

GAR INVESTMENT TREATY ARBITRATION


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# Ukraine

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## I Overview

### 1 What are the key features of the investment treaties to which this country is a party?

BIT Contracting Party or MIT (date of entry into force) <sup>1, 2</sup>	Substantive protections					Procedural rights		
	Fair and equitable treatment (FET)	Expropriation	Protection and security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts	Arbitration
Energy Charter Treaty (27 January 1999)	Yes	Yes	Yes	Yes	Yes	3 months	Yes	Yes
CIS Treaty on cooperation in investment activity (temporarily in force) <sup>3</sup>	No	Yes	Yes	No	No	None	Yes	Yes
Treaty between OPEC Fund for International Development (OFID) and Ukraine (27 June 2018 for Ukraine)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Albania (30 April 2004)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Argentina (6 May 1997)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Armenia (7 March 1996)	No	Yes	No	Yes	No	6 months	No	Yes
Austria (1 December 1997)	Yes	Yes	Yes	Yes	Yes	3 months	No	Yes
Azerbaijan (9 December 1997)	No	Yes	No	Yes	Yes	6 months	No	Yes
Belarus (11 June 1997)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Belgium and Luxembourg (not in effect from 27 July 2011)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Bosnia and Herzegovina (22 January 2004)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Brunei (25 April 2006)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Bulgaria (10 December 1995)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Canada (24 July 1995)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Chile (26 July 1997)	Yes	Yes	Yes	Yes	No	3 months	No	Yes
China (30 May 1993)	Yes	Yes	Yes	Yes	No	None	No	Yes
Democratic Republic of the Congo (ratified by Ukraine on 17 November 2010, not yet in force)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Croatia (16 May 2001) <sup>4</sup>	No	Yes	Yes	Yes	No	6 months	No	Yes
Cuba (4 December 1996)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Czech Republic (2 November 1995)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Denmark (29 April 1994)	Yes	Yes	Yes	Yes	Yes	3 months	No	Yes
Egypt (13 October 1993)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Equatorial Guinea (ratified by Ukraine on 19 September 2008, not yet in force)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Estonia (5 July 1995)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Finland (7 December 2005)	Yes	Yes	Yes	Yes	Yes	3 months	Yes	Yes
France (26 January 1996)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Gambia (ratified by Ukraine on 19 January 2006, not yet in force)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Georgia (18 December 1996)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Germany (29 June 1996)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes



BIT Contracting Party or MIT (date of entry into force) <sup>1, 2</sup>	Substantive protections					Procedural rights		
	Fair and equitable treatment (FET)	Expropriation	Protection and security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts	Arbitration
Greece (4 January 1997)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Hungary (20 December 1996)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
India (12 August 2003)	Yes	Yes	No	Yes	No	6 months	Yes	Yes
Indonesia (6 August 1997)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Iran, Islamic Republic (5 July 2003)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Israel (20 November 2012)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Italy (not in effect from 12 September 2012)	Yes	Yes	No	Yes	Yes <sup>5</sup>	6 months	Yes	Yes
Japan (26 November 2015)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Jordan (17 April 2007)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Kazakhstan (4 August 1995)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Korea, Republic (3 November 1997)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Kuwait (11 June 2003)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Kyrgyzstan (not in force)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Latvia (30 December 1997)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Lebanon (26 May 2000)	Yes	Yes	Yes	Yes <sup>6</sup>	Yes	6 months	Yes	Yes
Libya (23 April 2003)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Lithuania (27 February 1995)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Macedonia, TFYR (25 March 2000)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Moldova (27 May 1996)	Yes	Yes	Yes	Yes	No	6 months	No <sup>7</sup>	Yes
Mongolia (5 November 1992)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Morocco (23 April 2009)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Netherlands (1 June 1997)	Yes	Yes	Yes	Yes	Yes	3 months	No	Yes
Oman (12 May 2010)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Panama (13 June 2007)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Poland (14 September 1993)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Portugal (18 July 2003)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Qatar (9 April 2019)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Russia (27 January 2000)	No	Yes	Yes	Yes	No	6 months	Yes	Yes
San Marino (15 October 2008)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Saudi Arabia (27 August 2009)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Serbia (14 August 2001), Montenegro (14 August 2001) based on the Yugoslavia BIT	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Singapore (14 July 2007)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Slovakia (20 August 2009)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Slovenia (1 June 2000)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Spain (13 March 2000)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Sweden (1 March 1997)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Switzerland (21 January 1997)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Syria (16 March 2003)	Yes	Yes	Yes	Yes	No	6 months	No	Yes



BIT Contracting Party or MIT (date of entry into force) <sup>1, 2</sup>	Substantive protections					Procedural rights		
	Fair and equitable treatment (FET)	Expropriation	Protection and security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts	Arbitration
Tajikistan (27 May 2003)	No	Yes	Yes	Yes	No	6 months	Yes	Yes
Turkey (21 May 1998) <sup>8</sup>	No	Yes	No	Yes	No	6 months	Yes	Yes
Turkmenistan (28 September 1999)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
United Arab Emirates (9 April 2004)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
United Kingdom (10 February 1993)	Yes	Yes	Yes	Yes	Yes	3 months	No	Yes
United States (16 November 1996)	Yes	Yes	Yes	Yes	Yes	None (only for arbitration 6 months)	Yes	Yes
Uzbekistan (26 May 1994)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Vietnam (8 December 1994)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Yemen (ratified by Ukraine on 7 February 2002, not yet in force)	Yes	Yes	Yes	Yes	No	6 months	No	Yes

## II Qualifying Criteria

### 2 Definition of investor

What are the distinguishing features of the definition of ‘investor’ in this country’s investment treaties?

Issue	Distinguishing features in relation to the definition of ‘investor’
<b>Natural persons</b>	
<b>Permanent residents</b>	In respect of natural persons, the Ukrainian investment treaties normally define “investor” as a citizen or national of a contracting party. The permanent residents usually are not included in the definition of “investor”. However, under four BITs (with Azerbaijan, Canada, Israel and Kazakhstan), ECT and CIS Treaty the protection is provided to both citizens/nationals and permanent residents of a contracting party. CIS Treaty specifically provides the protection for stateless individuals. Under Bosnia and Herzegovina and San-Marino BITs the protection is granted to citizens and permanent residents from these countries respectively, but only to citizens and not permanent residents in respect of investors from Ukraine. The Argentina BIT excludes protection to the investment of a citizen of one contracting party who permanently resides in other contracting party for more than two years unless it is proved that the investment was admitted into the latter’s territory from abroad.
<b>Juridical persons</b>	
<b>Seat of the investor/ place of business</b>	While the majority of Ukrainian investment treaties provide that a juridical person incorporated or duly organised according to the laws of a contracting party is an “investor”, certain BITs contain additional requirements as to the territory of a contracting party: Eighteen BITs (with Argentina, Austria, Brunei, Bulgaria, Cuba, Germany, India, Lithuania, Lebanon, Macedonia, Mongolia, Morocco, Oman, Qatar, Serbia, Slovenia, Tajikistan and Turkmenistan) require that such entities have their seat in the territory of a contracting party or that such entities are constituted in or on the territory of a contracting party; five BITs (with Chile, Iran, Jordan, Poland, Switzerland) – “seat” and “business activity”; five BITs (with Italy, Portugal, Saudi Arabia, Slovakia, Turkey) – their “main office” or “headquarters”; France BIT – “legal address”; Belgium and Luxembourg and Finland BITs – “registered office”; Bosnia and Herzegovina BIT – registered seat, central seat, central office or main place of business activity. The Bosnia and Herzegovina, Brunei and Saudi Arabia BITs only apply this precondition to investors from these countries respectively and not to those from Ukraine. India BIT applies the requirement for a seat to investors from Ukraine only, and indicates that investors from India shall be incorporated in any part of India.



Issue	Distinguishing features in relation to the definition of ‘investor’
<b>Control by a non-national</b>	<p>Mainly, Ukrainian investment treaties do not regulate this issue.</p> <p>However, for example, the United States BIT provides the contracting parties with a discretion to deny the advantages of the BIT to any company if nationals of any third country control such company, and in case of a company of the other party if that company has no substantial business activities in the territory of the other party, or if it is controlled by nationals of any third country with which the denying party does not maintain normal economic relations.</p> <p>Denial of benefits is also provided by Japan BIT in relation to a company owned or controlled by a third country investor in case a respective contracting party does not maintain diplomatic relations with such third country or it implements certain restrictive measures in relation to such third country or in case a company controlled by a third country investor does not have substantial business activities in the territory of the other contracting party.</p> <p>According to Qatar BIT, denial of benefits is possible in relation to a company owned or controlled by individuals or entities of a contracting party where the investment is made or in relation to a company owned or controlled by a third country investor in case a denying party does not maintain diplomatic relations with such third country or in case a company controlled by a third country investor does not have substantial business activities in the territory of the other contracting party.</p>
<b>Control by investor</b>	<p>Several BITs provide protection to juridical persons controlled by investor: with Austria, Israel, Lithuania, Morocco, Netherlands, Spain, Switzerland – to juridical persons incorporated under the law of the contracting party and/or the third state and controlled by an investor; the Sweden BIT – to juridical persons located in the third state and effectively controlled by an investor; the France BIT – to any juridical person effectively controlled by investor; and the Qatar BIT - to independent funds, trusts and organizations established under the legislation of a contracting state or a third state in relation to which an investor exercises effective control.</p> <p>In addition, for example, the Morocco BIT protects the investor controlling the third-party juridical persons or the juridical persons on the territory of the contracting party provided that such investor does not refer to a dispute resolution mechanism under other investment treaty.</p>
<b>Intention to invest</b>	<p>The Cuba and Macedonia BITs include in the definition of “investor” natural and juridical persons who have the intention to make an investment.</p>
<b>State control</b>	<p>The Kuwait BIT and Saudi Arabia BIT (with respect to investors from Saudi Arabia only), United Arab Emirates BIT provide that the government of a contracting party may be an investor</p> <p>Under the Panama BIT state institutions are included in the definition of “investor” and the Canada, US and Japan BITs protect government-owned or controlled companies. The CIS Treaty provides that the contracting parties and state and territorial and administrative formations acting through authorised physical and juridical persons may act as investors.</p> <p>According to Qatar BIT, state ownership or control shall not affect the status of an investor, moreover, governments, official institutions and organs of power of a contracting party may be an investor.</p>
<b>Status of a juridical person</b>	<p>Fifteen BITs (with Brunei (with respect of investors from Brunei only), Bulgaria, Croatia, Czech Republic, Equatorial Guinea, Germany, Greece (in respect of Ukrainian investors only), Hungary, Moldova, Singapore, Saudi Arabia (in respect of investors from Saudi Arabia only), Sweden, Syria, Turkmenistan, Japan) provide for the definition of “investor”, which covers the entities not possessing the status of juridical persons.</p>

### 3 Definition of investment

What are the distinguishing features of the definition of ‘investment’ in this country’s investment treaties?

Issue	Distinguishing features in relation to the concept of ‘investment’
<b>Exclusion of certain assets</b>	<p>Most Ukrainian BITs do not contain any exclusion of certain assets from definition of “investment”. However, the Canada BIT does not protect real estate or other property, not acquired in the expectation or used for the purpose of economic benefit or other business purposes. The Israel BIT does not protect the operations of obtaining loans, credit facilities and reimbursable financial assistance by the investor. Japan BIT contains certain exclusions concerning loans and debt obligations. Only some of the BITs, with Argentina, Armenia, Chile, China, Cuba, Denmark, Egypt, Indonesia, Iran, the Netherlands, Singapore, Switzerland, Turkey, as well as OFID Treaty and CIS Treaty do not contain the provision that the alteration of the form of investment does not influence its character as an investment.</p>
<b>Indirect control of assets</b>	<p>Nine Ukrainian investment treaties explicitly include assets controlled indirectly (ECT, OFID Treaty, Japan, Belgium and Luxembourg, Canada, Finland, Kuwait, Morocco, USA BITs). In addition, the Italy BIT prescribes that the investor may invest through its subsidiary company.</p>



Issue	Distinguishing features in relation to the concept of ‘investment’
<b>Accordance with local laws</b>	<p>Most Ukrainian investment treaties explicitly require investments to be made in accordance with the contracting party’s laws. ECT, CIS Treaty and several BITs do not contain this requirement (with Albania, Belgium and Luxemburg, Bulgaria, Denmark, Korea, Lebanon, Mongolia, Netherlands). Japan BIT does not apply to the investments made in violation of law of a contracting party or both contracting parties.</p> <p>In addition, under some of the Ukrainian BITs (e.g. with Iran, Singapore, United Arab Emirates and Vietnam) the protection is granted only to investments admitted by competent authorities of the contracting party. The Vietnam BIT applies this precondition only in case of investments made into Vietnam and not those into Ukraine. OFID Treaty requires the government to confirm the investment.</p>
<b>Restriction on sphere of investment activity</b>	<p>Only three Ukrainian BITs (with Bulgaria, Russia, Tajikistan) stipulate that a contracting party may reserve the right to determine branches of economy and spheres of activity, in which the activity of foreign investors is excluded and/or restricted. The Germany BIT provides that a contracting party may establish the special requirements for permission of investment in special spheres of business activities under its legislation. The Canada BIT provides that it is not applicable to the investments in cultural industries.</p>
<b>Commencement of coverage</b>	<p>Most Ukrainian BITs protect investments made both before and after their entry into force. Seven Ukrainian BITs (OFID Treaty, Bosnia and Herzegovina, Estonia, Mongolia, Slovenia, Syria, Tajikistan BITs) are applied to investments made after their entry into force, whereas three others (Czech Republic, Poland, Russia BITs) only protect investments made after a specific date. The Iran BIT provides for the right of contacting states “to agree from time to time” that the BIT may protect the investments made before its entry into force.</p> <p>Moreover, some of the BITs expressly provide that they do not apply to claims and/or disputes that arose prior to their entry into force (eg. Argentina, Brunei, Chile, Equatorial Guinea, Estonia, Finland, Hungary, Israel, Japan, Jordan, Latvia, Lebanon, Morocco, Panama, Portugal, Qatar, San Marino, Singapore, Slovakia, Sweden, Yemen BITs). There are also BITs, which do not specifically regulate these issues, eg. Oman BIT.</p>

### III Substantive Protections

#### 4 Fair and equitable treatment

What are the distinguishing features of the fair and equitable treatment standard in this country’s investment treaties?

Issue	Distinguishing features of the fair and equitable treatment standard
<b>Illustrations of the FET standard</b>	<p>While most Ukrainian investment treaties simply provide that each contracting party shall ensure fair and equitable treatment to investments, for example, the France BIT is more prescriptive. It stipulates that the limiting of purchase or transporting the production, raw materials or supporting materials, fuel, energy shall be considered as a breach of fair and equitable treatment.</p> <p>In addition, the CIS Treaty and six Ukrainian BITs (with Armenia, Azerbaijan, Croatia, Russia, Tajikistan, Turkey) do not contain the fair and equitable treatment standard.</p>
<b>Scope of standard</b>	<p>Three Ukrainian BITs (with Bulgaria, China and Turkmenistan) extend fair and equitable treatment standard not only to investments but also to activity connected with investments, a number of Ukrainian BITs extends fair and equitable treatment standard, including through combination of this standard with MFN and/or national treatment, to returns on investment, e.g. with Argentina, Canada, Finland, Greece, India, Iran, Jordan, Syria, Yemen, Panama, Portugal, San Marino, Singapore, Slovakia, and Sweden.</p> <p>The scope of FET standard is also usually extended through incorporation of the FET standard together with the MFN and/or national treatment standards to management, maintenance, use, enjoyment or disposal of the investment, e.g. in BITs with Qatar, Argentina, Belarus, Czech Republic, Estonia, Latvia, Libya, Lithuania, Moldova, Panama, Portugal, San Marino, Slovenia, Sweden.</p> <p>OFID Treaty extends FET standard to establishment, acquisition, expansion, management, conduct, operation and sale or other disposal of investments. The United Arab Emirates BIT provides the fair and equitable treatment to investments in respect of its tax policy and Japan BIT – in relation to taxation measures.</p>
<b>International law</b>	<p>Several Ukrainian investment treaties expressly equate the obligation to provide fair and equitable treatment with the concept of fair and equitable treatment under international law or principles of international law or provide that the protection should not be less favorable than that provided by international law (eg. Albania, Belgium and Luxembourg, Canada, France, Japan, Jordan, Kuwait, Oman, United States BITs and ECT).</p>





## 5 Expropriation

What are the distinguishing features of the protection against expropriation standard in this country's investment treaties?

Issue	Distinguishing features of the 'expropriation' standard
Indirect expropriation	<p>Sixteen Ukrainian investment treaties expressly protect against direct as well as indirect expropriation (Belgium and Luxembourg, OFID Treaty, Brunei, Chile, Finland, France, Iran, Jordan, Kuwait, Lebanon, Netherlands, Poland, Switzerland, Turkey, United Arab Emirates, United States BITs). All other treaties, except for CIS Treaty and Austria BIT, protect against the measures having effect equivalent to nationalisation or expropriation, or measures tantamount to expropriation or nationalisation or other measures of similar character with the same consequences.</p> <p>Half of Ukrainian investment treaties expressly provide protection to investors owning the shares (other interests) in the expropriated company or shares in a company (joint-stock company) whose assets or investments were expropriated provided such companies are incorporated or constituted under the law of a contracting party in its own territory.</p>
Right to court or other competent authorities review	Part of Ukrainian BITs (with Belgium and Luxembourg, Brunei, Chile, China, Egypt, France, Indonesia, Macedonia, Netherlands, Oman, Poland, Qatar, Russia, Switzerland, Tajikistan, Turkey, Vietnam and OFID Treaty) do not contain the provision that the investor is entitled to have a case and valuation of the investment reviewed by the court or other competent authorities.
Right to compensation and payment order	Unlike other Ukrainian investment treaties, Kyrgyzstan, Uzbekistan and Austria BITs provide a right for investors to receive compensation subject to review of its amount and payment order by competent authorities or international arbitration. It is an open question as to whether this merely affords investors a right to refer disputes regarding the quantification of the value of any property taken by the host state or whether the treaty allows investors to refer disputes regarding whether an expropriation has occurred to arbitration.
In accordance with the due process of law	Most Ukrainian investment treaties require that any expropriation of an investment must occur under the due process of law, national legislation of the host state of the investment or pursuant to the law (legislation). There is no similar requirement in the BITs with Brunei, Denmark, Egypt, France, Germany, Mongolia, Morocco, Oman, United Kingdom.
Most favoured nation treatment	Unlike other Ukrainian investment treaties, Belgium and Luxembourg, OFID Treaty, Germany, Saudi Arabia and Turkey BITs directly prescribe that the investors are granted the most favoured nation treatment in respect of expropriation. The UK BIT expressly extends its national treatment and MFN provisions to other articles of the BIT, including the one concerning expropriation.
Additional criterion for lawful expropriation	The United Arab Emirates BIT provides for the such specific additional requirements, namely: the expropriation shall not violate any specific provision or contractual stability or rules of expropriation contained in an investment agreement; the expropriation is provided in accordance with decision of the competent court.

## 6 National treatment/most-favoured-nation treatment

What are the distinguishing features of the national treatment/most favoured nation treatment standard in this country's investment treaties?

Issue	Distinguishing features of the 'national treatment' and/or 'most favoured nation' standard
Common limitation	All Ukrainian BITs explicitly provide that the provision of "most favoured nation" and/or "national" treatment does not extend to the benefits of membership of a customs union, monetary union or free trade area.
Limitations concerning taxation	Most Ukrainian BITs (except, for example, BITs with Belgium and Luxemburg, Indonesia, and OFID Treaty) explicitly provide that the provision of "most favoured nation" and/or "national" treatment does not extend to the benefits from taxation agreements and/or taxation legislation. OFID Treaty explicitly provides for the immunity of OFID from taxation.
Limitations concerning other treaties	Some Ukrainian BITs provide limitations concerning other international treaties: for example, several Ukrainian BITs (with Armenia, Austria, China, Cuba, Denmark, Italy, Mongolia, Turkmenistan) provide that the MFN and/or national treatment do not extend to the benefits of agreements or local incentives on cross-border trading with neighboring countries; the Finland BIT – to the benefits under multilateral agreements which fully or partly regulate the investment; the Canada and Israel BITs – to the benefits under the existing or future bilateral or multilateral treaties regulating the spheres specified in the BIT (and under the Canada BIT also "negotiated within the framework of the GATT or its successor organization and liberalizing trade in services"); the United States BIT – to the benefits under any multilateral agreement under the framework of the GATT that enters into force subsequent to the signature of this BIT; the Argentina and Israel BITs – to the benefits under treaties specifically indicated in the respective BITs; the Israel BIT – to the benefits of investment treaties with third states signed before specific date; the Japan BIT – to the benefits under the multilateral treaties on protection of intellectual property.





Issue	Distinguishing features of the ‘national treatment’ and/or ‘most favoured nation’ standard
Other limitations	The CIS Treaty provides national and not MFN treatment. OFID Treaty provides MFN treatment both with respect to the regime granted by Ukraine to other multiparty financial institutions and with respect to other parties and their investments. Under the Lebanon BIT most favoured nation and national treatment is not applicable to the regime granted by Lebanon to investors of countries members of the Arab League, under the Netherlands BIT – to the benefits granted on the basis of reciprocity with a third state (in terms of fiscal advantages). The Brunei BIT – to the measures taken in order to establish the industry on its territory and applied only to the nationals of that contracting party. Moreover, the Canada and USA BITs stipulate the spheres with respect to which a contracting party has a right to make exceptions from application of most favoured nation and/or national treatment.
Scope	Generally, the MFN protection contained within Ukraine’s BITs applies to investments. In addition, the majority of BITs protect investors and “returns on investments”. However, some of the BITs (for example, with Armenia, Bulgaria, China, Japan, Oman, Russia, Turkmenistan, United States) and OFID Treaty expressly extend protection to activities associated with investments.
Limitation on national treatment	Several Ukrainian BITs, including with Democratic Republic of the Congo, Equatorial Guinea, Gambia, Iran, Kyrgyzstan, Poland, Uzbekistan, Vietnam, do not contain a provision affording investors national treatment. The Czech Republic BIT provides that the national treatment does not extend to regulations on acquisition of property rights over land or participation in privatisation; the Denmark and Netherlands BITs contain the similar provision but in respect of regulations under Ukrainian legislation only, the Switzerland BIT provides that the national treatment does not apply to the acquisition of land and natural resources. The Mongolia BIT provides that national treatment does not extend to special provisions applicable to foreign investors under the legislation of a contracting party. The Canada BIT contains limitations with respect to the existing non-conforming measures and certain non-conforming measures maintained or adopted after the BIT enters into force.

## 7 Protection and security

What are the distinguishing features of the obligation to provide protection and security to qualifying investments in this country’s investment treaties?

Issue	Distinguishing features of the ‘protection and security’ standard
Illustrations of the FPS standard	The formulation of the obligation to provide “protection and security” in Ukraine’s investment treaties is not uniform. Most Ukrainian investment treaties simply provide that each Contracting party shall grant “full protection and security” to investments. Some provide for “full protection” (eg, Austria BIT), “permanent protection and security” (eg, Belgium and Luxembourg BIT), “full and unconditional protection” (eg, CIS Treaty). Five Ukrainian bilateral investment treaties (Armenia, Azerbaijan, India, Italy, and Turkey BITs) do not provide for “protection and security” standard.
Extent of standard	The Argentina and Tajikistan BITs directly stipulate legal protection and security, while the Indonesia and Netherlands BITs prescribe physical protection and security. Some of the BITs provide the protection and security not only to investments, but also to the returns of investors, e.g. Austria, Brunei, Bulgaria, Canada, Finland, France, Greece, Jordan, Morocco, Tajikistan, Turkmenistan. The China BIT explicitly stipulates the protection to investors and activity associated with investment. The OFID Treaty extends this standard to establishment, acquisition, expansion, management, conduct, operation and sale or other disposal of investments.
International law	Several Ukrainian investment treaties provide that protection should not be less favorable than that provided by international law or should be in accordance with international law or recognized principles of international law (Albania, Belgium and Luxembourg, Japan, Kuwait, United Arab Emirates, United States BITs and ECT).

## 8 Umbrella clause

What are the distinguishing features of the umbrella clauses contained within this country’s investment treaties?

Issue	Distinguishing features of any ‘umbrella clause’
Scope	27 Ukrainian investment treaties contain an umbrella clause (ECT and Albania, Austria, Azerbaijan, Belgium & Luxembourg, Denmark, Egypt, Finland, Germany, Italy, Japan, Jordan, Korea, Kuwait, Kyrgyzstan, Lebanon, Mongolia, Morocco, Netherlands, Panama, Singapore, Spain, Switzerland, United Kingdom, United States, Uzbekistan, Vietnam BITs).
Qualification of the obligation	Most Ukrainian investment treaties containing umbrella clause provide for the obligation to honour any commitments (obligations) by a contracting party. In some BITs with umbrella clause it is expressly provided that a contracting party is obliged to honour the contractual obligations in respect of investments, e.g. with Austria, Jordan, Kyrgyzstan, Uzbekistan, Vietnam.



## 9 Other substantive protections

What are the other most important substantive rights provided to qualifying investors in this country's investment treaties?

Issue	Other substantive protections
Free transfer of payments	<p>All Ukrainian investment treaties contain a provision, which requires the contracting parties to permit investors to freely transfer investments and investment returns.</p> <p>While the expression of the right is not uniform, most Ukrainian BITs provide that such transfer is subject to the laws and policies of the host state. BITs with Armenia, Azerbaijan, Brunei, Bulgaria, China, Cuba, Equatorial Guinea, Estonia, Israel, Macedonia, Morocco, Oman, Panama, Russia, Saudi Arabia, Serbia, Slovakia, Tajikistan, and CIS Treaty require that such transfer may be done only after the payment of taxes and/or other duties and/or performance of all obligations or financial obligations.</p> <p>Twelve BITs (Albania, Belgium and Luxembourg, Bosnia and Herzegovina, Italy, Kyrgyzstan, Lebanon, Macedonia, Morocco, Qatar, United Arab Emirates, Uzbekistan, Vietnam) directly prescribe that MFN treatment should be applied to such transfer.</p> <p>In addition, for example, under the OFID Treaty and Japan BIT, transfers may be subject to restrictions in exceptional circumstances, such as balance of payments difficulties.</p>
Subrogation	<p>All Ukrainian BITs (except the United States BIT and OFID Treaty), provide for the right of the host state to subrogation. That means if a contracting party or any its agency makes a payment to any of its investors under a guarantee or a contract of insurance it has entered in respect of an investment, this contracting party or its agency will be entitled to the same rights as those of the investor in respect of the investment concerned.</p> <p>The France and Oman BITs specifically provide that such subrogation does not preclude the investor from asserting its rights before ICSID.</p> <p>Seven BITs (with Argentina, Bosnia and Herzegovina, Canada, Chile, Macedonia, Poland, Qatar) prescribe that the investor cannot protect its rights without the permission of the host state. The Iran, Morocco and Turkey BITs state that the disputes between a host state providing guarantee and a host state are regulated by the provision of the BIT concerning disputes between an investor and a contracting party.</p>
Armed conflict/civil unrest	<p>Ukrainian investment treaties usually guarantee investors of contracting parties “most favoured nation” treatment in regard to compensation paid to other investors of other states in the case of armed conflict or civil unrest.</p> <p>Most treaties (except for BITs with Belarus, Belgium and Luxembourg, Bulgaria, China, Cuba, Georgia, Kazakhstan, Kyrgyzstan, Lebanon, Poland, Russia, Serbia, Singapore, Tajikistan, United Arab Emirates, Uzbekistan, Vietnam) also provide for “national” treatment in such circumstances. Half of the Ukrainian investment treaties provide investors with a qualified right to receive compensation for losses caused by the host state in the event of armed conflict or civil unrest.</p>
Most favourable treatment in application of other rules	<p>Most Ukrainian BITs provide that if the regime under the provisions of law of either contracting party (except for France, Oman, Switzerland, Vietnam BITs), obligations under international law (except for France, Oman, Switzerland BITs) or specific contract provisions (except, for example, Belarus, Bosnia and Herzegovina, China, India, Indonesia, Iran, Israel, Poland, Portugal, Saudi Arabia, Serbia, Slovenia, Tajikistan, Turkmenistan, United Kingdom BITs) is more favourable than the regime under the relevant BIT the investor “may use” its benefits or such regime “shall prevail”.</p> <p>Five BITs (Canada, Chile, Denmark, Egypt, Russia BITs) do not contain such requirement at all.</p>

## IV Procedural Rights

### 10 Are there any relevant issues related to procedural rights in this country's investment treaties?

Issue	Procedural Rights
Fork-in-the-road	<p>Twenty-five Ukrainian investment treaties (Argentina, Belgium and Luxembourg, Bosnia and Herzegovina, Bulgaria, Chile, Finland, Georgia, Greece, Israel, Indonesia, Japan, Jordan, Kazakhstan, Kuwait, Lebanon, Morocco, Portugal, Qatar, San Marino, Saudi Arabia, Serbia, Slovakia, Tajikistan, Turkmenistan, United States BITs) and the CIS Treaty contain fork-in-the-road provisions. Under these treaties, investors must elect to pursue their claim through the local courts (competent tribunals of a contracting party) or by international arbitration. They cannot do both.</p>
Waiver of local remedies	<p>Six Ukrainian BITs (Japan, Israel, Canada, Finland, Slovakia BITs) provide that the right to commence arbitration is conditional on the investor waiving its rights to pursue any other cause of action in respect of alleged breach of the treaty in either of the contracting party's courts or tribunals.</p>



Issue	Procedural Rights
Exhaustion of local remedies	Only the Belarus–Ukraine BIT requires that the right to commence arbitration is contingent on the exhaustion of local remedies in respect of the disputes.
Institutional and ad hoc arbitration	Most Ukrainian investment treaties provide a right of recourse to ICSID and an ad hoc tribunal constituted in accordance with the UNCITRAL rules. Some treaties also allow investors to pursue an arbitration claim through: the Court of Arbitration of International Chamber of Commerce (Belgium and Luxembourg, Bosnia and Herzegovina, Jordan, Turkey, United Kingdom BITs); Arbitration Institute of the Stockholm Chamber of Commerce (Belgium and Luxembourg and Russia BITs, ECT); an ad hoc tribunal under the rules specifically provided in the BIT with different appointing authorities (Armenia, Brunei, China, Cuba, Germany, Libya, Poland, Turkey, United Arab Emirates BITs, OFID Treaty); only competent tribunal of a contracting party or an ad hoc tribunal constituted in accordance with the UNCITRAL rules (Bulgaria), only an ad hoc tribunal constituted in accordance with the UNCITRAL rules (Iran), competent tribunal of a contracting party or ICSID (Chile), only ICSID (France, Indonesia, Morocco, Oman, Singapore) and/or any other tribunal acting in accordance with any other arbitration rules as is mutually agreed by the parties (Japan, Kuwait, Mongolia, United Arab Emirates, United Kingdom, United States BITs).
Time limits	Canada, Japan, Qatar BIT and OFID Treaty set a time limit for commencing a dispute resolution proceeding under a treaty after expiration of three years (in case of Canada, Japan and OFID Treaty) and five years (in case of Qatar) after an investor had full possibility to become aware of the circumstances giving rise to the dispute (in case of Qatar) or after an investor became aware or should have become aware of the breach and damages (in case of Japan and Canada) or after an investor became aware of the dispute (in case of OFID Treaty).
Use of MFN to expand procedural rights	The United Arab Emirates BIT and Japan BIT expressly provide that the MFN treatment is not applied to any investment disputes. The Korea BIT stipulates that the MFN treatment is provided with regard to local remedies. The UK BIT expressly extends its national treatment and MFN provisions to other articles of the BIT, including the one concerning settlement of disputes.
Applicable law	Most Ukrainian investment treaties are generally silent as to what law or laws shall govern the parties' dispute. However, some treaties provide the application of: national law of the host state (Albania, Argentina, Armenia, Belgium and Luxembourg, China, Kuwait (in case of non-agreement of applicable law by parties to the dispute), Morocco, Spain, United Arab Emirates BITs); principles and/or rules of international law (Albania, Argentina, Armenia, Belgium and Luxembourg, Canada, China, Italy, Kuwait, Latvia, Lebanon, Morocco, Spain, United Arab Emirates BITs, as well as ECT); any specific agreement connected with the investment (Argentina, Morocco, Belgium & Luxembourg BITs), provisions of a treaty supplemented by general principles of international law and principle ex aequo et bono (OFID treaty). Under Qatar BIT, in case of an ad hoc arbitration, the dispute shall be resolved in accordance with the treaty, principles of international law and national legislation of the host state.
Enforcement of award	Most Ukrainian investment treaties state that the award is binding. The third part of all Ukrainian investment treaties provides that the contracting party should enforce an award subject to its national law. The Kyrgyzstan, Japan, Qatar and Uzbekistan BITs, OFID Treaty expressly stipulate that the awards shall be enforced under the New York Convention 1958.
Other requirements	CIS Treaty stipulates that the dispute settlement procedure for investors (juridical persons) is to be provided in its constituent documents. The Italy–Ukraine BIT stipulates that if an investor and a contracting party entered into investment agreement the procedure provided in such investment agreement shall be applied. The United Arab Emirates BIT requires written consent of both parties for submission of any matter regarding this BIT to international arbitration or to the ICSID. In addition, some of the BITs limit the scope of the disputes which may be submitted to arbitration, for example, China BIT – to the disputes concerning the amount of compensation in case of the nationalization, requisition or equivalent measures.

## 11 What is the status of this country's investment treaties?

Ukraine is a party to 66 effective BITs (Albania, Argentina, Armenia, Austria, Azerbaijan, Belarus, Bosnia and Herzegovina, Brunei, Bulgaria, Canada, Chile, China, Croatia, Cuba, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, India, Indonesia, Iran, Israel, Japan, Jordan, Kazakhstan, Korea, Kuwait, Latvia, Lebanon, Libya, Lithuania, Macedonia, Moldova, Mongolia, Morocco, the Netherlands, Oman, Panama, Poland, Portugal, Qatar, Russia, San Marino, Saudi Arabia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Tajikistan, Turkey (1996), Turkmenistan, the United Arab Emirates, the United Kingdom, the United States, Uzbekistan, Vietnam, Yugoslavia (in relation to Serbia and Montenegro).

BITs with Congo, Equatorial Guinea, Gambia, Kyrgyzstan, Romania, Turkey (new 2017 BIT) and Yemen were signed by Ukraine, but both or one of the contracting parties did not complete domestic procedures for such BITs to enter into force.

On 20 January 2010, the Verkhovna Rada of Ukraine ratified a supplementary protocol to the BIT with Czech Republic which entered into force on 17 May 2010.

BITs with Belgium & Luxembourg (presumably as of 27 July 2011) and Italy (presumably as of 12 September 2012) terminated.



On 4 October 2017, the Verkhovna Rada of Ukraine ratified a supplemental protocol to the BIT between Ukraine and Croatia, which has not yet entered into force.

On 5 December 2017, Ukraine ratified an investment treaty with OPEC Fund for International Development, which came into force for Ukraine on 27 June 2018.

On 6 September 2018, the Verkhovna Rada of Ukraine ratified a new investment treaty with Turkey, which expects completion of the domestic procedures for this treaty to enter into force on the part of Turkey. Once the new investment treaty with Turkey enters into force, it will substitute the BIT between Ukraine and Turkey signed on 27 November 1996.

On 9 April 2019, a bilateral investment treaty between Ukraine and Qatar entered into force.

On a separate note, on 1 September 2017, the Association Agreement between Ukraine and EU providing for the national treatment and most favoured nation treatment as regard to establishment and operation of subsidiaries, branches and representative offices of legal persons (subject to relevant reservations) has fully entered into force.

Ukrainian state authorities did not announce any policy with regard to renegotiation of existing investment treaties or their review as well as regarding refusal from investor-state dispute settlement provisions in future BITs.

## V Practicalities (Claims)

### 12 To which governmental entity should notice of a dispute against this country under an investment treaty be sent? Is there a particular person or office to whom a dispute notice against this country should be addressed?

<b>Government entity to which claim notices are sent</b>	The only Ukrainian investment treaty that provides that notices should be served to the Ministry of Justice of Ukraine is the Slovakia BIT. If the treaty does not specifically stipulate upon whom a dispute notice is to be served, the notice should be addressed to the Ministry of Justice of Ukraine.
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### 13 Which government department or departments manage investment treaty arbitrations on behalf of this country?

<b>Government department that manages investment treaty arbitrations</b>	The Department of International Disputes of the Ministry of Justice of Ukraine manages investment treaty arbitrations on behalf of the government of Ukraine. The Ministry of Justice of Ukraine represents Ukraine in investment treaty arbitration according to the Decree of the President of Ukraine No. 581/2002 dated 25 June 2002 (as amended, among others, on 22 February 2016). According to the recent amendments to this Decree, the interests of Ukraine shall be represented by the Ministry of Finance of Ukraine, the Ministry of Justice of Ukraine, and the Ministry of Foreign Affairs of Ukraine in case of settlement of disputes and respective proceedings before foreign competent authorities connected with performance of the state debt obligations of Ukraine.
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### 14 Are internal or external counsel used, or expected to be used, by the state in investment treaty arbitrations? If external counsel are used, does the state normally go through a formal public procurement process when hiring them?

<b>Internal/External counsel</b>	Arrangements for the defence of Ukraine in investment arbitration are determined by the Ministry of Justice of Ukraine on a claim-by-claim basis. Services of internal and/or external counsel may be used for these purposes. The Law of Ukraine “On Public Procurements” No. 922-VIII dated 25 December 2015, which entered into force on 1 April 2016, regulates the public procurement of legal services connected with the representation of Ukraine in international juridical bodies. In particular, the Law stipulates that such services may be procured in accordance with special negotiation procedure (ie, after negotiations with one or several participants) under the decision of the Cabinet of Ministers of Ukraine or the National Security and Defence Council of Ukraine – or through the two-stage competitive dialogue procedure. General procurement process may also apply.
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## VI Practicalities (Enforcement)

- 15 Has the country signed and ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)? Please identify any legislation implementing the Washington Convention.

Washington Convention implementing legislation	Yes. The Law of Ukraine “On Ratification of Convention on the Settlement of Investment Disputes Between States and Nationals of Other States” No. 1547-III dated 16 March 2000.
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- 16 Has the country signed and ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the New York Convention)? Please identify any legislation implementing the New York Convention.

New York Convention implementing legislation	Yes. Decree of the Presidium of the Verkhovna Rada of Ukrainian SSR “On Ratification of the Convention on Recognition and Enforcement of Foreign Arbitral Awards” dated 22 August 1960.
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- 17 Does the country have legislation governing non-ICSID investment arbitrations seated within its territory?

Legislation governing non-ICSID arbitrations	The Law of Ukraine “On International Commercial Arbitration” No. 4002-XII dated 24 February 1994 adopted on the basis of the UNCITRAL Model Law and aimed at settlement of commercial disputes; the Law of Ukraine “On Arbitration Courts [Domestic Arbitration]” No.1701-IV dated 11 May 2004 concerning domestic arbitration only.
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- 18 Does the state have a history of voluntary compliance with adverse investment treaty awards; or have additional proceedings been necessary to enforce these against the state?

Compliance with adverse awards	To date there have been seven adverse investment treaty awards against Ukraine in such cases: <i>Alpha Projektholding v Ukraine</i> (the award was successfully enforced); <i>Inmaris Perestroika v Ukraine</i> (the award was successfully enforced); <i>Joseph C Lemire v Ukraine</i> (Ukraine complied with the award voluntarily); <i>Remington Worldwide Limited v Ukraine</i> (the award was successfully enforced); <i>JSC “Tatnafta” v Ukraine</i> (upon unsuccessful attempt to set aside the award, Ukraine is now involved in several pending enforcement proceeding in different jurisdictions); <i>JXX Oil &amp; Gas and others v. Ukraine</i> (Ukraine unsuccessfully attempted to set aside the award; the Supreme Court is currently considering an appeal against the ruling of the Kyiv Court of Appeal dated 5 July 2019 that partially granted recognition and enforcement of the arbitral award in Ukraine. <i>City-State N.V., Praktyka Asset Management Company LLC, Crystal-Invest LLC and Prodiz LLC v. Ukraine</i> (the award was rendered in 2018, the Kyiv Court of Appeal is considering an application for the recognition and enforcement of this award in Ukraine within respective proceedings opened on 31 July 2019)
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- 19 Describe the national government’s attitude towards investment treaty arbitration.

Attitude of government towards investment treaty arbitration	The Ukrainian government continues to enter into investment treaties, all of which contain investor–state arbitration provisions. Generally, Ukraine duly complies with international investment arbitral awards rendered against it. The funds, which might be necessary for performance of awards rendered against Ukraine, are accounted and allocated in the state budget of Ukraine. Pursuant to the official Ukrainian sources, Ukraine is active in taking efforts to settle the investment disputes amicably and is voluntarily complying with respective settlement agreements. At the same time, Ukraine recently attempted to challenge two arbitral awards rendered against it in the cases of <i>JXX Oil &amp; Gas and others v. Ukraine</i> and <i>JSC “Tatnafta” v Ukraine</i> . Both challenges were not successful.
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## 20 To what extent have local courts been supportive and respectful of investment treaty arbitration, including the enforcement of awards?

### Attitude of local courts towards investment treaty arbitration

In order to enforce an ICSID award in Ukraine, in practice, it is necessary to obtain a judgment of the Ukrainian court on recognition and enforcement of such ICSID award. The relevant judgment of the Ukrainian court should also be obtained for recognition and enforcement of any other arbitral awards under other arbitration rules.

In general, Ukrainian courts tend to recognise and enforce the investment treaty arbitral awards.

Enforcement of an arbitral award in *Remington Worldwide Limited v Ukraine* involved several stages only because an award creditor indicated the Cabinet of Ministers of Ukraine as a respondent. After the creditor filed the second application and correctly indicated the state of Ukraine as a respondent, the award was successfully recognised and enforced.

In case, *LLC Energoalians v. the Republic of Moldova*, the application for recognition and enforcement of the arbitral award was returned without the hearing on merits due to the lack of jurisdiction.

The Ukrainian courts recently dealt with recognition and enforcement of an SCC emergency award against Ukraine in *JKX Oil & Gas PLC et al. v. Ukraine*. This case was considered by courts of all instances during several rounds of proceedings lasting from 2015 to 2018. On 19 September 2018, the Supreme Court upheld the ruling of the Kyiv City Court of Appeal dated 21 December 2016 which refused to recognise and enforce the SCC emergency award on public policy grounds and due to the failure to comply with the cooling-off period under the ECT. This case raised an important and disputed issue of the possibility of enforcement of interim awards / orders under the New York Convention. The judgment of the Supreme Court ultimately did not directly opine on this point since it substantiated the refusal to recognise and enforce the SCC emergency award by the public policy considerations and procedural violations.

Recently, there were several successful enforcements of investment treaty arbitral awards in Ukraine, which concerned investment treaty arbitral awards in relation to Ukraine as a host state of the investment and as a host state of the investor:

- Recognition and enforcement of the arbitral award of 2 May 2018 in *Everest Estate LLC et al. v. The Russian Federation* initiated by 18 Ukrainian companies and one Ukrainian individual in relation to expropriation of their property in the Crimea, PCA Case No. 2015-36. This recognition and enforcement was granted by the Kyiv Court of Appeal and then confirmed by the Supreme Court on 25 January 2019. By its decision, the Supreme Court also partially lifted the freezing order in respect of assets of several Russian and Ukrainian banks, in which the Russian Federation had a direct and indirect corporate interest, clarifying that the freezing order shall apply to the assets of the Russian Federation only and not to assets of other companies. In the recognition and enforcement proceeding, the Supreme Court in fact stripped the Russian Federation of its state immunity on the basis that the Russian Federation entered into the Ukraine-Russia BIT, which provided for resolution of disputes by arbitration and contained an obligation of the parties to comply with final arbitral awards. The Supreme Court interpreted these provisions in the Ukraine-Russia BIT as a waiver of immunity by the Russian Federation in accordance with the case law of the European Court of Human Rights (ECHR) and customary international law.
- Recognition and enforcement of the arbitral award of 26 November 2018 in *PJSC “State Savings Bank of Ukraine” v. The Russian Federation* concerning expropriation of the Bank’s assets in the Crimea, PCA Case No. 2016-14. The recognition and enforcement of this award was granted by the Kyiv Court of Appeal on 17 July 2019. The court decided that although the Russian Federation did not participate in the proceedings, it was duly notified of the proceedings and contents of the claims, evidence submitted by the claimant and the procedural timetable. The arbitral award was recognised in full, including with respect to the substantial interest for the period from 31 March 2014 until the full performance of the award. So far, there is no information on the challenge of the decision of the Kyiv Court of Appeal to the Supreme Court.
- Partial recognition and enforcement of the arbitral award of 6 February 2017 in *JKX Oil & Gas PLC et al. v. Ukraine*, PCA Case No. 2015-11. The Kyiv Court of Appeal rendered its decision on 5 July 2019 by which it granted partial recognition and enforcement of the arbitral award. The court refused to recognise and enforce the arbitral award only in part requiring the National Bank of Ukraine to conduct all required measures in order to facilitate the repatriation of dividends based on public policy considerations. In this respect, the court concluded that the National Bank of Ukraine unlike Ukraine was not a party to the UK-Ukraine BIT and that the award unduly intervened in the operations of the National Bank of Ukraine.





Notably, the Kyiv Court of Appeal rejected the arguments of the Ministry of Justice that the state of Ukraine was not given a possibility to present its case due to a tight procedural timetable after establishing that the Ministry of Justice took part in the consideration of the procedural timetable and had five months to submit its statement of defense and eight months to submit its rejoinder. The court also rejected jurisdictional objections of the Ministry of Justice based on the argument that the investment in dispute was made with manipulation of documents and in violation of Ukraine’s national legislation. The court concluded that such allegations are not based on the proper and admissible evidence.

The Kyiv Court of Appeal also recognised and enforced a non-monetary part of the award requiring Ukraine to allow the investor to conduct without limitations the transfer and repatriation of dividends irrespective of any relevant limitations established by the Ukrainian legislation.

So far, there is no information on the challenge of the decision of the Kyiv Court of Appeal to the Supreme Court.

## VII National Legislation Protecting Inward Investment

21 Is there any national legislation that protects inward foreign investment enacted in this country? Describe the content.

National legislation	Substantive protections			Procedural rights	
	FET	Expropriation	Other	Local courts	Arbitration
The Law of Ukraine “On Regime of Foreign Investing” No. 93/96-BP dated 19 March 1996	No	Yes	National treatment (with some exceptions); in some cases – preferential treatment; transfer of funds; compensation for losses; grandfather clause (for 10 years)	Yes	Yes
The Law of Ukraine “On Investment Activity” No. 1560-XII dated 18 September 1991	Yes	Yes	Compensation for losses	Yes	Yes
The Law of Ukraine “On Defence of Foreign Investments” No. 1540a-XII dated 10 September 1991	No	Yes	Protection and security; transfer of funds	No	No

The first two of the above Laws provide that if an international treaty of Ukraine establishes rules other than those provided by laws of Ukraine, the provisions of the international treaty shall apply.





## VIII National Legislation Protecting Outgoing Foreign Investment

- 22 Does the country have an investment guarantee scheme or offer political risk insurance that protects local investors when investing abroad? If so, what are the qualifying criteria, substantive protections provided and the means by which an investor can invoke the protections?

Relevant guarantee scheme	Qualifying criteria, substantive protections provided and practical considerations
Multilateral Investment Guarantee Agency	Ukraine has ratified the Convention establishing the Multilateral Investment Guarantee Agency (MIGA) (Seoul, 11 October 1985). According to the treaty, Ukrainian citizens and entities are eligible to acquire for the payment of a premium, political risk insurance from MIGA in respect of investments made in certain developing states under condition that certain requirements are met.
Export-Credit Agency of Ukraine	Ukraine is now in the process of establishing its Export-Credit Agency that in accordance with the Law of Ukraine “On Ensuring the Large-Scale Expansion of the Export of Goods (Works, Services) of Ukrainian Origin through Insurance, Guaranteeing and Cheapening of Export Crediting” No. 1792-VIII dated 20 December 2016 shall be empowered to provide insurance and reinsurance of direct investments from Ukraine limited to investments into the infrastructure required for the development of the export of goods, works and services of Ukrainian origin. Although formal steps to establish the Export-Credit Agency were taken under the Cabinet Decree dated 7 February 2018, the Agency is not yet fully operational.

## IX Awards

- 23 Please provide a list of any available arbitration awards or cases initiated involving this country’s investment treaties

### Awards involving Ukraine as a host state of the investment

#### ICSID Awards

*Joseph C Lemire v Ukraine*, ICSID Case No. ARB(AF)/98/1, Award dispatched on 18 September 2000

*Generation Ukraine Inc v Ukraine*, ICSID Case No. ARB/00/9, Award dispatched on 16 September 2003

*Western NIS Enterprise Fund v Ukraine*, ICSID Case No. ARB/04/2, Order signed on 16 March 2006

*Tokios Tokelès v Ukraine*, ICSID Case No. ARB/02/18, Award dispatched on 26 July 2007

*Alpha Projektholding GmbH v Ukraine*, ICSID Case No. ARB/07/16, Award dispatched on 8 November 2010

*Global Trading Resource Corp and Globex International Inc v Ukraine*, ICSID Case No. ARB/09/11, Award dispatched on 1 December 2010

*GEA Group Aktiengesellschaft v Ukraine*, ICSID Case No. ARB/08/16, Award dispatched on 31 March 2011

*Inmaris Perestroika Sailing Maritime Services GmbH and others v Ukraine*, ICSID Case No. ARB/08/8, Award dispatched on 1 March 2012

*Bosh International, Inc and B&P, LTD Foreign Investments Enterprise v Ukraine*, ICSID Case No. ARB/08/11, Award dispatched on 25 October 2012

*Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, award dispatched on 28 March 2011, the ad hoc Committee’s decision on annulment issued on 8 July 2013

*Poltava Gas B.V. and Poltava Petroleum Company v. Ukraine*, ICSID Case No. ARB/15/9), proceeding has been discontinued under the Order pursuant to ICSID Arbitration Rule 43(1) on 11 August 2015

*Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award dispatched on 2 July 2018

*City-State N.V., Praktyka Asset Management Company LLC, Crystal-Invest LLC and Prodiz LLC v. Ukraine*, ICSID Case No. ARB/14/9, Award dispatched on 26 July 2018

#### Non-ICSID awards

*AMTO LLC v Ukraine*, SCC Case No. 080/2005; IIC 346 (2008), Final Award signed on 26 March 2008

*Remington Worldwide Limited v Ukraine*, SCC, Award dispatched on 28 April 2011

*Laskaridis Shipping Co LTD, Lavinia Corporation, A K Laskaridis and P K Laskaridis v Ukraine*, PCA case, UNCITRAL Arbitration Rules, settled

*JSC “Tatnafta” v Ukraine*, PCA case, UNCITRAL Arbitration Rules, Award dated 29 July 2014

*JKX Oil&Gas plc et al. v. Ukraine*, PCA case, UNCITRAL (consolidated with ICSID and SCC arbitral proceedings), Award dated 6 February 2017



**Pending proceedings**

*Gilward Investments B.V. v. Ukraine*, ICSID Case No. ARB/15/33

*Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine*, SCC (Stockholm Chamber of Commerce) arbitral proceedings, Case No. 2015/092

*Emergofin B.V. and Velbay Holdings Ltd. v. Ukraine*, ICSID Case No. ARB/16/35

*Ministry of Land and Property of the Republic of Tatarstan v. Ukraine*, UNCITRAL

*Ihor Boiko v. Ukraine*, UNCITRAL

*PJSC “Gazprom” v. Ukraine*, UNCITRAL Arbitration Rules

*State Development Corporation “VEB.RF” v. Ukraine*, Stockholm Chamber of Commerce

*Olympic Entertainment Group AS (Estonia) v. Republic of Ukraine*, PCA Case No. 2019-18

**Awards involving Ukraine as a host state of the investors****Non-ICSID Awards**

*LLC Energoalians v. the Republic of Moldova*, UNCITRAL Arbitration Rules, Final Award issued on 25 October 2013

*State Enterprise Energorynok v. the Republic of Moldova*, SCC Case No. 2012/175, Final Award issued on 29 January 2015

*Everest Estate LLC et al v The Russian Federation*, PCA Case No. 2015-36, UNCITRAL Arbitration Rules, Final Award issued on 1 May 2018

*PJSC Oshchadbank v The Russian Federation*, PCA Case No. 2016-14, UNCITRAL Arbitration Rules, Final Award issued on 26 November 2018

*Stabil LLC et al v The Russian Federation*, PCA Case No. 2015-35, UNCITRAL Arbitration Rules, Final Award issued on 11 April 2019

*PJSC Ukrnafta v The Russian Federation*, PCA Case No. 2015-34, UNCITRAL Arbitration Rules, Final Award issued on 11 April 2019

**Pending proceedings**

*Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5

*Artem Skubenko and others v. Republic of North Macedonia*, ICSID Case No. ARB/19/9

*Aeroport Belbek LLC and Igor Valerievich Kolomoisky v The Russian Federation*, PCA Case No. 2015-07, UNCITRAL Arbitration Rules, Partial Award issued on 4 February 2019 addressing the Respondent’s liability, as well as outstanding issues of jurisdiction and admissibility

*PJSC CB PrivatBank and Finance Company Finilon LLC v The Russian Federation*, PCA Case No. 2015-21, UNCITRAL Arbitration Rules, Partial Award issued on 4 February 2019 addressing the Respondent’s liability, as well as outstanding issues of jurisdiction and admissibility

*PJSC DTEK Krymenergo v. the Russian Federation*

*Limited Liability Company Lugzor and others v The Russian Federation*, PCA Case No. 2015-29, UNCITRAL Arbitration Rules

*PJSC NJSC ‘Naftogaz of Ukraine’, PJSC State Joint Stock Company Chornomornaftogaz, PJSC Ukrtransgaz, Subsidiary Company Likvo, PJSC Ukrgasvydobuvannya, PJSC Ukrtransnafta, and Subsidiary Company Gaz Ukrainy v The Russian Federation*, PCA Case No. 2017-16, UNCITRAL Arbitration Rules, according to Naftogaz the Partial Award on the Respondent’s liability was issued on 22 February 2019

*Ukrenergo v The Russian Federation*, UNCITRAL Arbitration Rules

**Reading list**

Galuschenko G.V. *International Investment Law and Arbitration* – K.: Alerta, 2014

OECD (2016), *OECD Investment Policy Reviews: Ukraine 2016*, OECD Publishing, Paris



## Notes

- 1 None of the FTAs involving Ukraine includes investment chapters, except for the EFTA–Ukraine Free Trade Agreement dated 24 June 2010, which entered into force on 1 June 2012.
- 2 The data given regarding entry into force of treaties are taken from official Ukrainian sources. There are discrepancies regarding the date of entry into force between the official Ukrainian data and/or OECD and UNCTAD data in the treaties with Albania, Croatia, Canada, Chile, China, Egypt, Georgia, Hungary, Indonesia, Kazakhstan, Kuwait, Libya, Lithuania, Morocco, Singapore, Slovakia, United Arab Emirates and Uzbekistan. According to UNCTAD data, the following BITs are not in force: Albania, Congo, Equatorial Guinea, Gambia, Italy, Kyrgyzstan, Libya, Oman, Panama, Romania, Saudi Arabia, Singapore, Syrian Arab Republic, Tajikistan, new Turkey, Turkmenistan and Yemen, although according to Ukrainian data BITs entered into with Albania, Libya, Oman, Panama, Saudi Arabia, Singapore, Syrian Arab Republic, Tajikistan, Turkmenistan are in force.
- 3 Ukraine signed the CIS Treaty, but has not yet ratified it. It is understood that the CIS Treaty is temporary in force for Ukraine until performance of internal ratification procedures. At the same time, Ukraine is moving towards exit from the CIS and termination of the related treaties.
- 4 On 4 October 2017, Ukraine has ratified a supplemental protocol to the BIT between Ukraine and Croatia, which substantially modified the initial version of the BIT, which has not yet entered into force.
- 5 A contracting state (or its agencies) may enter into investment agreements with investor who invest into an area of special national interest. Such investment agreements shall establish the special legal relationships for such investments: Protocol to Italy–Ukraine BIT, article 2.
- 6 MFN clause is not applicable for the regime granted by Lebanon to members of the League of Arab States, Lebanon–Ukraine BIT, article 3(1).
- 7 Investors who suffered from expropriation can protect their interest in court: Moldova–Ukraine BIT, article 6 (2).
- 8 Ukraine has entered into the new BIT with Turkey on 9 October 2017, which makes substantial modification to the protection mechanisms in comparison with the previous BIT with Turkey dated 27 November 1996. The Ukrainian Parliament ratified the new BIT on 6 September 2018, Ukraine is expecting completion of the internal procedures on the part of Turkey. The new BIT shall substitute the previous BIT once it enters into force.





**Olexander Droug**  
Sayenko Kharenko

Olexander specialises in dispute resolution and restructuring with a focus on international arbitration and cross-border commercial litigation. His experience includes advising local and foreign clients at all stages of complex multi-jurisdictional proceedings involving the BVI, Cyprus, the Netherlands, Switzerland, Ukraine, the UK, and other fora, as well as commercial and investment arbitration under the arbitration rules of all major international arbitration institutions (LCIA, ICC, SCC), CIS-based arbitration institutions, ICSID Arbitration Rules and UNCITRAL Arbitration Rules. Mr Droug also advises clients on obtaining and implementing interim relief, including in support of arbitration proceedings and litigation, as well as on recognition and enforcement in Ukraine of arbitration awards and foreign court judgments.

Mr Droug has represented clients in proceedings relating to banking, financial services, securities, M&A, shareholders, trade, telecommunication, construction, energy, aviation, and product liability, as well as sports-related disputes. He also has significant experience representing both lenders and borrowers in financial restructuring and related disputes. In March 2017, Olexander was added to the list of arbitrators elected to settle disputes arising in financial restructuring procedures.

Mr Droug regularly contributes to key legislation in the areas of arbitration, litigation and restructuring.



**Olesia Gontar**  
Sayenko Kharenko

Olesia Gontar specialises in dispute resolution proceedings including domestic and cross-border litigation, international commercial and investment arbitration.

She advises international and domestic clients on a broad spectrum of matters at all stages of dispute resolution, from advising on drafting dispute resolution provisions in contracts and amicable resolution of disputes to recognition and enforcement of arbitral awards and court judgments.

Olesia has significant experience representing clients in arbitration proceedings under the arbitration rules of various arbitration institutions. These include the London Court of International Arbitration (LCIA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the International Court of Arbitration of the International Chamber of Commerce (ICC), the Grain and Feed Trade Association (GAFTA), the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC at the UCCI), and the Netherlands Arbitration Institution (NAI).

Her experience includes representation of clients in various cross-border litigation proceedings.

In addition, Olesia is one of the drafters of the expedited Arbitration Rules under the Law of Ukraine on Financial Restructuring.

Olesia also has substantial background in M&A and corporate matters, including advising clients on corporate restructurings, setting up joint ventures and corporate governance.





Sayenko Kharenko enjoys global reputation as a leading Ukrainian transactional and dispute resolution law firm. We specialise in complex cross-border and local matters and regularly handle the largest and most challenging transactions and disputes involving Ukraine.

Sayenko Kharenko's reputation as the Ukraine's leading firm in antitrust, corporate law, finance, international arbitration, international trade, labour law, litigation, mergers and acquisitions, restructuring, real estate, securities law and tax is confirmed by our foremost position in league tables, top rankings in the legal directories as well as international and local awards for our work.

Our International Arbitration Practice Group is a unique team of arbitration lawyers being experienced in international commercial and investment arbitration. Sayenko Kharenko advises clients on all aspects of international arbitration including the choice of arbitration forum, applicable law, advising on the risks and possible outcome of the arbitration, representation in the course of the arbitral proceedings before different international arbitration institutions all over the globe, enforcement of arbitral awards and other matters.

Sayenko Kharenko's arbitration lawyers have unprecedented insight into the arbitration proceedings in Ukraine and abroad built on their experience of serving as party appointed arbitrators, sole arbitrators, chairmen of the arbitral tribunal, and legal counsel to a party to arbitration. Sayenko Kharenko handled international arbitration covering all major spheres of international business, including disputes arising from financial, corporate and M&A transactions, construction, international sales of goods, agency and distribution contracts, joint venture agreements, oil and gas supply contracts, sport, telecommunication, aviation, as well as investment treaty disputes.

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