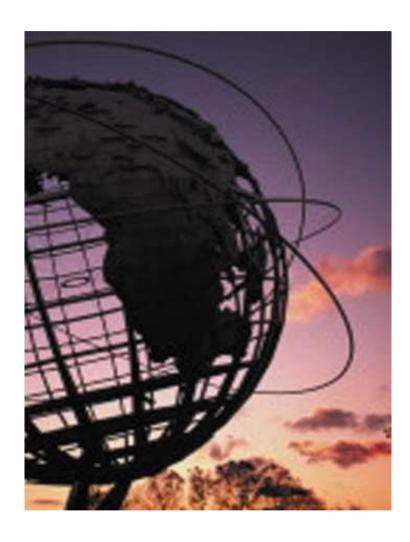


Politische Risiken / Absicherungsmöglichkeiten Ihrer Auslandsinvestitionen über den privaten Kreditversicherungsmarkt

19.06.2020



Einführung | Definition



Was ist ein politisches Risiko?

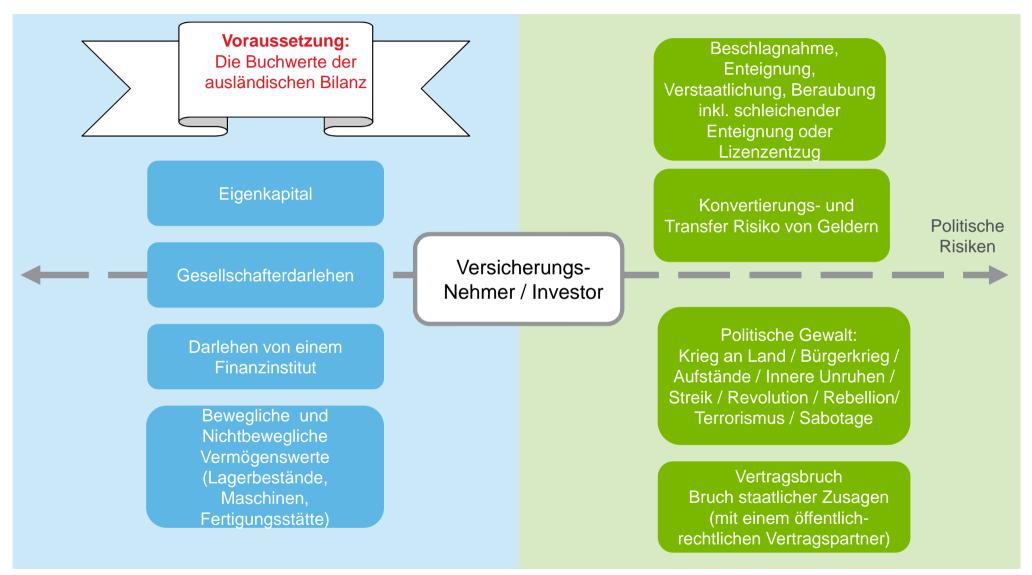


Politische Risiken | Beispiele von "Hoheitlichen Eingriffen"

- Enteignungsrisiken
- Nichtkonvertierung und Transferrisiken von Geldern
- Politische Gewalt
- Vertragsbruch / Bruch staatlicher Zusagen mit einem öffentlich-rechtlichen Geschäftspartner
- Nicht Honorierung eines Gerichtsurteils / eines Schiedsgerichtspruches
- Willkürliche Gerichts- / Ermittlungsverfahren
- Rechtswidrige Verweigerung projektwesentlicher Genehmigungen
- Besetzung des Betriebsgeländes durch hoheitliche Sicherheitskräfte
- Auferlegung unangemessener willkürlicher Strafzahlungen / -steuern
- Beschlagnahme der importierten Spezialmaschinen, die nach Abschluss des Projektes ursprünglich hätten wieder aus dem Land exportiert werden sollen.



Politische Risiken | Auslandsinvestitionen auf einem Blick





Politische Risiken | Auslandsinvestitionen – nicht versicherbare Risiken





Deckungsumfang | Privater Markt – Absicherung Ihres Investments

- Neue oder bereits existierende Auslandsinvestitionen.
- Die Investition muss nicht direkt aus Deutschland heraus erfolgen.
- Es kann ein Projekt oder mehrere Projekte verteilt auf unterschiedliche Länder abgesichert werden (Portfolioansatz).
- Maßgeschneiderter Deckungskonzept
 - Kreditlimit / Kapazität zwischen ca. EUR 3 Mio. EUR 150 Mio. per Projekt/Land denkbar
 - Laufzeiten zwischen 1 Jahr 15 Jahren denkbar
 - Individuelle Prämie je nach Ländermix, Laufzeit, Limithöhe sowie Deckungsumfang
 - Syndizierter Ansatz auch möglich
 - Mehrere Versicherer, die sich das Risiko teilen.
 - 1 Police (Wording)
 - ➤ Identische oder unterschiedliche Policenbedingungen
 - 1 Kooperationsvertrag zwischen den Versicherern u.a. für den Schadenfall

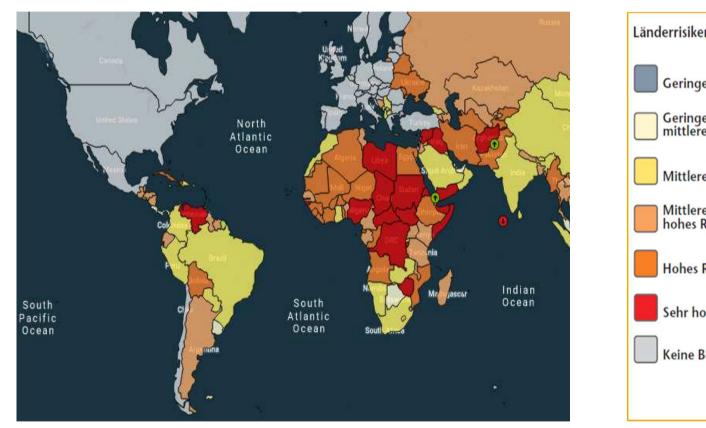


Deckungsumfang | Hermes Bund – Absicherung Ihres Investments

- Nur neue Investitionen.
- Die Förderungswürdigkeit der Investition steht im Vordergrund.
- Deutsche Investition = die Investition muss von Deutschland aus getätigt werden.
- Ausreichender Rechtsschutz (=IFV) auf Basis von bilateralen Verträgen zwischen Deutschland und dem Anlageland oder der EU und dem Anlageland.
- Es kann immer nur ein Projekt abgesichert werden (kein Portfolioansatz).
- Deckungskonzept gemäß den Regeln des OECD Konsensus.
- Deckungsumfang ähnlich wie bei dem privaten Markt



Aon Politische Risikokarte 2020 | Online verfügbar



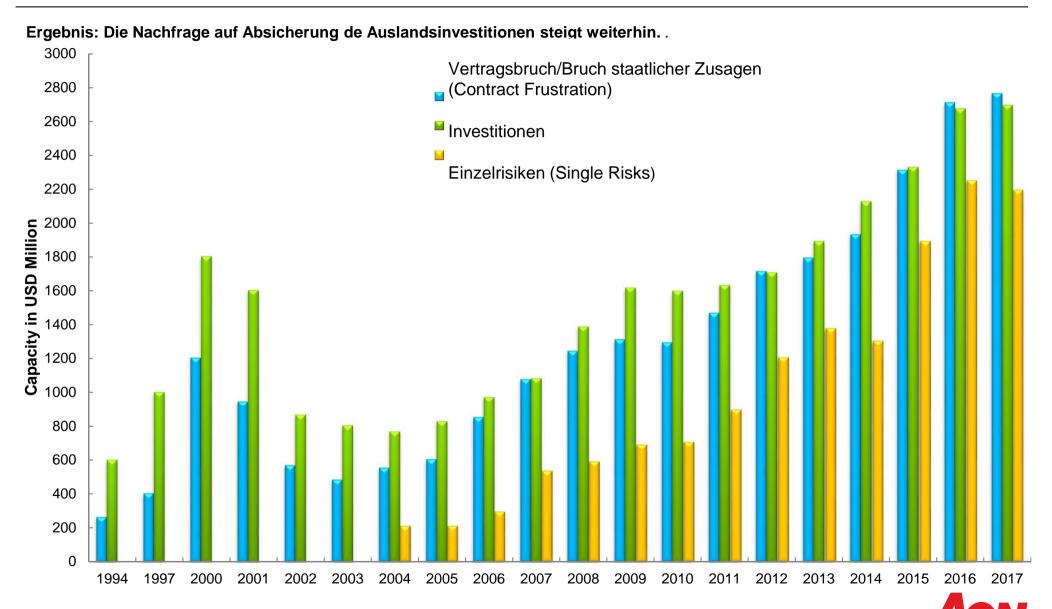


https://www.riskmaps.aon.co.uk

Kostenloser Zugang nach erfolgter einmaliger Registrierung; vierteljährliche Updates



Der Versicherungsmarkt | Vergleich der Zeichnungskapazitäten (privater Markt)



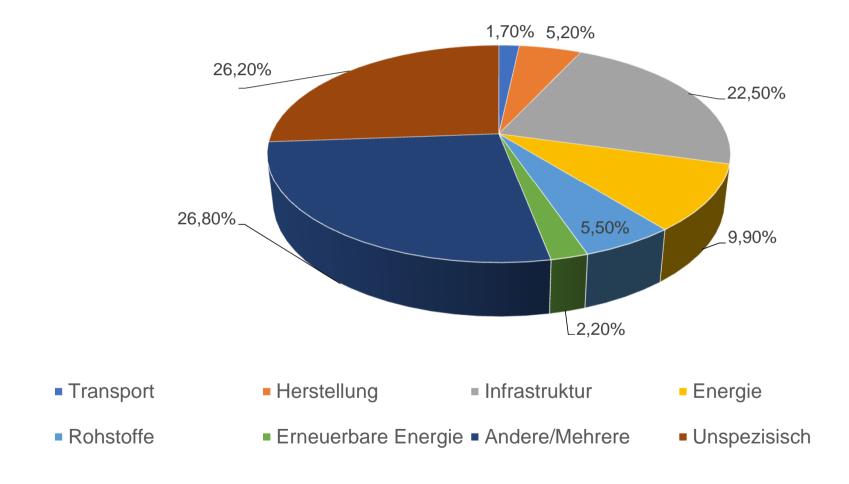
Der Versicherungsmarkt | Top 5 Länder 2019

Berne Union	Hermes Bund
Top 5 Staaten = 58% der Gesamtkapazität	Top 5 Staaten = 91,4% der Gesamtkapazität
Kasachstan USD 7,2 Mrd. (27%)	China über EUR 1 Mrd.
Vietnam USD 3,2 Mrd. (12%)	Argentinien EUR 800 Mio.
China USD 2,6 Mrd. (10%)	Mexiko EUR 429 Mio.
Pakistan USD 1,5 Mrd. (6%)	Kuwait EUR 384 Mio.
Ägypten USD 1,2 Mrd. (4%)	Indien EUR 351 Mio.

Quelle: Berne Union H1 Data Report 2019 + Hermes Bund Jahresbericht 2019



Auslandsinvestitionen | Neue Investitionen weltweit pro Industriezweig H1/2019

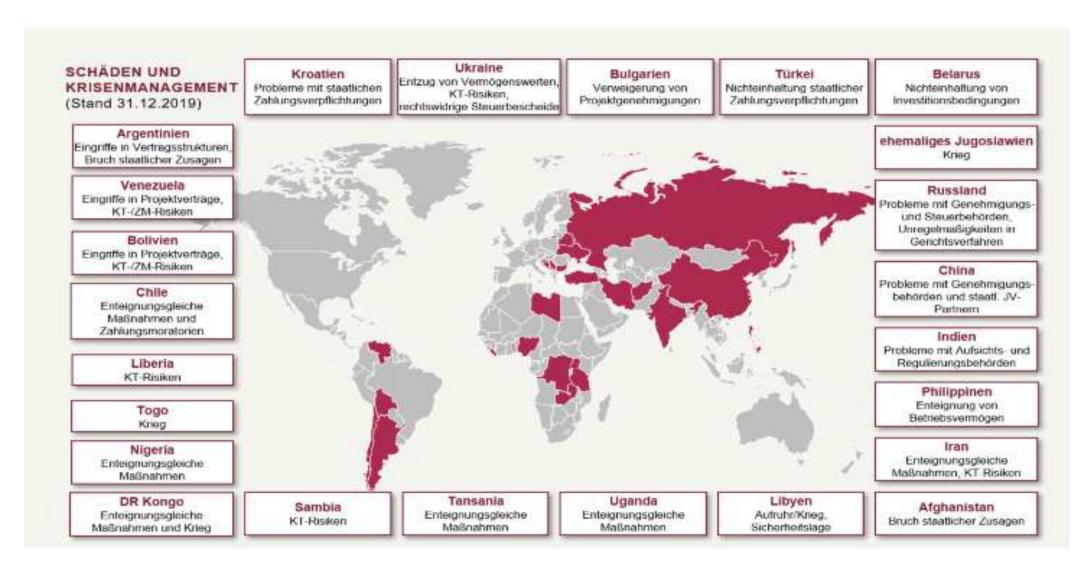


Quelle: Berne Union

ACNEmpower Results®

Aon Credit Solutions

Schäden | Krisenmanagement weltweit von Hermes Bund



Legende: KT/ZM Schäden: Konvertierungs- und Transferrisiken/ ZM= Zahlungsmoratorium



Aon Credit Solutions

Vielen Dank für Ihr Interesse!



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McDermott Will & Emery

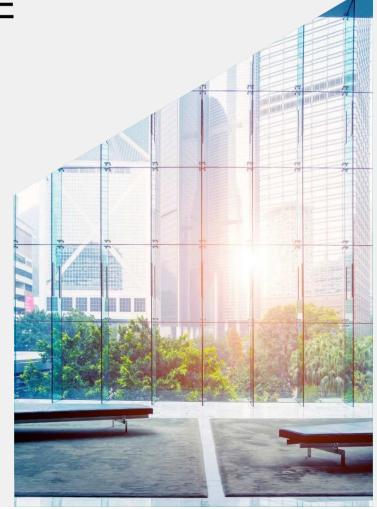


INVESTITIONSSCHUTZVERTRÄGE UND INVESTOR-STAAT SCHIEDSVERFAHREN

Arne Fuchs, LL.M. (GWU)

Partner, Global Co-Chair International Arbitration & Dispute Resolution

19. Juni 2020



mwe.com

EINFÜHRUNG



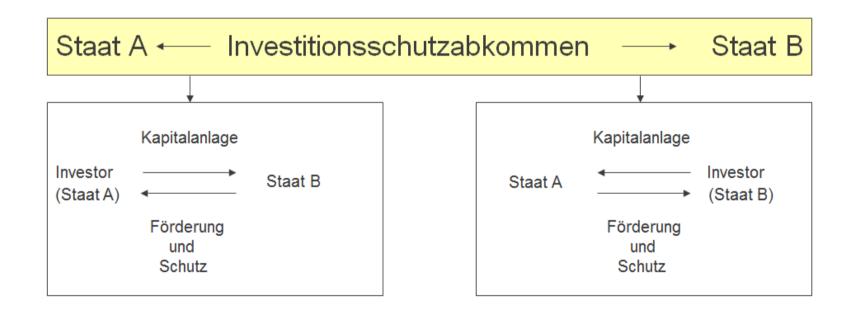


INVESTITIONSSCHUTZ: WAS IST DAS?

- Weltweit bieten über 2.000 BITs und MITs wichtigen Schutz für Kapitalanlagen im Ausland vor politischen Risiken, u.a. vor:
 - Enteignungen (inkl. indirekter Enteignungen, z.B. durch Vertragskündigung, Vertragsaufhebung oder Erfüllungsverweigerung);
 - Diskriminierender, willkürlicher und ungerechter Behandlung;
 - Nichterfüllung vertraglicher Pflichten (sog. "umbrella clause").
- Schäden, die durch eine widerrechtliche, dem Gaststaat zurechenbare Handlung verursacht wurden, müssen umfassend ersetzt werden (oft Ermittlung durch DCF-Methode).
- Entscheidung durch unabhängigen Spruchkörper (internationales Schiedsgericht).
- Kompatibel mit Versicherungslösungen.



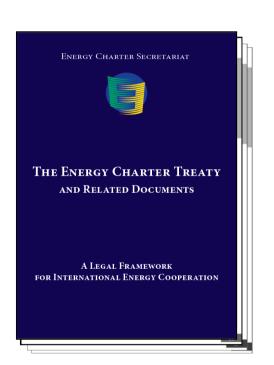
INVESTITIONSSCHUTZ: WIE FUNKTIONIERT DAS?



PRAXISBEISPIELE: INVESTITIONSSCHUTZ-ABKOMMEN



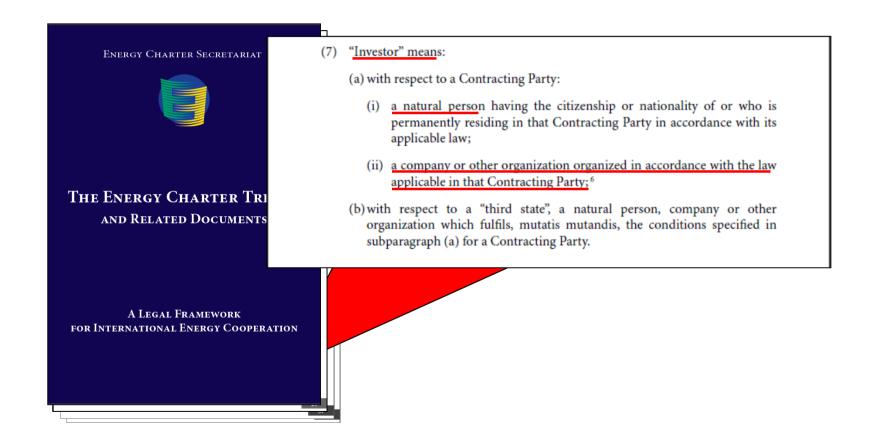
DER ENERGIECHARTAVERTRAG ("ECT")



- Völkerrechtliches Abkommen zwischen 50 Staaten (sowie EU/ Euratom).
- Sektorspezifisch: Energie.
- Investitionsschutzkapitel mit umfassenden Vorschriften zum Schutz von Auslandsinvestitionen und direktem Zugang zu internationaler Schiedsgerichtsbarkeit für ausländische Investoren.



ARTIKEL 1 (7) ECT: WER IST EIN "INVESTOR"?



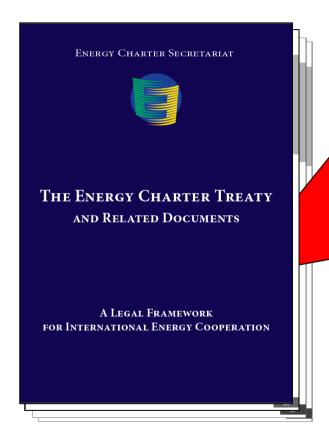


DER ECT: VERTRAGSPARTEIEN





ARTIKEL 1 (6) ECT: WAS IST EINE "KAPITALANLAGE"?



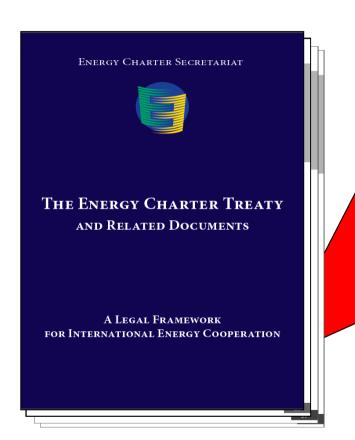
- (6) "Investment" means every kind of asset, owned or controlled directly orindirectly by an Investor and includes:
 - (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
 - (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
 - (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
 - (d) Intellectual Property;
 - (e) Returns;
 - (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the "Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

"Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat.



SCHUTZSTANDARDS: ENTEIGNUNG

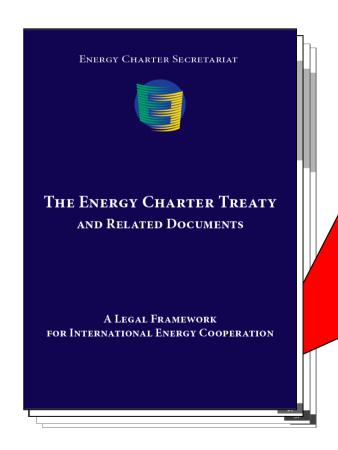


- (1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:
 - (a) for a purpose which is in the public interest;
 - (b) not discriminatory;
 - (c) carried out under due process of law; and
 - (d) accompanied by the payment of prompt, adequate and effective compensation.

Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date").



SCHUTZSTANDARDS: "FAIR AND EQUITABLE TREATMENT"

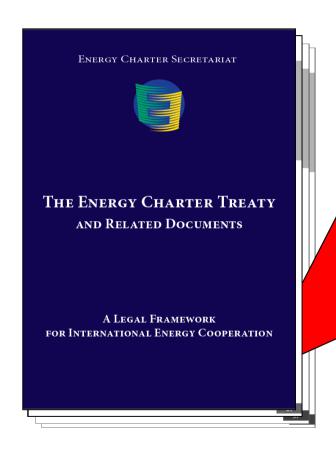


(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable. equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

SCHUTZSTANDARDS: "FAIR AND EQUITABLE TREATMENT" (CONT'D)

- Grobe Merkhilfe: Vertrauensschutz und §§ 74/75 Einl. ALR*
 - §. 74. Einzelne Rechte und Vortheile der Mitglieder des Staats müssen den Rechten und Pflichten zur Beförderung des gemeinschaftlichen Wohls, wenn zwischen beyden ein wirklicher Widerspruch (Collision) eintritt, nachstehn.
 - §. 75. Dagegen ist der Staat denjenigen, welcher seine besonderen Rechte und Vortheile dem Wohle des gemeinen Wesens aufzuopfern genöthigt wird, zu entschädigen gehalten.

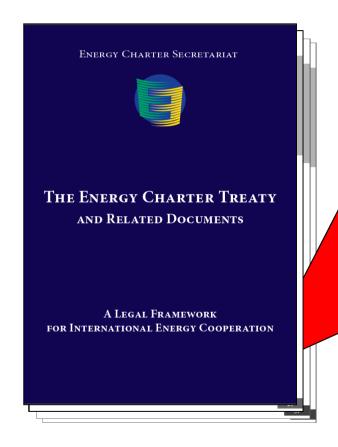
SCHUTZSTANDARDS: "MOST CONSTANT PROTECTION AND SECURITY"



(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable. equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.



SCHUTZSTANDARDS: DIE "UMBRELLA CLAUSE"



(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable. equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

DURCHSETZUNG VON RECHTEN: INVESTOR-STAAT SCHIEDSVERFAHREN





Sources: (i) Die Zeit, 27.2.2014, Schattenjustiz: Im Namen des Geldes, (ii) https://livestream.com/ICSID/events/6528857/videos/140109477.

PRAXISBEISPIELE: STAATLICHE MAßNAHMEN UND COVID-19



DAS "RIGHT TO REGULATE"

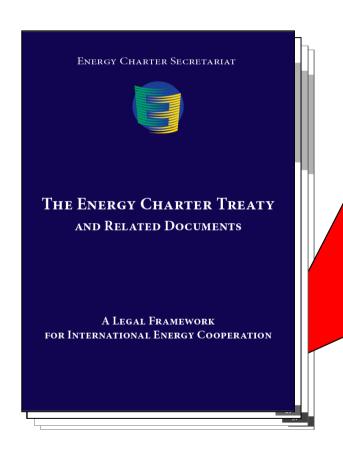
Bischoff Case (German-Venezuelan Comm'n, 1903):

•"während einer Epidemie einer Infektionskrankheit [kann] sicherlich keine Haftung für die angemessene Ausübung von hoheitlicher Gewalt begründet werden."

•Gleichwohl kann die COVID-19-Pandemie auch nicht uneingeschränkt zur Rechtfertigung staatlicher Eingriffe dienen, selbst "wenn die ursprüngliche Inbesitznahme rechtmäßig war, [haftet die] Regierung für Schäden aufgrund unangemessen langer Dauer der Beschlagnahme des Eigentums und für Beschädigung desselben während dieses Zeitraums."



DIE "COMPENSATION FOR LOSSES" KLAUSEL



- (1) Except where Article 13 applies, an Investor of any Contracting Party which suffers a loss with respect to any Investment in the Area of another Contracting Party owing to war or other armed conflict, state of national emergency, civil disturbance, or other similar event in that Area, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other settlement, treatment which is the most favourable of that which that Contracting Party accords to any other Investor, whether its own Investor, the Investor of any other Contracting Party, or the Investor of any third state.
- (2) Without prejudice to paragraph (1), an Investor of a Contracting Party which, in any of the situations referred to in that paragraph, <u>suffers a loss</u> in the Area of another Contracting Party resulting from
- (a) <u>requisitioning of its Investment</u> or part thereof by the latter's forces or authorities; or
- (b) <u>destruction of its Investment</u> or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,
- shall be accorded <u>restitution or compensation</u> which in either case shall be prompt, adequate and effective.



BEISPIELE STAATLICHER COVID-19-MAßNAHMEN

- Übernahme von privaten Krankenhäusern (z.B. Spanien);
- Umwandlung von Hotels in Krankenhäuser (z.B. Indien und Israel);
- Aussetzung der Erhebung von Autobahngebühren (z.B. Peru und Indien);
- Aussetzung von Mietzahlungen (und sonstige Nutzungsentgelte)
 (z.B. Deutschland);
- Aussetzung der Zahlungen von Energierechnungen (z.B. Argentinien und Bolivien);
- Restriktionen im Bereich der erneuerbaren Energien (z.B. Mexiko).

DANKE!





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Arne Fuchs is a partner and global co-chair of the international arbitration and dispute resolution group at McDermott. He has extensive experience advising clients in international commercial arbitrations and investment arbitrations across sectors (including automotive, banking, energy, gaming, health, infrastructure, IT, M&A, mining, real estate, and TMT). He has handled disputes in pure *ad hoc* proceedings, under UNCITRAL *ad hoc* rules, as well as under most major institutional rules (including the ICSID Convention, ICC, LCIA, HKIAC, SCAI, DIS Rules and DIS Sport Arbitration Rules).

In addition to his role as counsel, Arne is also acting as (sole / presiding) arbitrator. He is a Fellow of the Malaysian Institute of Arbitrators (FMIArb) and was appointed to the list of arbitrators of the Japan Commercial Arbitration Association (JCAA), the Panel of Arbitrators of the Asian International Arbitration Centre (AIAC) and the arbitrator and mediator pool of the Court of Arbitration of Art (CAfA).

Arne serves as delegate of the German National Committee of the ICC on the ICC Commission on Arbitration and ADR and he is a Member of the Arbitration Committee of the International Bar Association. In 2017, Arne was appointed by the ICC International Court of Arbitration as Regional Representative for the Europe and Russia Chapter of the ICC YAF (with a 2017-2019 mandate). He regularly speaks on international arbitration topics and teaches training courses and workshops on dispute resolution around the world.

Arne has been recognized and recommended for his dispute resolution expertise by leading directories, including GAR's Who's Who Legal: Arbitration – Future Leaders, Legal 500 EMEA and the Expert Guide Commercial Arbitration. Clients and peers describe him as "very smart", "an excellent lawyer and arbitrator", "phenomenally hard working" and "a prominent name in the investment arbitration space".