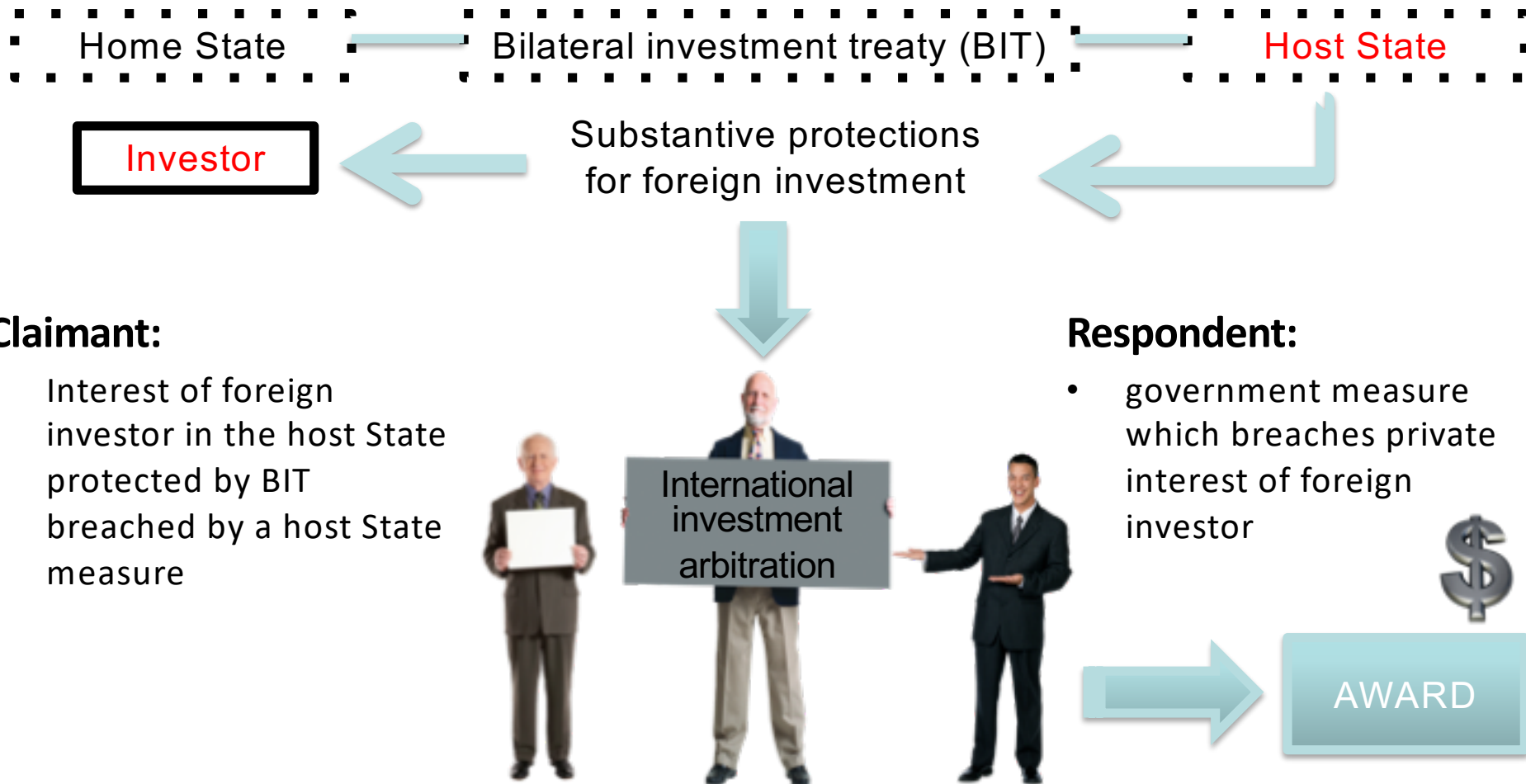
Achmea judgment in the context of international investment law

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Outline

- International investment law at glance
- EU law as an issue in investment arbitrations
- ISDS post *Achmea*

BITs and ISDS



International investment law

- **Fragmented system: diversity of treaties and tribunals**
 - 2369 BITs in force (310 other TIPs)
 - 297 pending cases
- **BITs and ISDS in the EU:**
 - Intra-EU bilateral investment treaties: 182
 - Extra-EU bilateral investment treaties: 1165
 - Intra-EU arbitrations: 86 pending cases

(UNCTAD data, <http://investmentpolicyhub.unctad.org>)

Intra-EU BITs

- **Bilateral:** between two Member States
- Only intra-EU dimension
- Only Member States are party to BIT (not the EU)
- Legally binding only for MSts which are party to the BIT
- International law

Energy Charter Treaty (ECT)

- **Multilateral** international agreement
- Intra-EU and extra-EU
- MSt and the EU are party to the ECT
- Legally binding both for the EU and MSts (except Italy)
- International law/EU law

EU law in investment arbitrations

- Intra-EU BITs overlap and conflict with EU law
 - more favourable treatment of investors from certain Member States (Art. 18)
- ISDS provides for parallel jurisprudence through arbitration (Art. 344 and 267)
 - monopoly of the CJEU to interpret EU law
- ECT: disconnection clause?

Different BITs, different applicable law

- The Netherlands-Slovakia BIT: Article 8(6)
“The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:
 - The law in force of the Contracting Party concerned...”
- What if the applicable law clause does not refer to domestic law?

EU law as an issue in investment arbitration

- EU law as the law applicable to the resolution of the investment dispute
 - Domestic law
 - International law
- EU law as a matter of fact
- Investment tribunals only interpret international law?

ISDS post *Achmea*

- Intra-EU jurisdictional objection
- *Masdar v Spain*: “the *Achmea* judgment has no bearing upon the present case” (para 678)
 - Intra-EU BIT vs. the ECT
 - Bilateral agreement of Member States (the Netherlands-Slovakia BIT in *Achmea*) vs. Multilateral agreement of the EU and Member States
 - The Opinion of AG Wathelet in *Achmea* (!?)

ISDS post *Achmea*?

- Intra-EU BITs? The ECT?
- Ongoing intra-EU arbitrations? What if arbitral tribunals do not follow *Achmea*?
 - Non-ICSID vs. ICSID arbitrations
- Already paid awards?
- Extra-EU BITs?
- Restructuring of future investments?
- Legitimacy