

12TH ANNUAL  
**TAX PLANNING STRATEGIES**  
 U.S. AND EUROPE

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**Why International Private Clients Like Europe: Effective European Planning Structures**

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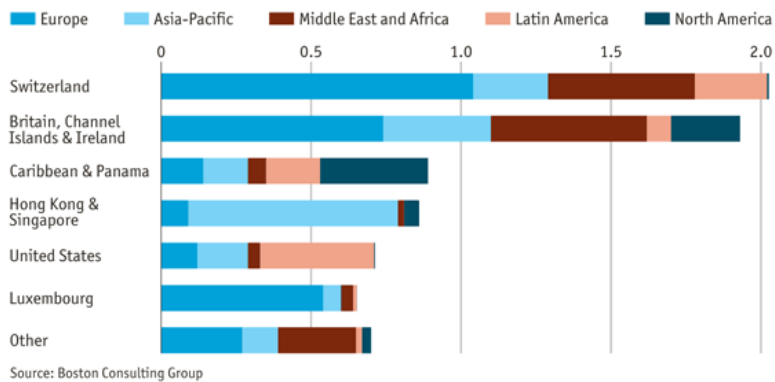
## Why private clients like Europe

- ❑ mature tax treaty networks
- ❑ participation / holding company regimes
- ❑ sophisticated wealth structures (common and civil law)
- ❑ investment protection agreements
- ❑ residence and citizenship opportunities
- ❑ will growing tax transparency affect international appetite for European structures?

## Offshore wealth

### Sources and sites of offshore wealth

2010, \$trn



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## European wealth structures

- trusts (UK and British offshore centres)
- foundations (Netherlands, Austria, Switzerland, Liechtenstein)
- companies (Netherlands and Luxembourg)
- partnership vehicles (Netherlands, UK)
- funds (Ireland, Luxembourg)

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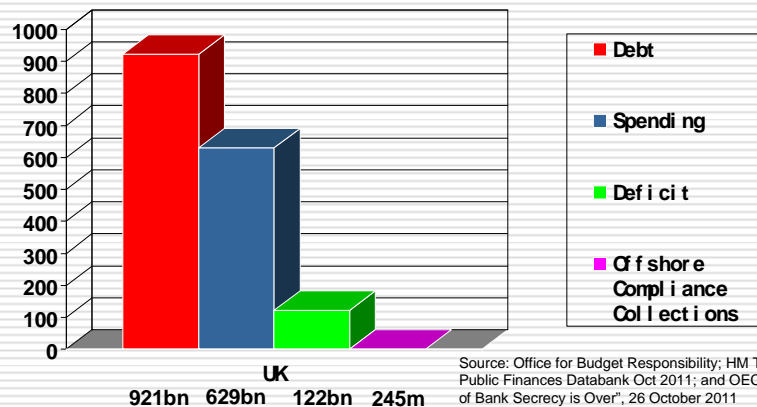
## Investment protection treaties

- bilateral sovereign agreements protecting against political risks (*e.g.*, expropriation)
- private sector investor rights against host governments
- no "limitation of benefits" rules
- arbitration governed by ICSID rules
- compensation orders are enforceable against foreign assets in 185 countries

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## UK government finances

£ Sterling bn



Source: Office for Budget Responsibility; HM Treasury, Public Finances Databank Oct 2011; and OECD, "The Era of Bank Secrecy is Over", 26 October 2011

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## Overview of countries covered

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- Brazil
- Germany
- Malta
- Switzerland
- United Arab Emirates

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## Questions to panelists (1)

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- When international private clients invest in Europe what structures do they typically use?
  - Trusts/foundations vs. companies/partnerships? Funds? Insurance wrappers? Family offices?
  - Is there a tendency for clients from common-law countries to use trusts and for clients from civil-law countries to use foundations? Or are these forms converging?

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## Germany

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- ❑ Structures for inbound investments
  - Usually holding companies/partnerships, frequently offshore
  - Direct investments by trusts are rather unusual (trusts itself not recognized)
- ❑ Trust or Foundation?
  - As trusts are not recognized in many civil-law countries, the use of foundations is quite common
  - Offshore trusts are used where applicable

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## Switzerland

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- ❑ Trusts and foundations (about 50/50) are very common for our clients
- ❑ Clients typically use holding or auxiliary companies or branches
- ❑ Family offices organized as support centers (cost-plus) or low-taxed SPVs
- ❑ Trusts are becoming more popular for civil law clients, but common law clients generally do not use foundations

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## United Arab Emirates

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- Vehicles generally used for international investments:
  - Offshore companies (BVI, Cayman Islands)
  - Local companies (onshore, free zone)
  - International companies with access to tax treaties
- Trends/tendency:
  - "onshoring" as result of increased tax awareness; majority still offshore though
  - Common law vs. civil law does not seem to be the driver; origin of advisors decisive

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## United Arab Emirates

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- Family succession planning
  - Trusts, foundations, family holdings
  - Common law vs. civil law driven by educational background, location of underlying assets, origin of advisors

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## Brazil

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- ❑ The use of an intermediary EU holding company is one of the most effective solutions for Brazilian private clients willing to invest overseas.
- ❑ Most EU holding company jurisdictions offer a form of participation exemption on dividends received by their entities from wholly-owned participations.

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## Brazil

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- ❑ Most EU holding companies are not mentioned in the blacklist.
- ❑ Such a policy would be consistent with Brazil's understanding of the participation exemption rules found in most of its tax treaties with EU countries.
- ❑ Spanish ETVE, Dutch BV, Austrian GmbH

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## Malta

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- ❑ Companies: Participation Exemption, other investments = effective low tax or tax neutral; and for flexibility in financing = contributions
- ❑ Trusts: transparent, flow through with double tax relief to beneficiaries, or treated like company, with effective tax after refund 5% max, and access to tax treaty network (64)
- ❑ Foundations: treated like company

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## Malta

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- ❑ Funds: Professional Investor Funds tax neutral, no capital gains, no transfer duty, fast licensing procedure
- ❑ Resident, non-domiciled companies taxable on a remittance basis only
- ❑ Common law tends to use trusts, Civil law goes for foundations, unless persuaded by specific requirements met alternatively

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## Questions to panelists (2)

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- When international private clients invest in Europe what are the typical substance requirements in order for structures not to be disregarded?
- What other mechanisms do your tax authorities have to challenge foreign structures?
  - *E.g.*, CFC legislation, abuse of law, place of effective management, sham transactions, shifting of burden of proof?

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## United Arab Emirates

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- Substance requirements
  - UAE has no federal tax law
  - Some Emirates have implemented tax legislation but are not enforcing it
  - No transfer pricing regulations
  - No substance requirements apart from free zones conditions
- Mechanisms regarding foreign investments
  - Freehold property investments
  - Foreign ownership restrictions ("51-49%")
  - Free zones

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## Germany

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- ❑ Substance test for treaty protection
  - Own business activity of foreign company or
  - Economic reasons for interposing the foreign company and adequate business substance
- ❑ Other protective rules
  - CFC-rules (company controlled by residents)
  - "Look-through"-rules (foreign trusts/found. with German settlor/beneficiaries)
  - Other specific anti-avoidance rules and a general "abuse of law" rule

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## Switzerland

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- ❑ Substance is typically an adequately equipped office with at least one person on the payroll
- ❑ Foreign structures can be attacked by the tax authorities on the basis of effective management, theory of mandate / POA or on the basis of tax avoidance
- ❑ Tax haven companies most vulnerable

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## Malta

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- ❑ Malta attracts foreign investment, so mindful not to impose arduous substance requirements
- ❑ No substance requirement, CFC, transfer pricing, thin cap, shifting burden proof
- ❑ Yet, from perspective of other jurisdictions, recommend management and control, economic rationale and profit-margin

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## Brazil

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- ❑ Typical requirement is the economic substance for establishing a structure overseas.
- ❑ The current trend is not to disregard structures, but to apply stricter taxation rules to countries or structures which are on the blacklist
  - *E.g.*, stricter CFC, TP and thin capitalization rules, higher withholding tax rates.

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## Questions to panelists (3)

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- Does confidentiality typically play a role?
  - *vis-à-vis* the tax authorities?
  - for other reasons?
- Is watertight confidentiality still possible from your point of view?
  - What (tax or non-tax) reporting obligations does your jurisdiction have?
  - What structures are typically used for confidentiality purposes?

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## Questions to panelists (3 cont'd)

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- Is the rising tide of tax information exchange (*e.g.*, art. 26 of the OECD-MC, TIEAs) influencing the decisions of clients where to invest?
  - How many treaties complying with the new OECD standard has your own jurisdiction concluded?
  - Are these treaties being tested in practice already?
  - Information exchange *vs.* withholding tax?

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## Brazil

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- ❑ Confidentiality tends to be at the top of most Brazilians' lists of estate planning needs.
- ❑ Usually achieved by means of a trust, although the general level of awareness among Brazilians about the use of trusts remains low.
- ❑ TIEAs: so far have not proven to be useful to the tax authorities. Brazilian clients still have not seen the need to change their behavior because of the TIEAs.

## Brazil

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- ❑ The procedure entirely depends on the availability of the relevant information, which in turn depends on the legal requirements and administrative measures laid down in the secrecy jurisdiction.
  - Often, the information simply does not exist in the jurisdiction concerned, and this is deliberate.
- ❑ The way the information is obtained may also be challenged administratively or judicially.

## Brazil

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- ❑ Brazil/US TIEA: has been approved by the National Congress, but still needs sanction by the President to enter into force.
- ❑ Novelty: A party to the agreement may request that the other party allow officials to enter the territory of the requested party, to the extent permitted under its domestic laws, to interview individuals and examine records with the prior written consent of the individuals concerned.

## Germany

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- ❑ Confidentiality
  - secured for attorneys and tax advisers
  - no obligation for mandatory disclosures to the tax authorities without client's consent
- ❑ No strict confidentiality
  - reporting obligation on all notarizations
  - no strict bank secrecy
  - international exchange of information
- ❑ Fiduciary agreements may be an option

## Germany

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- ❑ Germany has a wide net of agreements on tax information exchange
- ❑ If the investment is properly structured, we do not see a relevant influence of a possible information exchange on the investment decision
- ❑ Withholding tax is used with regard to foreign investors (subsequent refund applies in case of treaty protection)

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## Malta

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- ❑ Confidentiality is sought, both for tax and other purposes (creditors, security)
- ❑ Challenge to confidentiality from global organizations (Joint Forum Peer Review, Art 26 OECD-MC, TIEAs)
- ❑ Reporting upon tax exchange of information request, specifically under treaties or EU Directives; or AMLTF
- ❑ Typical structures: trusts, fiduciaries

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## Malta

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- ❑ Investment decision influenced, but pressure for converging global standards
- ❑ Treaty network based on evolving OECD-MC, some protocols added
- ❑ Questions are received from other tax authorities
- ❑ Global trend is towards information exchange, *e.g.*, FATCA, EU Savings Directive

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## Switzerland

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- ❑ No concerns about confidentiality towards Swiss tax administration
- ❑ Concerns about family in general, spouses and children in particular, concerns about foreign authorities (asset protection), security concerns
- ❑ Confidentiality remains possible, Swiss corporations (AG/SA), foundations, Trusts. Generally no filing obligations other than for Swiss tax purposes.

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## Switzerland

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- ❑ No real changes in investments decisions as a result of exchange of information
- ❑ Slight increase of immigration by HNWIs because of fiscal pressure in other countries and sometimes relating to exchange of information
- ❑ Over 40 tax treaties with exchange of information concluded
- ❑ Flow of information starting slowly, constant adjustments to new requirements
- ❑ Switzerland is aiming for a level playing field as to the quality of the information
- ❑ Swiss policy focus is on withholding tax, exchange only upon request (see Rubik)

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## Switzerland

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- ❑ **Rubik's Magic: Now you see a fraud, now you don't !**
- ❑ **Rubik CH-DE** signed with Germany on September 21, 2011
  - **regularizing the past**: existing undeclared assets - German resident client has the choice between
    - a) anonymous lump-sum payment of between 19 to 34% of the assets;
    - or
    - b) voluntary disclosure to Germany (via the bank and the Swiss FTA)
  - **regularizing the future**: future investment income - German resident client has the choice between
    - a) anonymous final withholding tax at a flat rate of 26.375%; or
    - b) voluntary disclosure to Germany (via the bank and the Swiss FTA)
- ❑ **Rubik CH-UK** signed with the UK on October 6, 2011: essentially the same as CH-DE except that future investment income is subject to a final withholding tax at a rate between 27 to 48%, depending on the nature of the income. Special rules apply to "non-doms".
- ❑ **Entry into force**: foreseen for early 2013, but ratification in Germany appears problematic.

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## United Arab Emirates

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### Confidentiality

- Traditionally very high on principal's agenda
  - Disclosure to authorities
  - Avoid public disclosure
  - Avoid third party involvement
- Optimal discretion
  - Via trust or foundation structures
  - Via nominee arrangements
  - Use of blocker funds (SIF, PUT)

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## United Arab Emirates

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- Exchange of information for tax purposes
  - Approx. 50 tax treaties in force
  - Lack of tax administration
  - Lack of taxation
- No inheritance/gift tax treaties

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## Questions to panelists (4)

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- What about estate and gift taxation?
  - If this is an issue, what structures exist to avoid tax when transferring wealth between generations?
  - Do you have tax treaties covering estate and/or gift taxation?
- What about wealth taxes?

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## Germany

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- Significant estate and gift tax exists
  - Business property may be transferred very privileged (even tax-free) if certain conditions are met
  - Other assets may be structured to use the business property-relief
  - Currently only 6 treaties covering estate and gift tax
- Currently no wealth tax in Germany

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## Malta

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- No estate or gift taxes
- 5% duty on Maltese real estate transmission, with exemptions or relief for home and family
- Typical structures for individuals would involve a trust
- No wealth taxes

## Brazil

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- Not really an issue in Brazil as estate and gift tax are taxed at a rate of 4% only.
- No wealth taxes in Brazil.
- As far as taxes on private ownership of estates and vehicles are concerned, they will be levied equally regardless of where owner is located or which structure is used. Not much room for tax planning in this sense.

## United Arab Emirates

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- Domestic
  - No inheritance/gift tax
  - No wealth tax
  - No income tax
- Treaties
  - Inheritance: France

## Switzerland

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- Generally, no or very low estate or gift taxes between spouses and in the direct line
- Exceptions may apply to lump-sum taxpayers
- Tax on estate/gift to other parties can be rather high (25 to 55%)
- People's initiative (referendum) for new federal estate and gift tax of 20% pending
- Pre-immigration tax planning making use of irrevocable discretionary trust or foundations may be recommended
- 10 treaties covering estate tax in force (with AT, DE, DK, FI, FR, NL, NO, SE, UK and the US)
- Gift tax not covered by double tax treaties

## Switzerland

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- ❑ The Swiss cantons levy an annual net wealth tax (on world-wide wealth)
- ❑ Special rules for lump sum taxpayers (no wealth tax in French speaking cantons, lump sum taxable wealth in German speaking cantons)
- ❑ Rates generally low or reasonable in the German speaking cantons (*e.g.*, 0.1% to 0.4% per annum)
- ❑ Rates often high in French speaking cantons (*e.g.*, up to 1.2% in Geneva)
- ❑ Some cantons have introduced tax caps («bouclier fiscal») in order to cap accumulation of income and wealth taxes (*e.g.*, capped at 60% of income)

## Questions to panelists (5)

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- ❑ What other issues, if any, have to be considered from the point of view of your jurisdiction?
- ❑ Do bilateral investment protection treaties matter?
  - How many such treaties does your jurisdiction have?

## Switzerland

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- ❑ BITS matter indeed. We dealt with several cases where the BITS were decisive for the location of an investment structure
- ❑ Over 120 BITs in force! One of the world's most comprehensive networks of BITs (3rd after Germany and China)

## Malta

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- ❑ VAT - 18%, unless exempt; planning
- ❑ Cost of maintenance *e.g.* EUR 7,000 p.a.
- ❑ Repatriation – No withholding taxes on dividends, interest, royalties
- ❑ Exit strategies – No capital gains, or Transfer of IP/goodwill to foreign group company, or
- ❑ Change of legal seat/redomiciliation

## Malta

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- Globally, degree of protection varies, as does the extent of liability. However, BITs provide assurance for investors: legal security and international dispute resolution mechanism.
- Bilateral investment promotion and protection agreements in force:
  - Albania, Canada, China, Croatia, Egypt, Kuwait, Libya, Montenegro, Serbia, Switzerland, Tunisia, Turkey, USA
  - Expanding to India, etc
  - Intra-EU BITs

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## Brazil

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- BITs matter immensely, but Brazil has not signed any (although has been negotiating some).
- Therefore, private clients willing to invest in jurisdictions with unstable political regimes usually do it through an EU holding company in order to benefit from a BIT network.
- Not challenged by the tax authorities, as even Petrobras (a company in which the Federal Union holds 51%) makes its investment overseas through its Dutch company.

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## United Arab Emirates

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- BITs
  - 35 BITs in place
  - GCC vs UAE
  - Exclusion of natural resources (*Abu Dhabi*)

## Germany

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- Issues which often matter for international private clients
  - Rather low threshold to become tax resident in Germany (premises only used from time to time may suffice)
  - Unfavorable treatment of foreign trust structures
  - German estate and gift tax applies if either the donor or the donee is tax resident in Germany

## Germany

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- ❑ Germany has a wide net of bilateral investment protection treaties (141)
- ❑ Settlements by international arbitration under these treaties do from time to time matter for enterprises with widely spread international investments

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## Thank You!

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