



# KIEV ARBITRATION DAYS

## Investment Protection and Political Risk Insurance

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CLIFFORD  
CHANCE

## The German Perspective

# Table of Contents (I)

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Institutional Framework Int'l: ECAs	4
International Co-operation	5
BITs and European Union	7
Institutional Framework in Germany	8
Selected Tools for Trade and Investment Promotion	9
Eligibility Criteria (Investment Guarantees)	10
Scope of Cover (Investment Guarantees)	16
Administrative Procedure	21
Guarantee Agreement	23
Investment Guarantee Declaration and General Conditions	24
Causes of Loss (Covered Risks)	25
Exclusions for Foreign Owned Entities	26
Time of Event of Loss	27
Contribution Value	30
Maximum Amount of Guarantee and Maximum Liability under Guarantee	32
Starting Point and End of Cover	35

# Table of Contents (II)

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General Duties of Beneficiary	38
Special Duties of Beneficiary	41
Consequences of Non-Compliance, Approvals, Rescission, Termination	43
Indemnification Procedure	48
Calculation of Indemnification: Gross Loss Amount	50
Calculation of Indemnification: Net Loss Amount	53
Calculation of Indemnification: Final Steps	54
Subrogation	55
Legal Action following Indemnification	56
Recoveries	57
Assignment of Benefit under Cover	58
Assignment of Covered Investment	59
Guarantee Premium	60
Period of Exclusion and Jurisdiction	61
German Bilateral Investment Treaties	62
Vienna Convention on the Law of Treaties (VCLT) (23 May 1969)	66

# Institutional Framework Int'l: ECAs

## Some selected official export credit agencies:

Australia:	Export Finance and Insurance Corporation (EFIC)
Austria:	Oesterreichische Kontrollbank AG (OeKB)
Belgium:	Office national du Dueroire/Nationale Delcrederedienst (ONDD)
Canada:	Export Development Canada (EDC)
Czech Rep.:	Export Guarantee and Insurance Corporation (EGAP)
Denmark:	Eksport Kredit Fonden (EKF)
France:	Compagnie Française d'Assurance pour le Commerce Extérieur (COFACE)
Germany:	A consortium of Euler Hermes Deutschland AG and PricewaterhouseCoopers AG WPG as mandataries of the Federal Republic of Germany
Italy:	SACE S.p.A. Servizi Assicurativi del Commercio Estero (SACE)
Japan:	Nippon Export and Investment Insurance (NEXI)
Korea (RoK):	Korea Trade Insurance Corporation (K-SURE)
Luxembourg:	Office du Dueroire (ODD)
New Zealand:	Export Credit Office (ECO)
Poland:	Korporacja Ubezpieczeń Kredytów Eksportowych (KUKE)
Switzerland:	Swiss Export Risk Insurance (SERV)
Turkey:	Export Credit Bank of Turkey (Türk Eximbank)
UK:	Export Credits Guarantee Department (ECGD)
USA:	Export-Import Bank of the United States (Ex-Im Bank)

# International Co-operation (I)

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The International Union of Credit and Investment Insurers (Berne Union) (since 1934) (together with the Berne Union Prague Club 79 members)

- Promotes uniform principles for export credit and investment insurance.
- Establishing a forum of cooperation among public and private insurance agencies.
- “Value Statement”: commitment to operate in a professional manner that is financially responsible, respectful of the environment and which demonstrates high ethical values.
- “Guiding Principles” (October 2008): promoting practices that contribute to sustainable economic growth.
- “INV Operational Guidelines” (October 2008): providing guidelines and framework
- Support given to newly established credit and investment insurance agencies within the Prague Club.

The Prague Club (since 1993) (37 members)

- Information exchange forum for newly established credit and investment agencies.
- Supporting unified rules both for export credit insurances and foreign investments.
- Members originate in Central and Eastern Europe, Asia and Africa.

# International Co-operation (II)

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## Organisation for Economic Co-operation and Development (OECD)

- Supporting sustainable economic growth and raising living standards
- OECD Declaration on International Investment and Multinational Enterprises dated 21 June 1976 (last revision on 25 May 2011)
  - Annex 1: OECD Guidelines for Multinational Enterprises
    - Covering concepts and principles, general policies, disclosure, human rights, employment and industrial relations, environment, combating bribery, bribe solicitation and extortion, consumer interests, science and technology, competition and taxation
    - Setting out implementation procedures
  - Annex 2: Conflicting Requirements
- and related Decisions of the OEDC Council
- Adhering governments: all OECD members as well as Argentina, Brazil, Columbia, Costa Rica, Egypt, Latvia, Lithuania, Morocco, Peru, Romania and Tunisia
- Revised Council Recommendation on Common Approaches on the Environment and Officially Supported Export Credits (18 June 2012) (to be applied accordingly pursuant to INV Operational Guidelines of Berne Union)
- OECD Anti-Bribery Convention and related Recommendations

# BITs and European Union

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## Bilateral Investment Treaties (BITs)

- Play an outstanding role with respect to the protection of foreign investments
- The Federal Republic of Germany is party to 131 BITs (October 2013)
- 8 further BITs were signed, are have not yet entered into force (1 of which is already provisionally applicable)
- ICSID Convention and other dispute resolution mechanisms

## EU Legislation

- Artt. 206, 207 of the Treaty on European Union (as amended by the Treaty of Lisbon):
  - Authority to determine the common commercial policy with respect to foreign direct investments was transferred unto the European Union
- Art. 218 of the Treaty on European Union (as amended by the Treaty of Lisbon):
  - Agreements with third countries or international organisations
- National BITs remain in force, at least for a transitional period
- Numerous open issues of the transition remain unresolved
- EU is not a party to the ICSID Convention

# Institutional Framework in Germany

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- Federal Republic of Germany (represented by the Federal Ministry of Economy and Technology (BMWFi))
- Acting through two Mandataries (“*Mandatäre*”):
  - PricewaterhouseCoopers Aktiengesellschaft Wirtschaftsprüfungsgesellschaft  
Lead Mandatary for
    - Investment Guaranties (including participatory loans)
    - Untied Loan Guaranties
  - Euler Hermes Deutschland AG  
Lead Mandatary for
    - Export-related tools of the trade promotion toolbox, including w/o limitation
    - Export Credit Cover
- Euler Hermes’ role as mandatary to be distinguished from own business areas, i.e.:
  - Credit Insurance
  - Guarantee Credits (*Avalkredite*)



# Selected Tools for Trade and Investment Promotion

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## Lead Mandatary: PwC

- Investment Guarantees (*Investitionsgarantien*)
- Untied Loan Guaranties (*UFG-Garantien*)
  - Related Securitisation Guaranties (*Verbriefungsgarantien*)

## Lead mandatary: Euler-Hermes:

- Wholturnover Policy (*Ausfuhrpauschalgewährleistung*)
- Credit Confirmation Risk Cover (*Akkreditivbestätigungsrisikodeckung*)
- Counter-Guarantee (*Avalgarantie*)
- Constructional Works Cover (*Bauleistungsdeckung*)
- Manufacturing Risk Cover (*Fabrikationsrisikodeckung*)
- Buyer Credit Cover (*Finanzkreditdeckung*)
  - Related Securitisation Guaranties (*Verbriefungsgarantien*)
- Leasing Cover (*Leasingdeckung*)
- Export Credit Cover for Service Providers (*Leistungsdeckung*)
- Supplier Credit Cover (*Lieferantenkreditdeckung*)
- Revolving Supplier Credit Cover (*Revolvierende Lieferantenkreditdeckung*)
- Framework Credit Cover (*Rahmenkreditdeckung*)
- Revolving Buyer Credit Cover (*Revolvierende Finanzkreditdeckung*)
- Contract Bond Cover (*Vertragsgarantiedeckung*)

# Eligibility Criteria (Inv. Guarantees) (I)

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## ■ German Investors

- Companies (Corporations or partnerships) registered in Germany
  - Certain exclusions of liability in case of foreign majority-controlled German companies
- Sole proprietors resident in Germany
- In case of participatory loans: sub-participation of foreign banks not excluded

## ■ Existence of a BIT with the host state of the investment or equivalent protection

- BITs with 131 jurisdictions + 1 provisionally applicable (October 2013)
- Sufficient level of protection procured
  - By legal system of the host state of the investment
  - Otherwise
- Issuance of investment guarantees may be suspended in case of unresolved investment disputes

# Eligibility Criteria (Inv. Guarantees) (II)

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## ■ Worthiness of support / particular national interest

- Special criteria in case of dual use or sensitive transactions
- Environmental impact
- Compliance with laws in general  
(Special focus: anti-bribery legislation)

No eligibility if contrary to important national interests

## ■ In particular: The environmental impact

- Compliance with „Common Approaches“
  - Developed for officially supported export credits with a repayment terms of 2 years or more, here to be applied accordingly
  - Includes also an assessment of certain aspects relating to social impact

# Eligibility Criteria (Inv. Guarantees) (III)

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## ■ In particular: The environmental impact (cont'd)

### ● Screening (*Vorprüfung*) and Classification of Projects

#### ■ Categories:

- Category A: Potential to have a significant adverse environmental impact
  - Impact may be broader than site or facilities subject to physical works
  - Sensitive sectors
  - In or near sensitive areas
- Category B: Potential environmental impact less adverse
  - Impact site-specific
  - Generally not irreversible
  - Mitigation measures readily available
- Category C: Minimal or no adverse environmental impact

# Eligibility Criteria (Inv. Guarantees) (IV)

## ■ In particular: The environmental impact (cont'd)

### ● Review (*Umweltprüfung*)

- Information required
  - Potential environmental impact
  - Standards, practices and processes intended to apply
  - Results of public consultations with relevant stakeholders
- For Category A Projects:
  - Environmental Impact Assessment covering areas specified in Common Approaches
  - Together with other studies, reports and action plans
- For Category B Projects:
  - Variable from project to project
  - Potential negative and positive impacts
  - Measures to prevent, minimise, mitigate, compensate for adverse impacts and improve environmental performance
- For Category C Projects:
  - No further action required
- Benchmarking against
  - host country standards (always to be complied with) and
  - and other relevant standards, generally the Safeguard Policies of World Bank (non-compliance only for justified reasons)

# Eligibility Criteria (Inv. Guarantees) (V)

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## ■ In particular: The environmental impact (cont'd)

### ● Evaluation, Decision and Monitoring

- Evaluate information from screening and review and decide whether to
  - Request further information
  - Decline official support
  - Provide official support
- If support is to be provided, decide whether this should involve
  - Conditions prior to or after final commitment, e.g.
  - Prevention and/or mitigation measures, covenants, monitoring requirements
- Put procedures in place to monitor and ensure compliance with conditions

### ● Exchange and disclosure of information

- For Category A Projects:
  - Disclose publicly project information at least 30 days before a final commitment to grant official support
  - Require that environmental impact information be made publicly available at least 30 days before a final commitment to grant official support or explain why this information is exceptionally not published
- Make available to the public at least annually information on projects classified in Category A and in Category B

# Eligibility Criteria (Inv. Guarantees) (VI)

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## ■ Reasonableness of risk

- Political risk (country risk)
- Counter-measures to mitigate risk
- Taking into consideration exposure to pre-existing risks
- Degree of worthiness of support (in particular procuring jobs)
- Special criteria for project finance and other structured finance

Reasonable expectation that there shall be no cause of loss

## ■ Compliance with OECD Guidelines for Multinational Enterprises

- Recommendation (not directly applicable, but to be considered as providing guidance)

# Scope of Cover (Inv. Guarantees) (I)

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## ■ Subject of cover

- Direct investments: general definition
  - Long-term investment
  - Into a project in a foreign country
  - For entrepreneurial purposes
  - In cash or in kind
  - Only new investments
- Returns on relevant investments
- All rights and claims subject to cover must be expressly listed in the investment guarantee

## ■ Types of investment:

- Shares / membership interests in a project company
- Endowment with capital of a foreign branch or permanent establishment
- Participatory loans
- Other assets of value



# Scope of Cover (Inv. Guarantees) (II)

## ■ Types of investment (cont'd):

- Shares / partnership interests in a project company
  - Voting rights, control rights, voice in entrepreneurial decisions
  - Rights to returns and liquidation proceeds
  - Irrespective of whether acquired through subscription of new shares, acquisition of existing shares, subscriptions in the context of a capital increase, allocation of bonus shares
  - Including shares / partnership interests resulting from a conversion of debt into equity
  - Reinvested profits eligible up to 300% of original contribution value
- Endowment with capital of a foreign branch or permanent establishment
  - Long-term contribution of cash, assets or other services
  - Obligation to prepare financial statements for relevant branch or permanent establishment where endowed capital is to be shown like equity
- Participatory loans
  - From a shareholder / partner or from a third party, including participatory bank loans
  - Criteria for a participatory loan:
    - Long-term loan for the purpose of financing a project abroad
    - Moderate rate of interest (e.g. pegged to refinancing costs, fixed or variable)
    - Balanced contract
    - No early termination rights of Lender, except for good cause
    - No excessive security rights of Lender
    - Default interest not exceeding actual costs

# Scope of Cover (Inv. Guarantees) (III)

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## ■ Types of investment (cont'd):

- Other assets of value
  - Long-term
  - Into a project in a foreign country
  - For entrepreneurial purposes
  - In cash or in kind
  - Including, in particular, rights based on concessions, bonds or Rights related to the production of oil and gas based on Service Contracts
  - Common for, but not limited to, PPPs or investments in the oil and gas industry

## ■ Types of return on investments:

- Paid-out dividends (on shares / partnership interests)
- Dividend-like returns (on endowment capital)
- Interest (on participatory loans)
- Other types of returns (e.g. based on bonds, concessions and “other assets of value”)

# Scope of Cover (Inv. Guarantees) (IV)

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## ■ When is an investment “new”?

- No cover for existing investments
  - In principle application needs to be filed before funds are transferred
  - Technical delays of the application do not necessarily exclude an investment from cover
- Special types of new investments
  - Additional investments (*Zusatzinvestitionen*)
  - Equity resulting from a debt-equity swap
  - Reinvested profits (up to 300% of contribution value)
  - Bonus shares

## ■ Limits for the cover of returns:

- Must be set out in investment guarantee
  - 100% of contribution value as standard, up to 300% for PPPs, deviation from standard limits for good cause
- Yearly cap as per special application
  - 10% of contribution value as standard, up to 20% for PPPs, yearly adjustments as per special application if appropriate

# Scope of Cover (Inv. Guarantees) (V)

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- Uncovered portion: at least 5% of each loss
  - Must not be otherwise covered or insured
- Term of investment guarantee
  - Standard: up to 15 years
  - In exceptional cases up to 20 years (in particular for PPPs)
  - Extension of up to 5 years possible as per special application

# Administrative Procedure (I)

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- Administrative procedure processed by the mandataries PwC and Euler-Hermes with PwC as lead mandatary
  
- Application to be submitted to PwC
  
- Decision by the Federal Ministry of Economics and Technology
  - With the consent of the Federal Ministry of Finance
  - Upon consultation with the Federal Ministry of Foreign Affairs and the Federal Ministry of Economic Co-operation and Development
  - In the Inter-ministry Committee for the Granting of Guarantees for Direct Investments abroad (*Interministerieller Ausschuss für die Übernahme von Garantien für Direktinvestitionen im Ausland, IMA*)

# Administrative Procedure (II)

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## ■ Participants in IMA-Meetings:

- Representatives of the Federal Ministry of Economics and Technology, the Federal Ministry of Finance, Federal Ministry of Foreign Affairs and the Federal Ministry of Economic Co-operation and Development
- Representatives of the mandataries of the Federal Republic (PwC and Euler-Hermes)
- Experts from the producing industry, trade or banking industry (in an advisory capacity) as appointed by the Federal Ministry of Economics and Technology
- Representatives of the Federal Ministry of Economics and Technology preside over all IMA meetings

## ■ Meetings and records confidential

## ■ Approval (acceptance letter) to be communicated to applicant by PwC

# Guarantee Agreement

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## ■ Acceptance letter

- Is intended to bring about a contract under civil law
- Parties:
  - Federal Republic of Germany, represented by the Ministry of Economy and Technology, which in turn is represented by the two mandataries (PwC and Euler Hermes PwC); and
  - Investor (in case of a participatory bank loan each lender of the lenders syndicate)
- Reference to General Conditions
- Starting point for potential cover (subject to further requirements)

## ■ Separate acceptance letters required for

- Increase of maximum liability under investment guarantee; or
- Extension of term of investment guarantee

## ■ Written form

- Validity requirement for all agreements and declarations

# Investment Guarantee Declaration and General Conditions

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## ■ Guarantee declaration (*Gewährleistungserklärung*)

- Executed by both mandataries of the Federal Republic of Germany
- Sets out
  - Brief description of relevant investment
  - All rights and claims subject to cover
  - Type of covered investment
  - Term of Guarantee
  - Maximum amount of covered investment
  - Maximum amount of covered returns
  - Yearly cap for cover of returns
  - Maximum amount covered by Guarantee
  - Uncovered portion
  - Maximum liability of the Federal Republic of Germany
  - Deadline for the contribution of the covered capital (in cash or kind)
  - Particular conditions
  - Reservations, if applicable

## ■ General Conditions

- General Conditions for Investment Guarantees: (September 2004)



# Causes of Loss (Covered Risks)

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- Losses in relation to the covered investment or covered returns as a result of a cause of loss
  - Nationalisation, expropriation or other intervention by the sovereign, the result of which is tantamount to an expropriation (event of expropriation)
  - Breach of a legally valid undertaking by a governmental agency or any entity or agency guided or controlled by the government to the extent that the relevant undertakings create legal rights of the project company and are set out in the investment guarantee (event of breach of undertaking)
  - War or armed dispute, revolution, civil commotion, or terrorist acts related to these events (event of war)
  - Ban on payments or moratorium (event of ban on payments or moratorium)
  - Impossibility of conversion or transfer of amounts deposited at a solvent bank for the purpose of transfer to Germany (event of impossibility of conversion or transfer)

# Exclusions for Foreign Owned Entities

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## ■ Exclusion of losses

- Resulting from a direct or indirect foreign shareholding in the beneficiary or a foreign influence on the beneficiary
- If at the time of the loss triggering event or measure
- More than 50% of the capital of the beneficiary or the voting rights were owned by foreigners or subject to foreign control

Foreign control is in particular present if the legally responsible managers or the person(s) de facto managing the Beneficiary

- are either foreign citizens,
- subject to instructions by foreign citizens; or
- act under the control of foreign citizens

# Time of Event of Loss (I)

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## ■ In an event of expropriation:

- When the relevant investment or the claim to paid-out returns is taken in its entirety (total loss) or in part (partial loss)
- The same applies accordingly to the liquidation proceeds of the foreign branch or permanent establishment

## ■ In an event of expropriation or in an event of war:

- When all assets of the project company, the foreign branch or the foreign permanent establishment are taken or destroyed; or
- When such a substantial part of the assets of the project company, the foreign branch or the foreign permanent establishment are taken or destroyed that the operations of the project company, the foreign branch or the foreign permanent establishment cannot be sustainably continued without losses, resulting in a situation where
  - The shares / partnership interests, the endowed capital or the other asset of value are deemed lost (total loss); or
  - The claim into which the shares / partnership interests were converted, the claim resulting from the participatory loan, the claim resulting from the other asset of value or the claim to the returns can no longer be satisfied or collected in any form

# Time of Event of Loss (II)

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## ■ In an event of breach of undertaking:

- When, because of such breach, the operations of the project company, the foreign branch or the foreign permanent establishment cannot be sustainably continued without losses, resulting in a situation where
  - The shares / partnership interests, the endowed capital or the other asset of value are deemed lost (total loss); or
  - The claim into which the shares / partnership interests were converted, the claim resulting from the participatory loan, the claim resulting from the other asset of value or the claim to the returns can no longer be satisfied or collected in any form

## ■ In an event of ban on payment or moratorium:

- When, because of such ban or moratorium, a due claim into which the shares / partnership interests were converted, a due claim resulting from the participatory loan, a due claim resulting from the other asset of value or a due claim to the returns can no longer be satisfied or collected in any form
- The same applies accordingly to the liquidation proceeds of the foreign branch or permanent establishment

# Time of Event of Loss (III)

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- In an event of impossibility of conversion or transfer:
  - When, because of such event of impossibility of conversion or transfer in the host state of the investment,
    - Amounts deposited at a solvent bank for the purpose of transfer to the Beneficiary have not been converted or transferred within a two months period from the date of deposit;
    - Provided that these were deposited to pay a due claim into which the shares / partnership interests were converted, a due claim resulting from the participatory loan, a due claim resulting from the other asset of value or a due claim to the returns;
    - Provided further that all existing laws, regulations and treaties governing such conversion or transfer have been complied with.
  - The same applies accordingly to the liquidation proceeds of the foreign branch or permanent establishment

# Contribution Value (I)

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- Amount in EUR that reflects the payments (in cash or in kind) made by the Beneficiary as investment
  - To the extent that the Beneficiary may include the same as acquisition and production costs in its balance sheet, according to German GAP,
  - But in no event in excess of the maximum amount for the cover of the investment as set out in the guarantee declaration
- As per special application may be included the counter-value in EUR of:
  - Shares / partnership interests resulting from a conversion into equity of
    - profits; or
    - open reserves resulting from profits
  - The same shall apply accordingly to an allocation of shares / partnership interests resulting from measures of the project company that are equivalent to such capital increase from company funds
  - Maximum 300% of payments (in cash or in kind) made by the Beneficiary as investment

# Contribution Value (II)

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## ■ Reduction of the contribution value

- Upon repayment, other repatriation, disposal or guarantee event in relation to the investment
- On a pro rata basis according to the proportion of the repaid, repatriated, disposed or indemnified part of the investment to the total investment

## ■ Payments (in cash or in kind) made by the Beneficiary as investment before the filing of the application are, in principle, excluded from cover

- Technical delays in the application process do not necessarily exclude cover

## ■ Currency of Cover: Euro (unless otherwise agreed)

- Conversion of amounts in other currencies:
  - Determination of maximum amount of guarantee in EUR and contribution value cap lead to a cap on indemnification payments at the last turnover tax conversion rate before the determination of the premium (*Entgeltkurs / Premium Conversion Rate*)
- Waiver of exchange rate cap (*Aufhebung der Kursbegrenzung*):
  - Possible against 10% surcharge to Premium in case of hard currencies (relevant in particular for participatory loans)

# Maximum Amount of Guarantee and Maximum Liability under Guarantee (I)

- Maximum amount of covered investment
  - To be set out in guarantee declaration
  - Reflecting value of payments (in cash or kind) to be made by the Beneficiary as investment
  - Reduction of maximum amount:
    - In case of investments subject to scheduled repayments / repatriation:
      - at the end of each guarantee year in accordance with amortization schedule to be set out in guarantee declaration
    - In case of all investments
      - at the end of each guarantee year by the amount in which the guarantee became moot
        - As a result of any repayment , repatriation or disposal of the investment
        - That occurred without regard to any amortization schedule or in deviation therefrom,
        - Provided that such reduction has been reported by the Beneficiary within 1 months as of the end of a guarantee year
    - Upon application by the Beneficiary with effect to the end of the then current guarantee year (subsequent re-increases up to the amount of the contribution value require the consent of the Federal Republic)
    - Upon an event of loss in relation to the investment by the amount of the covered loss as determined in the indemnification proceedings



# Maximum Amount of Guarantee and Maximum Liability under Guarantee (II)

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## ■ Maximum amount of covered returns

- To be set out in guarantee declaration as a percentage of the maximum amount of covered investment
- Upon reduction of maximum amount of covered investment pro rata reduction of the maximum amount of covered investment
- Upon an event of loss in relation to the returns reduction of the amount of the covered returns as determined in the indemnification proceedings (in case of recoveries post indemnification the Beneficiary may apply for a re-increase of the maximum amount for covered returns accordingly)

# Maximum Amount of Guarantee and Maximum Liability under Guarantee (III)

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- Uncovered portion: at least 5% of each loss
  - To be set out in guarantee declaration
  - Must not be otherwise covered or insured
  
- Maximum liability of Federal Republic
  - Maximum amount of guarantee minus uncovered portion
  - To be set out in guarantee declaration
  - Exclusion of further claims against Federal Republic based on any legal ground whatsoever
  - Exclusion of indemnification for petty damages with an aggregate amount of less than EUR 2,000 in any calendar year

# Starting Point and End of Cover (I)

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## ■ Requirements for start of cover

- Guarantee agreement has come into force
- Investment has been made by Beneficiary
- Compliance with deadline for contribution as set out in guarantee declaration
  - Extension of deadline possible, subject to supplement to guarantee declaration
  - An investment has been made upon receipt (i.e. authority to dispose) of the relevant contribution by the project company, the foreign branch or the permanent establishment

## ■ In case of investments in several instalments:

- Requirements for start of cover to be tested for each instalment separately

## ■ If a covered risk has already materialized at the start of cover:

- Exclusion of losses attributable to such risk
- In case of temporary measures (e.g. a temporary moratorium)
  - Further exclusion of losses resulting from an extension or renewal of such measure

# Starting Point and End of Cover (II)

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- If a covered risk has already materialized at the start of cover (cont'd):
  - In the event of circumstances present at the time when the guarantee agreement enters into force that disallow or restrict
    - The payment or transfer of returns; or
    - The payment or other repatriation of the counter-value of the investmentlosses attributable to such circumstances shall be excluded from cover
  - Same exclusion applies in principle if such circumstances occur after the entry into force of the guarantee agreement, but before the starting point of cover
    - Unless it would be unreasonable to demand from the Beneficiary to refrain from effecting outstanding contributions into its investment
  
- End of cover
  - Ordinary expiry on expiry date set out in guarantee declaration
  - Other reasons (e.g. termination, cancellation etc.)

# Starting Point and End of Cover (III)

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## ■ Extended cover

- In an event of expropriation, event of war or event of breach of undertaking
  - If such event occurs within six months of the ordinary expiry of the guarantee; and
  - The relevant risk has materialized before the ordinary expiry of the guarantee
- In an event of impossibility of conversion or transfer
  - If such event occurs within two months of the ordinary expiry of the guarantee
- In each case unless the cover was subject to early termination because of a declaration of termination, cancellation or for other reasons

## ■ Failure to effect collection and transfer without undue delay

- Exclusion of cover
  - if the collection and transfer of claims (claim into which shares / partnership interests were converted, participatory loans, claim resulting from other assets of value, returns) is not effected without undue delay upon their respective due date, or the maturity of which has been extended,
  - Unless the Federal Republic has consented to a continuation of cover
- The same applies accordingly to the liquidation proceeds of the foreign branch or permanent establishment

# General Duties of Beneficiary (I)

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## ■ Compliance with laws and regulations

- Compliance with laws and regulations
  - of Germany; and
  - of the host state of the investment governing foreign investments
- Obtaining all required approvals for foreign investments
- Compliance with all conditions, requirements and obligations pursuant to
  - Host state approvals; and
  - Agreements with the host state

## ■ Annual and *ad hoc* reporting

- Annual reporting (within 9 months after the end of each financial year)
  - Re current status and development of the investment, the project company, the foreign branch or the permanent establishment
  - Balance sheet, profit and loss statement and notes thereto, business report, auditor's report etc.
  - Environmental report for the project (if applicable)
- If requested, at any time reporting of further details with respect to the investment and all related transactions

# General Duties of Beneficiary (II)

## ■ Immediate notification if any of the following occurs:

- All requirements for the start of cover are met
  - for the entire investment; or
  - any part of the investment

setting out the amount of the relevant investment (or part thereof)

- Shares / partnership interests or other assets of value are converted into claims
- Foreign branches or permanent establishments are liquidated
- Covered investments are transferred to an other party, otherwise disposed of, or repayments are made with respect thereto
- Material changes occur with respect to the investment, in particular
  - Modifications to or cancellation / termination of
  - The constitutive documents of the project company or agreements related to the investment

The same applies accordingly to a foreign branch or permanent establishment

- Approvals relating to the investment are subjected to conditions or other requirements
- The government or other authorities of the host state of the investment grant or modify special undertakings with respect to the investment or the project company
- The Beneficiary acquires further shares / partnership interests in the same foreign entity and the same are not subject to a Federal guarantee

# General Duties of Beneficiary (III)

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- Proving the value of payments (in cash or in kind) for the covered investment
  - At any time on request, in an event of loss at the latest
  - Particularly relevant for contributions in kind
  
- Returning the guarantee declarations and supplements, if any
  - After expiry of the period to file an application for indemnification
  
- Audit rights of the Federal Republic
  - Right to examine at any time any records, accounts and other documents, which might be material to the investment guarantee
  - Right to require or make copies thereof
  - At the Beneficiary's expense
  - At the Federal Republic's request, the Beneficiary has to undertake all reasonable efforts to enable the Federal Republic or any person acting on its instructions to undertake an equivalent audit of the project company
  - Obligation of Beneficiary to retain all records related to the guaranteed investment



# Special Duties of Beneficiary (I)

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## ■ Prevention and mitigation of losses

- Obligation to exercise due and reasonable care with the diligence of a prudent businessman to prevent or mitigate losses
- Obligation to follow instructions given by the Federal Republic

## ■ Cost participation of the Federal Republic

- Reasonable costs of risk prevention and mitigation
- To the extent incurred with the approval or per instruction of the Federal Republic
- Provided that the relevant measures transcend customary measures of risk prevention and mitigation, and
- Provided the costs thereof constitute a substantial burden for the Beneficiary considering the type and volume of its business activities
- Cost participation of Federal Republic in proportion to the extent the relevant claim could be indemnified if an event of loss occurs

# Special Duties of Beneficiary (II)

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- Immediate notification if any of the following emergency matters occurs:
  - Becoming aware of circumstances constituting a risk increase
    - In particular if a covered risk threatens to materialize with respect to the investment
  - If circumstances occurred or measures were taken that constitute a covered risk (whether or not this has already resulted in an event of loss)
  
- Mitigate loss of BIT protection
  - If the host state of the investment terminates a BIT with the Federal Republic, and
  - If this results in a loss of BIT protection before the expiry of the investment guarantee
  - Then the Beneficiary shall, in agreement with the Federal Republic, take such measures as necessary for the protection of the investment

# Consequences of Non-Compliance, Approvals, Rescission, Termination (I)

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- Culpable contribution by the Beneficiary to the occurrence of a loss
  - In particular through a violation of a duty under the General Conditions or the guarantee declaration
  - Existence and scope of indemnification obligation of Federal Republic shall depend on the circumstances of the case, in particular
    - The extent to which the breach of the relevant duty has contributed to the occurrence of the loss
  - This applies accordingly if the breach of duty by the Beneficiary contributed to an increase of the loss or prevented its mitigation
  
- Culpable violation of a duty by the Beneficiary without effect on the occurrence or scope of a loss
  - Relating to duties under the General Conditions or the guarantee declaration
  - Right of the Federal Republic to deny or reduce indemnification
    - If the violation of the duty had an impact on the determination or scope of the obligation of the Federal Republic

# Consequences of Non-Compliance, Approvals, Rescission, Termination (II)

## ■ Criminal acts, in particular bribery

- If in connection with the project
  - Contracts, undertakings by the government, approvals, registrations or other benefits are being obtained, or were obtained,
  - By means of a criminal act, in particular bribery,
- Then the Federal Republic may rescind or terminate the guarantee, and shall thereupon be released from any liability thereunder
  - Unless the Beneficiary did not know, and should not have known, this fact

## ■ No cover for approval risks

- No cover for disadvantages that result from conditions and requirements set out in
  - Host state approvals; and
  - Agreements with the host state
- No cover for disadvantages resulting from the failure to obtain approvals that provide access to general or special benefits
- The term “approvals” shall include undertakings, registrations, concessions and the like

# Consequences of Non-Compliance, Approvals, Rescission, Termination (III)

## ■ Culpably incomplete or false information

- If the Beneficiary provided culpably incomplete or false information in the application proceedings
- Then the Federal Republic may rescind the guarantee within two months of becoming aware of the relevant fact
- If rescission is declared after an event of loss occurred,
  - then the obligation to indemnify remains unaffected
  - to the extent that such incompleteness or incorrectness had no impact on
    - the occurrence of the event of loss, and
    - the scope of the obligations of the Federal Republic, in particular the assumption of the guarantee,
  - provided that the right of the Federal Republic to avoid the guarantee for fraud shall remain unaffected

## ■ Risk increase before starting point of cover

- In the event of a risk increase before the starting point of cover
- The Federal Republic may terminate or limit the guarantee with immediate effect
  - Unless the Beneficiary is not in a position to refrain from effecting outstanding contributions into its investment

# Consequences of Non-Compliance, Approvals, Rescission, Termination (IV)

## ■ Change of project agreements

- If
  - The constitutive documents of the project company or agreements that may relate to the investment
  - Are amended, supplemented or cancelled / terminatedand if this leads to a material risk increase,
- Then the Federal Republic may terminate the guarantee with effect as of such amendment, supplement or cancellation / termination
- Such termination shall not affect
  - the obligation to indemnify the Beneficiary for events of loss
  - that occurred before such amendment, supplement or cancellation / termination
- The same applies accordingly to a foreign branch or permanent establishment

## ■ Government undertakings

- In the event of a granting or expansion (sic!) of special undertakings by the government or other authorities of the host state of the investment with respect to the investment or the project company
- The Federal Republic may limit the guarantee with effect as of such new or expanded undertaking to the extent that the same might result in a risk increase

# Consequences of Non-Compliance, Approvals, Rescission, Termination (V)

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## ■ Serious breach of duty, etc.

- In the event of
  - A serious breach of its contractual duties by the Beneficiary; or
  - A serious reason relating to the person of the Beneficiary
- The Federal Republic may terminate the guarantee with immediate effect

## ■ Attribution of wrongful conduct of project company etc.

- The conduct of
  - The Project company
  - Any trustees of the Beneficiary
  - Other persons that are subject to the Beneficiary's instructionsshall be attributed to the Beneficiary
- Application of this provision on minority stakes

## ■ Termination by Beneficiary

- The Beneficiary may terminate the guarantee with one month' notice with effect to the end of each guarantee year

# Indemnification Procedure (I)

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- Application for indemnification to be submitted to PwC
  - Immediately after the occurrence of the event of loss
  - But in no event later than six months after the end of cover
  
- Legal validity
  - Beneficiary bears burden of proof for
    - Occurrence of a cause of loss and its requirements
    - Legal basis and quantum of its loss
  - “Risk of applicable law and jurisdiction” to be borne by Beneficiary
  
- PwC does not accept any documentation risk
  - Beneficiary and its lawyers to ensure that documentation is legal, valid and binding and in compliance with all relevant requirements
  - Irrelevant whether PwC has seen or commented on the documentation during the application procedure



# Indemnification Procedure (II)

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## ■ Determination of Loss

- Determination of loss (including calculation of indemnification) within an appropriate period as of receipt of all documentation required to prove the loss
- If determination of loss not yet possible, then provisional indemnification on the basis of the available documents (requires special application of Beneficiary)

## ■ Payment of (provisional or final) Indemnification

- Not earlier than
  - 1 month after Beneficiary has been notified of calculation, and
  - in principle 6 months after the event of loss
- In case of participatory loans payment of indemnification
  - Either in accordance with amortization schedule as set out in facility agreement,
  - Or in appropriate instalments over the remaining term of the guarantee

Interest payable at the rate set out in the facility agreement, but in no event more than the refinancing rate of the Federal Republic on the outstanding amount of indemnification, starting with the day of the first instalment thereof
- Indemnification repayable (plus interest at the refinancing interest rate of the Federal Republic as of the time indemnification was paid) in case of overpayments
- Repayment rules without prejudice for more far-reaching obligations under the law

# Calculation of Indemnification: Gross Loss Amount (I)

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## ■ In relation to the investment:

- In case of a total loss in relation to the shares / partnership interests, endowed capital or other asset of value:
  - The present value of the investment at the time when the event of loss occurred, but in no event more than the contribution value
- In case of a partial loss in relation to the shares / partnership interests or other asset of value (not applicable for endowment capital):
  - The loss in value calculated as the difference between (1) and (2) below, with
    - (1) Being the present value of the investment at the time when the event of loss occurred, but in no event more than the contribution value; minus
    - (2) Being the residual value of the investment
- In case of shares / partnership interests that have been converted into a claim, participatory loans and claims based on an asset of value:
  - The unrealizable part of such claim, valued at the present value of such claim at the time when the event of loss occurred, but in no event more than the contribution value of the investment
  - In case of a partial loss the gross loss amount shall be limited to such part of the contribution value that corresponds to the affected part of the claims
  - The same applies accordingly to the liquidation proceeds of the foreign branch or permanent establishment

## ■ In relation to returns:

- The unrealizable part of the claim to the relevant returns

# Calculation of Indemnification: Gross Loss Amount (II)

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## ■ Present value of investments:

- Value in EUR at the time when the event of loss occurred
- Determined under due consideration of management accounting principles and
- Taking into account balance sheets and profit and loss calculations continued up to the event of loss

## ■ Residual value of investments:

- Value in EUR immediately following the occurrence of the event of loss
- Determined under due consideration of management accounting principles and
- Taking into account balance sheets and profit and loss calculations continued up to the point in time immediately following the event of loss
- Long-term impairments resulting from the event of loss that are to be expected with a high degree of probability shall be appropriately considered
- In the event of a liquidation of the enterprise, or a sale of the remaining shares / partnership interests following the event of loss, the liquidation proceeds or sale proceeds, as the case may be, shall be deemed to represent the residual value if there is a causal link between the event of loss and the liquidation or sale

# Calculation of Indemnification: Gross Loss Amount (III)

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- Unrealizable part of claims valued at present value:
  - Determined in comparison to such amount that the Beneficiary had obtained in case of a conversion and transfer at the time when the event of loss occurred
  - Foreign currency amounts to be converted at the Euro reference rate fixed by the ECB
    - If no EUR reference rate by ECB is available:
    - Most recent selling rate (*Verkaufskurs*) fixed by Deutsche Bundesbank
    - Exchange rate quoted on major foreign exchanges
  
- Contribution value as cap
  - Calculation as explained above
  - Waiver of exchange rate cap (*Aufhebung der Kursbegrenzung*):
    - Possible against 10% surcharge to Premium in case of hard currencies
  - Waiver relevant in particular for participatory loans

# Calculation of Indemnification: Net Loss Amount

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## ■ Net loss amount

### ● Gross Loss amount *minus*

All economic benefits in connection with the event of loss (after deduction of necessary costs and expenses)

- All payments and the monetary value of other economic benefits which the Beneficiary received from the project company, the host state, insurances or from other third parties following the event of loss
  - All proceeds from the realization of rights, tangible assets, collateral and other security
  - The economic value of all obligations,
    - from which the Beneficiary is released as a result of the event of loss; or
    - In relation to which the Beneficiary can achieve discharge by means of set-off or otherwise vis-à-vis the project company or third parties liable for damages in relation to the event of loss
  - The economic value of other benefits obtained by the Beneficiary
- ### ● If economic benefits relate to guaranteed and unguaranteed investments, allocation pro rata

# Calculation of Indemnification: Final Steps

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## ■ Covered loss

- Net loss amount to the extent that such amount does not exceed the
  - Maximum amount of covered investment; and
  - Maximum amount of covered returns,Respectively

## ■ Indemnification amount

- Covered loss *minus*
- Uncovered portion

# Subrogation

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## ■ Subrogation of indemnified rights and claims

### ● Contractual subrogation (where possible)

- Upon payment of indemnification
- Subrogation of the following rights and claims
  - Indemnified rights and claims
  - Compensation claims
  - Claims vis-à-vis insurances, if any, and similar claims
  - Rights to amounts paid into accounts / deposited abroad
  - Related collateral

### ● Trustee relationship where a transfer of rights proves impossible or has been waived by the Federal Republic

### ● Following instructions from the Federal Republic

## ■ The Federal Republic may withhold the payment of indemnification pending a prior transfer and assignment of rights and claims

# Legal Action following Indemnification

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## ■ Legal action following indemnification

- Obligation of Beneficiary to take all action appropriate, Upon request of the Federal Republic also in its own name (notwithstanding any subrogation)
  - To collect or realize indemnified rights or claims
  - To realize collateral
- Obligation of Beneficiary to follow instructions given by the Federal Republic
- The same applies to rights held by the Beneficiary in a trustee capacity for the Federal Republic

## ■ Cost participation of Federal Republic

- Reasonable costs of extraordinary measures for the prosecution of rights and claims following indemnification (usual routine costs not subject to cost sharing)
- To the extent incurred with the approval or per instruction of the Federal Republic
- Cost sharing of Federal Republic and Beneficiary pro rata their respective share



# Recoveries

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## ■ Recoveries received after indemnification

- To be shared between the Federal Republic and the Beneficiary in the ratio of covered portion to uncovered portion
- Share of the Federal Republic limited by the amount of indemnification paid plus the interest rate for longer-term refinancing operations fixed by the ECB
- Waterfall for allocation of amounts owed to the Federal Republic:
  - Interest paid by the Federal Republic in relation to indemnifications for participatory loans
  - Indemnifications paid by the Federal Republic in relation to covered returns
  - Indemnifications paid by the Federal Republic in relation to covered investments
  - Interest on the repayment claim of the Federal Republic

# Assignment of Benefit under Cover

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## ■ Assignment of benefit under cover

- Written consent of the Federal Republic required for assignments
- Effects of § 354 a of the German Commercial Code (*HGB*): in case of lack of approval the Federal Republic may discharge its obligations by making a payment to the Beneficiary

## ■ No assignment of contract

- Assignor remains contract counter-party of the Federal Republic, unless otherwise agreed with the Federal Republic
- The calculation of losses shall take place exclusively among the Federal Republic and the Beneficiary

## ■ Set-off and related rights

- Federal Republic may exercise vis-à-vis the assignee, too, all rights of set-off, defences, rights of retention or other rights it enjoys vis-à-vis the Beneficiary

# Assignment of Covered Investment

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- Assignment of covered investment or Project company ceases to exist
  - In the event
    - Of any assignment by the Beneficiary of the covered investment; or
    - Of any other form of disposal by the Beneficiary of the covered investment; or
    - That the project company ceases to exist due to a merger or amalgamation or similar corporate action
  - The guarantee shall terminate automatically,
  - Unless the Federal Republic agrees to its continuation

# Guarantee Premium

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- **Administrative fee**
  - 0.05% of maximum amount of guarantee for amounts exceeding EUR 5 mn, max. EUR 10,000
- **Percentage of the covered investment**
  - 0.5% p.a. of the contribution value at the begin of each guarantee year
  - Plus  $\frac{1}{6}$  of 0.5% p.a. of the difference between the maximum amount for covered investments and the contribution value for outstanding contributions at the begin of each guarantee year
  - Upward adjustment at the end of a year if the contribution value increases during a guarantee year
- **Consequences of late payment**
  - If the first premium is not paid within 3 weeks as of its due date:
    - Federal Republic may rescind guarantee following a written notice with threat of rescission
  - If a subsequent premium is not paid within 3 weeks as of its due date:
    - Federal Republic may terminate guarantee with immediate effect following a written notice with threat of termination
- **Premium in case of rescission, termination or expiry**
  - Premium remains payable up to the date of rescission, termination or expiry

# Period of Exclusion and Jurisdiction

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## ■ Period of exclusion

- 6 months exclusion period for filing a complaint with a court in relation to claims against the Federal Republic under the investment guarantee
- Period starts as of notification that the Federal Republic rejects a claim (with reference to the 6 months period)

## ■ Jurisdiction

- For all disputes among the Federal Republic and the Beneficiary based on the investment guarantee
- Courts of general jurisdiction in Hamburg, Germany

# German Bilateral Investment Treaties (I)

- Broad variety of treaties from different eras
- Scope of protection may vary from standard definitions in the General Terms for investment guarantees
- Interpretation
  - Definition of key terms (Art. 1 of German Model Treaty):
    - Investment
    - Returns
    - Investor
    - Territory of contracting states
  - Rules of interpretation pursuant to Vienna Convention on the Law of Treaties
- Material terms
  - Admission and protection of investments (Art. 2 of German Model Treaty)
    - Promotion and admission
    - Fair and equitable treatment
    - No impairment by arbitrary or discriminatory measures
    - Protection of returns (including reinvested returns)
  - National and most-favoured-nation (MFN) treatment und carve-outs thereto (Art. 3 of German Model Treaty)

# German Bilateral Investment Treaties (II)

## ■ Material terms (cont'd)

- Compensation in case of expropriation (Art. 4 of German Model Treaty)
  - Full protection and security
  - Investments may not
    - directly or indirectly
    - be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization
    - except for the public benefit and against compensation.
  - Compensation
    - Equivalent to value
    - To be paid with undue delay
    - To carry interest until payment
    - Effectively realizable
    - Freely transferable
  - Legality of expropriation and amount of compensation subject to review by due process of law
  - MFN treatment in case of losses due to war and war-like events, free transfer
  - Special MFN treatment in all matters relating to expropriation and compensation
- Free transfer (Art. 5 of German Model Treaty)
  - Principal amount of investment and additional amounts
  - Returns
  - Repayment of loans
  - Liquidation and sales proceeds
  - Compensation
  - Transfers without delay at market rate of exchange

# German Bilateral Investment Treaties (III)

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## ■ Material terms (cont'd)

- Subrogation (Art. 6 of German Model Treaty)
  - Recognition of subrogation (by operation of law or under contractual arrangements)
  - Free transfer protections to be applied accordingly
- Conflict rules (Art. 7 of German Model Treaty)
  - More favourable domestic legislation
  - Umbrella clause
    - *“Each Contracting State shall fulfil any other obligations it may have entered into with regard to investments in its territory by investors of the other Contracting State.”*
  - Precedence of double taxation treaties
- Scope of application (Art. 8 of German Model Treaty)
  - Application to prior investments



# German Bilateral Investment Treaties (IV)

## ■ Dispute settlement

- Disputes between the contracting states (Art. 9 of German Model Treaty)
- Disputes among a contracting state and an investor of the other contracting state (Art. 10 of German Model Treaty)
  - Encouraging amicable settlement / option to institute ICSID conciliation proceedings
  - After 6 months
  - Submission to (at the investor's choice)
    - ICSID / ICSID (Additional Facility)
    - UNCITRAL
    - ICC
    - LCIA
    - Arbitration Institute of Stockholm Chamber of Commerce
  - In practice choices much more limited
  - Award shall be binding and not subject to appeal or remedy other than those provided in the governing convention or arbitral rules on which it is based
  - Enforcement as a final and absolute ruling under domestic law
    - In practice subject to appropriate recognition proceedings (except for ICSID awards)
  - *Situs* of arbitration: New York Convention state if requested by investor
  - Compensation received under an insurance contract shall not constitute an available defence

## ■ Relations between the contracting states

- Existence of diplomatic / consular relations not relevant for applicability of treaty (Art. 11 of German Model Treaty)

# Vienna Convention on the Law of Treaties (VCLT) (23 May 1969)

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## ■ Rules for the interpretation of treaties

### ● General rule (Art. 31)

- A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose
- Context:
  - Text including preamble and annexes
  - Agreements related to the treaty made between all parties in connection with the conclusion of the treaty
  - Instruments made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty
- To be taken into account:
  - any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions
  - any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation
  - any relevant rules of international law applicable in the relations between the parties
- A special meaning shall be given to a term if it is established that the parties so intended

### ● Supplementary means of interpretation (Art. 32)

- Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or
- to determine the meaning when the interpretation according to article 31:
  - leaves the meaning ambiguous or obscure; or
  - leads to a result which is manifestly absurd or unreasonable

### ● Interpretation of treaties authenticated in two or more languages (Art. 33)

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# A brief look at Clifford Chance

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We are recognised by the market and our competitors as being one of the premier international law firms, combining the highest global standards with local expertise. Leading lawyers from different backgrounds and nationalities come together as one firm, offering unrivalled depth of legal resources across the key markets of the Middle East, Americas, Asia Pacific and Europe.

We are a single partnership operating through an integrated network founded on a "one firm" approach. Creating an environment where lawyers work closely with colleagues from our 35 offices is critical to the success of delivering a first-rate service.

The firm focuses on the core areas of commercial activity: capital markets; corporate; finance; litigation & dispute resolution; real estate, and tax, pensions and employment.

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