



Investment Treaty Arbitration

in 20 jurisdictions worldwide

2014

Contributing editors: Stephen Jagusch and Epaminontas Triantafilou



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Ukraine

Tatyana Slipachuk, Olena Perepelynska and Tetyana Makukha

Sayenko Kharenko

Background

1 What is the prevailing attitude towards foreign investment?

Ukraine has great investment capacity. Ukraine entered into and continues to conclude multilateral and bilateral investment treaties with foreign states. Moreover, national legislation provides for national treatment and a number of guarantees for foreign investments. At the same time, notwithstanding the existence of an extensive system of legislative acts, there is no integrated and coordinated system of investment legislation in Ukraine. Thus, the formation of a regulatory framework in relation to investment still continues.

In 2011, the State Agency for Investment and National Projects of Ukraine was established in order to assist foreign investors in their interactions with state authorities and local government. The said state agency is responsible for the involvement of foreign investments in Ukraine, support of investment development in the regions of Ukraine, and formation of regional centres for investment and development to provide investors with services pursuant to the Law on the Preparation and Implementation of Investment Projects under the Principle of 'One Window' (No. 2623).

In June 2013, the Ministry of Incomes and Fees of Ukraine created the special Council on Promotion of Investments and Entrepreneurship. The Council unites significant Ukrainian and foreign investors.

The Council acts as an advisory body to the Ministry of Incomes and Fees of Ukraine, providing the interaction between the Ministry and local and foreign investors on the development of tax and customs policy. The Council is authorised to:

- submit proposals on priorities and strategic objectives of the Ministry's activity, as well as recommendations on improving the investment climate and conditions of doing business in Ukraine;
- prepare and provide proposals on draft legal acts submitted to the Council;
- receive information from the departments of the Ministry necessary for the operation of the Council; and
- invite to its meetings the representatives of departments of the Ministry, its local authorities, other executive and legislative bodies, organisations, potential investors, etc.

2 What are the main sectors for foreign investment in the state?

According to the State Statistics Committee of Ukraine, the main sectors for foreign investment in the last year included finance and insurance, metal industry, food and beverage industry, electric and gas supply, manufacture of rubber and plastic products and distributive industries.

3 Is there a net inflow or outflow of foreign direct investment?

The State Statistics Committee of Ukraine reports that, as of 1 July 2013 the inflow of foreign direct investment in Ukraine is US\$65.914 billion and the outflow of direct investment from Ukraine is US\$6.741 billion.

4 Describe domestic legislation governing investment agreements with the state or state-owned entities.

There is no specific legislative act governing investment agreements with Ukraine or Ukrainian state-owned entities. Such agreements are regulated by different laws.

In particular, relations in the sphere of public-private partnership are governed by the Law of Ukraine on Public-Private Partnership (No. 2404-VI, 1 July 2010). The public-private partnership in Ukraine is conducted in the form of cooperation under the contract between the investor and Ukraine, the Autonomous Republic of Crimea or relevant state authorities in relation to the objects in state or communal ownership or ownership of the Autonomous Republic of Crimea. The public-private partnership may take place in any form (any type of contract) except for production-sharing contracts. The type of contract to be concluded shall be determined by the state authority that adopts the decision on the public-private partnership.

Production-sharing contracts are regulated by the Law of Ukraine on Production-Sharing Contracts (No. 2404-VI, 1 July 2010). Under the production-sharing agreement, the investor makes provision for exploration and mining in the defined area and agrees to perform the assigned work at their own expense and risk, compensation expenses and receiving fees (remuneration). In due course, the state provides to investors approvals, quotas, special permits and licences, documents certifying the right to use land and other approvals to perform activities. Such documents are issued in accordance with the legislation of Ukraine for the period of the production-sharing agreement.

In accordance with article 22 of the Law on Regime of Foreign Investing, business activities of foreign investors related to the use of state- or municipality-owned objects transferred to the concession of a foreign investor shall be conducted under the concession agreement. Such agreements are governed by the Law of Ukraine on Concessions (No. 997-XIV, 16 July 1999), the Law of Ukraine on Peculiarities of Lease or Concession of Objects of State-Owned Fuel and Energy Complex (No. 3687-VI, 8 July 2011), the Law of Ukraine on Peculiarities of Lease or Concession of Objects of Centralised Water Supply, Heating Supply and Water Draining Being in Municipal Property (No. 2624-VI, 21 October 2010) and others.

International legal obligations

- 5 Identify and give brief details of the bilateral or multilateral investment treaties to which the state is a party also indicating whether they are in force.

Ukraine is party to the Energy Charter Treaty.

It has also entered into bilateral investment treaties with the following states: Albania, Argentina, Armenia, Austria, Azerbaijan, Belarus, Belgium and Luxembourg, Bosnia and Herzegovina, Brunei, Bulgaria, Canada, Chile, China, the Democratic Republic of the Congo, Croatia, Cuba, Czech Republic, Denmark, Egypt, Equatorial Guinea, Estonia, Finland, France, Gambia, Georgia, Germany, Greece, Hungary, India, Indonesia, Iran, Israel, Italy, Jordan, Kazakhstan, South Korea, Kuwait, Kyrgyzstan, Latvia, Lebanon, Libya, Lithuania, Macedonia, Moldova, Mongolia, Morocco, Netherlands, Oman, Panama, Poland, Portugal, Russia, San Marino, Saudi Arabia, Serbia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Tajikistan, Turkey, Turkmenistan, United Arab Emirates, the United Kingdom, the United States, Uzbekistan, Vietnam and Yemen.

Eight BITs (with Albania, the Democratic Republic of the Congo, Equatorial Guinea, Gambia, Kyrgyzstan, Oman, Saudi Arabia and Yemen) have not yet come in force.

In addition, Ukraine has signed, but not ratified, the CIS Treaty on cooperation in investment activity, thus the CIS Treaty is not in force for Ukraine.

- 6 Is the state party to the ICSID Convention?

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) was adopted on 16 March 2000. On 7 July 2000, the ICSID Convention entered into force for Ukraine.

- 7 Does the state have an investment treaty programme?

No.

Regulation of inbound foreign investment

- 8 Does the state have a foreign investment promotion programme?

Unfortunately Ukraine has not yet adopted a foreign investment promotion programme.

The Cabinet of Ministers of Ukraine Resolution on Approval of the Concept of the State Specific Economic Programme of Investment Activity Development in 2011-2015 Years (No. 1900-p, 29 September 2010) only identifies main goals, including those for the promotion of foreign investments; in particular:

- stimulation of private investment, improving legislation regulating investment activities and removing barriers to investment;
- development of the investment market and investment infrastructure;
- creation of conditions for the effective functioning of innovative financial institutions and investment enterprises; and
- improving efficiency and increasing transparency in the function of public-private partnership (concessions, joint activities, production sharing agreements).

At the same time, local state authorities and self-government authorities have adopted investment promotion programmes for specific regions or cities.

- 9 Identify the domestic laws that apply to foreign investors and foreign investment, including any requirements of admission or registration of investments.

The following Laws of Ukraine specifically regulate the treatment of foreign investments and investors: the Law of Ukraine on Regime of Foreign Investing (No. 93/96-BP, 19 March 1996), the Law of Ukraine on Investment Activity (No. 1560-XII, 18 September 1991) and the Law of Ukraine on Defence of Foreign Investments (No. 15401-XII, dated 10 September 1991). These laws provide for national treatment, protection from expropriation, free transfer of funds and other protections for foreign investments. However, the above protections are granted only for duly registered investments.

The procedure of state registration is regulated under the Resolution of the Cabinet of Ministers of Ukraine on Adoption of the Order of State Registration (Reregistration) of Foreign Investments and its Annulment (No.139, 6 March 2013). Registration is conducted by the regional or Kiev and Sevastopol city state administrations or the Council of Ministers of the Autonomous Republic of Crimea within seven calendar days from the date of submission of the following documents:

- the informational notification marked by the Ministry of Incomes and Fees of Ukraine;
- documents on the form of investment (articles of incorporation, contracts, etc); and
- documents on value of the investment.

The Law of Ukraine on the Preparation and Implementation of Investment Projects under the Principle of 'One Window' (No. 2623) defines the legal and organisational framework of the investment projects.

In addition, some other legislation provides for regulations applicable to foreign investment; in particular the Law of Ukraine on the Elimination of Discrimination in the Taxation of Business Entities Created Using Assets and Resources of National Origin (No. 1457-III, 17 February 2000), the Law of Ukraine on General Principles of the Establishment and Functioning of Special (Free) Economic Zones (No. 2673-XII, 13 October 1992), the Tax Code of Ukraine, the Commercial Code of Ukraine, the Civil Code of Ukraine, the Land Code of Ukraine, the Law of Ukraine on Innovation (No. 40-IV, 4 July 2002), the Law of Ukraine on Financial Leasing (No. 723/97-BP, 16 December 1997) and the Law of Ukraine on Concessions (No. 997-XIV, 16 July 1999).

- 10 Identify the state agency that regulates and promotes inbound foreign investment.

According to the Decree of the President of Ukraine on the State Agency for Investment and National Projects of Ukraine (No. 583/2011, 12 May 2011), the State Agency for Investment and National Projects of Ukraine is responsible for the promotion of foreign investment in Ukraine.

In particular, under Law No. 2623, investors may submit any requests in connection with their investment project to the regional centres of State Agency for Investment and National Projects of Ukraine. The relevant regional centre shall provide the investor with the action plan and documents necessary for implementation of the investment project.

- 11 Identify the state agency that must be served with process in a dispute with a foreign investor.

The Department on Representation of Interests of the State in International and Foreign Judicial Institutions of the Ministry of Justice of Ukraine manages investment treaty arbitrations on behalf of the government. The Ministry of Justice represents Ukraine

in investment treaty arbitration, according to the Decree of the President (No. 581/2002, 25 June 2002).

Investment treaty practice

12 Does the state have a model BIT?

No.

13 Does the state have a central repository of treaty preparatory materials? Are such materials publicly available?

Under the Order of the State Committee on Archives of Ukraine and the Ministry of Foreign Affairs on approval of the Regulations on State Departmental Archive of the Ministry of Foreign Affairs of Ukraine (No. 59/78, 17 April 2006), materials created in the course of the activity of the Ministry of Foreign Affairs, including the originals of international treaties and materials related to them, are located in State Departmental Archive of the Ministry of Foreign Affairs. The Archive provides copies of documents for a fee.

14 What is the typical scope of coverage of investment treaties?

Pursuant to Ukrainian investment treaties, the investor may be an individual or legal entity. In respect of individuals, Ukrainian investment treaties normally define ‘investor’ as a citizen or national of a contracting party. Permanent residents are not usually included in the definition of ‘investor’. However, under four BITs (with Azerbaijan, Canada, Israel and Kazakhstan), the Energy Charter Treaty (ECT) and Commonwealth of Independent States Treaty (CIS Treaty), protection is provided to citizens or nationals and permanent residents of a contracting party.

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:

- 15 BITs (with Argentina, Austria, Bulgaria, Cuba, Germany, India, Lithuania, Macedonia, Mongolia, Morocco, Oman, Serbia, Slovenia, Tajikistan and Turkmenistan) require that such entities have their seat in the territory of a contracting party;
- five BITs (with Chile, Iran, Jordan, Poland and Switzerland) require that such entities have their seat and business activity in the territory of a contracting party;
- five BITs (with Italy, Portugal, Saudi Arabia, Slovakia and Turkey) require that such entities have their main office or headquarters in the territory of a contracting party;
- the France and Lebanon BITs require that such entities have their legal address in the territory of a contracting party;
- the Belgium and Luxembourg, and Finland BITs require that such entities have their registered office in the territory of a contracting party; and
- the Bosnia and Herzegovina BIT requires that such entities have their registered seat, central office or main business activity in the territory of a contracting party.

Most Ukrainian BITs do not contain any exclusion of certain assets from the 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.

Most Ukrainian investment treaties explicitly require investments to be made in accordance with the contracting party’s laws.

15 What substantive protections are typically available?

Ukrainian investment treaties typically prescribe:

- protection from expropriation;
- fair and equitable treatment;
- full protection and security;
- umbrella clause; and
- most-favoured nation clause.

All Ukrainian investment treaties provide for protection against unlawful expropriation. In addition, 14 investment treaties expressly protect against direct as well as indirect expropriation (Belgium and Luxembourg, Brunei, Chile, Finland, France, Iran, Jordan, Kuwait, Lebanon, Netherlands, Poland, Turkey, United Arab Emirates and United States BITs). Half of the BITs expressly provide protection to investors owning shares in the expropriated company.

Only the CIS Treaty and five Ukrainian BITs (with Armenia, Azerbaijan, Croatia, Russia and Turkey) do not contain the fair and equitable treatment standard. While most investment treaties simply stipulate that each contracting party shall ensure fair and equitable treatment to investments, only the France BIT is more prescriptive. It stipulates that limits imposed on the purchase or transportation for production of raw materials or supporting materials, fuel, and energy shall be considered as a breach of fair and equitable treatment.

The formulation of the obligation to provide ‘protection and security’ in Ukrainian investment treaties is not uniform. Most investment treaties just state that each contracting party shall grant ‘full protection and security’ to investments. Some provide for ‘full protection’ (for example, the Austria BIT), ‘permanent protection and security’ (for example, the Belgium and Luxembourg BIT) and ‘full and unconditional protection’ (for example, the CIS Treaty). Four Ukrainian BITs (Armenia, Azerbaijan, India and Turkey) do not provide for ‘protection and security’ as standard.

Twenty-six Ukrainian investment treaties contain an umbrella clause (ECT, and the Albania, Austria, Azerbaijan, Belgium and Luxembourg, Denmark, Egypt, Finland, Germany, Italy, Jordan, Korea, Kuwait, Kyrgyzstan, Lebanon, Mongolia, Morocco, Netherlands, Panama, Singapore, Spain, Switzerland, United Kingdom, United States, Uzbekistan and Vietnam BITs).

All Ukrainian BITs explicitly provide that the provision of most-favoured nation or national treatment does not extend to the benefits of membership of a customs union, monetary union or free trade area.

In addition, all Ukrainian investment treaties contain a provision which requires the contracting parties to permit investors to freely transfer investments and investment returns. All BITs (except the United States BIT) provide for the right of the host state to subrogation.

16 What are the most commonly used dispute resolution options for investment disputes between foreign investors and your state?

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 (the Belgium and Luxembourg, Bosnia and Herzegovina, Jordan and United Kingdom BITs); the Arbitration Institute of the Stockholm Chamber of Commerce (the Belgium and Luxembourg and Russia BITs); an ad hoc tribunal under the rules specifically provided in the BIT with different appointing authorities (the Armenia, China, Cuba, Germany, Libya, Poland, Turkey and United Arab Emirates BITs) or any other tribunal acting in accordance with any other arbitration rules as is mutually agreed by the parties (the Kuwait, Mongolia, United Arab Emirates, United Kingdom, United States BITs).

Update and trends

The investment climate has been changing in Ukraine under the influence of both internal and external factors, including joining the WTO, negotiations with the EU and the Custom Union of Russia, Belarus and Kazakhstan and respective change of regulations applicable to investment and doing business in Ukraine in general.

Over the past years, fewer investment arbitration disputes have been initiated against Ukraine. In particular, according to public information, no investment arbitration cases were brought up against Ukraine in 2011–2013.

At the same time, many foreign investors have left the jurisdiction, while many others are considering this option subject to the degree of regulatory changes which are to be introduced in Ukraine (for example, taxation issues).

The state tries to develop a dialogue with the investors, for example through the establishment of special governmental and non-governmental bodies as described.

In recent years, Ukraine has improved its regulations on investment arbitration proceedings and award enforcement. In particular, on 29 August 2012 the Cabinet of Ministers adopted the Resolution on Amendments to the Order of the Usage of Funds provided by the State Budget for Payments Related to the Enforcement of Decisions of Foreign Jurisdictional Authorities Delivered upon Consideration of Cases against Ukraine (No. 798), stipulating the usage of state budget funds in order to cover expenditures under, inter alia, decisions and arbitral awards delivered against Ukraine in investment arbitrations, including those connected to security for the enforcement of the mentioned decisions and awards (concerning the provision of bank guarantees, letters of credit, deposits, etc). The mechanism of provision of such security facilitates the enforcement of investment arbitral awards if rendered against Ukraine.

17 Does the state have an established practice of requiring confidentiality in investment arbitration?

The awards in investment arbitrations involving Ukraine are usually public. The only confidential award is the award in *Remington Worldwide Limited v Ukraine*. The decision on annulment of the ad hoc committee in *Joseph C Lemire v Ukraine (II)*, as well as the settlement agreements in *Laskaridis Shipping v Ukraine* and *Western NIS Enterprise Fund v Ukraine* are also not public.

Investment arbitration history

18 How many known investment treaty arbitrations has the state been involved in?

Ukraine has been involved in 13 investment treaty arbitrations:

- *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 Tokeles v Ukraine*, ICSID Case No. ARB/02/18, award dispatched on 26 July 2007;
- *AMTO LLC v Ukraine*, SCC Case No. 080/2005; IIC 346 (2008), final award signed 26 March 2008;
- *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;
- *Remington Worldwide Limited v Ukraine*, SCC, award dispatched 28 April 2011;
- *Inmaris Perestroika Sailing Maritime Services GmbH and ors v Ukraine*, ICSID Case No. ARB/08/8, award dispatched on 1 March 2012;
- *Laskaridis Shipping Co LTD, Lavinia Corporation, A K Laskaridis and P K Laskaridis v Ukraine*, UNCITRAL;
- *Bosh International Inc and B&P Ltd Foreign Investments Enterprise v Ukraine*, ICSID Case No. ARB/08/11, award dispatched on 25 October 2012; and
- *Joseph C Lemire v Ukraine*, ICSID Case No. ARB/06/18; IIC 485 (2011), award dispatched on 28 March 2011; the ad hoc committee's decision on annulment issued on 8 July 2013.

In addition, Ukraine is currently involved in one pending proceeding in *JSC 'Tatnafta' v Ukraine*, utilising ad hoc arbitration under UNCITRAL Arbitration Rules.

All public awards are available at www.italaw.com/.

19 Do the investment arbitrations involving the state usually concern specific industries or investment sectors?

Investment arbitrations involving Ukraine have concerned different industries such as the petrochemical industry (*GEA Group Aktiengesellschaft v Ukraine*), the sunflower oil industry (*Western NIS Enterprise Fund v Ukraine*), the printing industry (*Tokios Tokeles v Ukraine*), radio broadcasting (*Joseph C Lemire v Ukraine*), the poultry products industry (*Global Trading Resource Corp and Globex International Inc v Ukraine*) and maritime operations (*Inmaris Perestroika v Ukraine* and *Laskaridis Shipping Co v Ukraine*).

However, four investment arbitrations concerned the building industry, namely hotel development projects (*Alpha Projektholding GmbH v Ukraine* and *Bosh International v Ukraine*), construction of an office building (*Generation Ukraine Inc v Ukraine*) and shipbuilding (*Laskaridis Shipping Co v Ukraine*).

20 Does the state have a history of using default mechanisms for appointment of arbitral tribunals or does the state have a history of appointing specific arbitrators?

Ukraine usually appoints arbitrators without using a default mechanism. The only arbitrator appointed several times is Dr Jürgen Voss (in *Generation Ukraine Inc v Ukraine* and *Joseph C Lemire v Ukraine*; both in additional facility and arbitration proceedings).

21 Does the state typically defend itself against investment claims? Give details of the state's internal counsel for investment disputes.

Ukraine usually defends itself with the help of the Ministry of Justice of Ukraine and external counsel (Ukrainian and international law firms), retained according to the special proceedings.

Enforcement of awards against the state

22 Is the state party to any international agreements regarding enforcement, such as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

Yes. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) came into force for Ukraine on 8 January 1961. The European Convention on International Commercial Arbitration entered into force for Ukraine on 18 March 1963.

23 Does the state usually comply voluntarily with investment treaty awards rendered against it?

There were four awards against Ukraine in the following cases: *Alpha Projektholding v Ukraine*, *Inmaris Perestroika v Ukraine*, *Remington Worldwide Limited v Ukraine*, and *Joseph C Lemire v Ukraine (II)*.

The payments under the awards in first three cases were made by Ukraine only after completion of enforcement proceedings before the state courts in Ukraine. From the publicly available information, the state voluntarily complied with the award in *Joseph C Lemire v Ukraine (II)*.

24 If not, does the state appeal to its domestic courts against unfavourable awards?

The awards in *Alpha Projektholding v Ukraine*, *Inmaris Perestroika v Ukraine* and *Remington Worldwide Limited v Ukraine* were successfully enforced in Ukrainian courts. Ukraine did not appeal against enforcement.

25 Give details of any domestic legal provisions that may hinder the enforcement of awards against the state within its territory.

There are no specific provisions regulating the enforcement of investment arbitral awards in Ukraine. Thus, enforcement is governed by the general provisions of Chapter VIII of the Civil Procedure Code of Ukraine. Article 390 of the Civil Procedure Code prescribes that such enforcement shall be granted in the cases provided by international treaties ratified by the Parliament of Ukraine (including the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)) or, in the absence of such agreement, based on the reciprocity principle. In the latter case the enforcement may be dismissed on the grounds established in article 396 of the Civil Procedure Code of Ukraine, including the ground that such enforcement would pose a threat to the interests of Ukraine.

There is no special legislation governing the sovereign immunity of Ukraine, except for several provisions in the Law of Ukraine on Production-Sharing Contracts (No. 2404-VI, 1 July 2010) and the Budgetary Code of Ukraine (No. 2456-VI, 8 July 2010), applicable to the waiver of immunity by Ukraine.

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