

Investment Treaty Arbitration

Contributing editors

Stephen Jagusch QC and Epaminontas Triantafylou



2018

GETTING THE
DEAL THROUGH

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Ukraine

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Background

1 What is the prevailing attitude towards foreign investment?

Ukraine has great investment capacity. Ukraine entered into and continues to enter into 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. Therefore, the formation of a regulatory framework in relation to investment continues.

The unstable political and social situation in the country, the occupation and annexation of the Crimea and military activity in the Donetsk and Lugansk regions negatively affects investment activities in the country.

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

According to the report of the State Statistics Service of Ukraine for the period of January to July 2017, the main sectors for foreign direct investment included the industrial sector (26.7 per cent) (wherein the process industry constitutes 20.7 per cent), finance and insurance (26.4 per cent), wholesale and retail trade, auto and motorcycles service (13.3 per cent), immovable property transactions (9.8 per cent), professional, scientific and technical activity (6 per cent), and information and telecommunications (5.4 per cent).

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

According to the report of the State Statistics Service of Ukraine, as of 1 July 2017, the inflow of foreign direct investment in Ukraine is US\$47,434.9 million and the outflow of direct investment from Ukraine is US\$6,616.6 million.

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, dated 1 July 2010, as amended). 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 and local authorities in relation to the objects in state or municipal 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. 1039-XIV, dated 14 September 1999, as amended). Under the production-sharing agreement, the investor agrees during the agreed period of time to perform exploration, prospection and mining in the defined area at its own expense and risk with subsequent compensation of expenses and payments of remuneration. The state undertakes to ensure issuance to investors approvals, quotas, special permits and licences, documents certifying the right to

use land and other approvals, permits, licences related to the exploitation of subsoil resources, works, construction of buildings, envisaged in the production-sharing agreements. 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 (No. 93/96-BP, dated 19 March 1996, as amended), 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, dated 16 July 1999, as amended), the Law of Ukraine on Peculiarities of Lease or Concession of Objects of State-Owned Fuel and Energy Complexes (No. 3687-VI, dated 8 July 2011, as amended), 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, dated 21 October 2010, as amended) and others. Ukrainian legislation also includes specific regulation on the management of state-owned entities, which may affect the procedure for conclusion of the investment agreements with such entities, for example, the Law of Ukraine On Managing Objects That Are in State Ownership (No. 185-V, dated 21 September 2006).

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 a 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, Japan, Jordan, Kazakhstan, South Korea, Kuwait, Kyrgyzstan, Latvia, Lebanon, Libya, Lithuania, Macedonia, Moldova, Mongolia, Morocco, the Netherlands, Oman, Panama, Poland, Portugal, Russia, San Marino, Saudi Arabia, Serbia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Tajikistan, Turkey, Turkmenistan, the United Arab Emirates, the United Kingdom, the United States, Uzbekistan, Vietnam and Yemen.

Ukraine is negotiating bilateral investment treaties with Bahrain, the United Mexican States, Sri Lanka, Nigeria, Algeria and Qatar.

According to the Ministry of Economic Development and Trade of Ukraine, on 26 May 2017, Ukraine signed an investment treaty with OPEC Fund for International Development.

Ukraine has also signed, but not ratified, the CIS Treaty on cooperation in investment activity. The CIS Treaty is temporarily in force for Ukraine until the internal ratification procedures are carried out.

6 If applicable, indicate whether the bilateral or multilateral investment treaties to which the state is a party extend to overseas territories.

According to the Denmark BIT, it may be extended to the territories of the Faroe Islands and Greenland if the contracting parties so agree

separately. There is no information that such application was agreed between the states.

According to the UK BIT, it may be extended to the territories for whose international relations the government of the United Kingdom are responsible as may be agreed between the contracting parties in an Exchange of Notes. There is no information that such application was agreed between the states.

According to the BIT with the Netherlands, it shall apply to the part of the Netherlands in Europe, to the Netherlands Antilles and to Aruba unless the notification that the procedures required for entering of the treaty into force has been complied with provides otherwise. Respective notifications are not publicly available. In addition, the territory of the Netherlands shall include the territory under its sovereignty and the sea and submarine areas over which it exercises, in conformity with international law, sovereignty, sovereign rights of jurisdiction.

According to the BIT with France, it shall apply to the territory of France including its sea area, meaning economic zone and continental shelf.

There are no other specific indications as to the territorial application of the mentioned BITs in the texts of the BITs.

Information on the application of the Energy Charter Treaty is available at the official website of the Energy Charter Treaty at www.energycharter.org/.

7 Has the state amended or entered into additional protocols affecting bilateral or multilateral investment treaties to which it is a party?

On 20 January 2010, the Ukrainian parliament ratified additional protocol to the BIT between Ukraine and Czech Republic signed on 16 September 2008.

On 4 October 2017, the Ukrainian Parliament ratified additional protocol to the bilateral investment treaty between Ukraine and Croatia signed on 21 November 2016.

According to the official press release at the website of the President of Ukraine, on 9 October 2017, an additional protocol to the bilateral investment treaty between Ukraine and Turkey was signed.

Ukraine has also signed and ratified the Amendment to the Trade-related Provisions of the Energy Charter Treaty that entered into force on 21 January 2010.

8 Has the state unilaterally terminated any bilateral or multilateral investment treaties to which it is a party?

Ukraine has never unilaterally terminated any investment treaty.

9 Has the state entered into multiple bilateral or multilateral investment treaties with overlapping membership?

Yes, Ukraine entered into the Energy Charter Treaty that resulted in overlapping membership. The Energy Charter Treaty and BITs of Ukraine with signatories and contracting parties of the Energy Charter Treaty continue to operate in parallel.

Ukraine has also signed, but not ratified, the CIS Treaty on cooperation in investment activity. It coexists with BITs of Ukraine with Uzbekistan, Kazakhstan, Belarus, Tajikistan, Kyrgyzstan, Moldova, Azerbaijan, Armenia, Georgia and Turkmenistan.

10 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.

11 Is the state a party to the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)?

No, Ukraine did not sign the Mauritius Convention.

12 Does the state have an investment treaty programme?

No.

Regulation of inbound foreign investment

13 Does the state have a foreign investment promotion programme?

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 (No. 1900-p, 29 September 2010) only identifies certain 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).

The Cabinet of Ministers of Ukraine also approved the Program of Development of the Investment and Innovative Activity in Ukraine (Resolution of the Cabinet of Ministers of Ukraine dated 2 February 2011, No. 389).

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

14 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, dated 19 March 1996, as amended); the Law of Ukraine on Investment Activity (No. 1560-XII, dated 18 September 1991, as amended); 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.

On 31 May 2016, the Verkhovna Rada of Ukraine adopted the Law of Ukraine on Amendments to Certain Legislative Acts of Ukraine on Cancellation of Obligation to Register Foreign Investments (entered into force on 25 June 2016) whereby the obligation to register foreign investments was cancelled.

The Law of Ukraine on the Preparation and Implementation of Investment Projects under the Principle of 'One Window' (No. 2623-VI, dated 21 October 2010) defines the legal and organisational framework of the investment projects.

Additional 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, dated 17 February 2000, as amended); the Law of Ukraine on General Principles of the Establishment and Functioning of Special (Free) Economic Zones (No. 2673-XII, dated 13 October 1992, as amended); Ukraine's Tax, Commercial, Civil and Land Codes, and the Law of Ukraine on Innovation (No. 40-IV, 4 dated July 2002, as amended); the Law of Ukraine on Financial Leasing (No. 723/97-BP, dated 16 December 1997, as amended) and the Law of Ukraine on Concessions (No. 997-XIV, 16 July 1999, as amended) etc.

In 2014, the Ukrainian parliament adopted a specific regulation on activity in the Crimea. In particular, on 27 April 2014, the Law on Guaranteeing Citizens' Rights and Freedoms and Legal Regime in the Temporarily Occupied Territory of Ukraine (No. 1207-VII, dated 15 April 2014, as amended) came into force. Under the Law, the Crimea is considered to still be a part of Ukrainian territory, which has been temporarily occupied.

The Law contains specific rules to be taken into account by any businesses having interests or operating in the Crimea. For example, the Law provides that the transfer of title to real estate in the Crimea shall be carried out pursuant to the laws of Ukraine. Transfer of title to real estate in the Crimea made without complying with the requirements of the Ukrainian law will not be recognised in Ukraine.

In addition, Ukraine does not recognise operations, actions and local regulations or acts of the Crimean authorities and their officials. The Law provides that any decisions and documents issued either by the Crimean authorities or their officials are null and void and do not have legal effect in the territory of Ukraine.

Business activities in the Crimea were not restricted by the Law and are governed by the specific Law on the Creation of the Free Economic Zone of the Crimea and the Peculiarities of Economic Activity in the Temporarily Occupied Territories of Ukraine (1636-VII, dated 12 August 2014). The specific Law in Chapter II sets forth the peculiarities of a free economic zone operating during the temporary occupation in the Crimea for 10 years. It eliminates certain taxes and regulates, for example, the import of goods and services, the currency regime, labour relations and the crossing of the border of the free economic zone of the Crimea. In particular, under article 8 of the specific Law, Ukraine guarantees protection on the rights of individuals and companies, including the protection of foreign investments, in accordance with the laws of Ukraine.

15 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. However, on 31 March 2015, the Decree of the Cabinet of Ministers of Ukraine on Establishment of the Commission on Liquidation of the State Agency for Investment and National Projects of Ukraine (No. 290-p, dated 31 March 2015, as amended) has been adopted. In accordance with the Decree of the Cabinet of Ministers of Ukraine (No. 1079-p, dated 13 October 2015), the Ministry of Economic Development and Trade has undertaken implementation of the functions and full powers of the State Agency for Investment and National Projects of Ukraine.

There are two advisory bodies focusing on foreign investment promotion and working under the auspices of the Cabinet of Ministers of Ukraine – the Foreign Investments Promotion and Support Office coordinated by the Governmental commissioner in investment issues (established under the resolution of the Cabinet of Ministers of Ukraine No. 740 dated 19 October 2016), and the President of Ukraine – the National Investment Council of the President of Ukraine (the regulation of the Council was approved on 29 August 2016 by the Decree of the President of Ukraine).

In addition, in 2014, Ukraine has established the Business Ombudsman Council being an advisory body of the Cabinet of Ministers of Ukraine.

16 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, dated 25 June 2002, as amended).

Investment treaty practice

17 Does the state have a model BIT?

No.

18 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 of the State Departmental Archive of the Ministry of Foreign Affairs of Ukraine (No. 59/78, dated 17 April 2006, as amended), 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 the State Departmental Archive of the Ministry of Foreign Affairs. It provides copies of documents for a fee.

19 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 an ‘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.

20 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 four Ukrainian BITs (with Armenia, Azerbaijan, 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-seven Ukrainian investment treaties contain an umbrella clause (ECT, and the Albania, Austria, Azerbaijan, Belgium and Luxembourg, Denmark, Egypt, Finland, Germany, Italy, Japan, 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 that 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.

21 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 and United States BITs).

22 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 awards are the awards in *Remington Worldwide Limited v Ukraine* and in *JKX Oil & Gas, et al v Ukraine*. The settlement agreements in *Laskaridis Shipping v Ukraine* and *Western NIS Enterprise Fund v Ukraine* are also not public.

23 Does the state have an investment insurance agency or programme?

On 20 December 2016, the Ukrainian parliament adopted 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. According to this Law, the Cabinet of Ministers of Ukraine is empowered to institute the Export-Credit Agency that, among other functions, will 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. Currently, such Export-Credit Agency has not yet been established.

Law No. 1792-VIII does not contain specific rules on the contingency of the investment insurance on the availability of an investment treaty between the state and the host state (target of the investment). At the same time, according to this Law, the Export-Credit Agency shall be responsible for performance of functions, securing financial obligations and implementation of rights under the bilateral investment treaties of Ukraine and multilateral treaties.

Investment arbitration history

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

Ukraine has been involved in 16 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, order taking note of the

Update and trends

Ukraine is in the process of implementing judicial reform, which was started by the Law of Ukraine 'On Amendments to the Constitution of Ukraine (in relation to Justice)' enacted by the Verkhovna Rada of Ukraine on 2 June 2016. Within this process, on 3 October 2017, the Verkhovna Rada adopted restated versions of the procedural codes of Ukraine, including the Civil Procedure Code of Ukraine, which deals with recognition and enforcement of foreign arbitral awards in Ukraine.

- discontinuance issued by the Tribunal on 1 June 2006 pursuant to Arbitration Rule 43(1);
- *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 on 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 on 28 April 2011;
- *Inmaris Perestroika Sailing Maritime Services GmbH and others 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, settled;
- *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; IIC 485 (2011)), award dispatched on 28 March 2011; the ad hoc committee's decision on annulment issued on 8 July 2013 (award upheld);
- *JSC Tatnafta v Ukraine*, ad hoc, under UNCITRAL Arbitration Rules, award dated 29 July 2014 (as reported in press, as of July 2017, Ukraine is challenging the award, respective proceedings are pending);
- *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 Rules 43(1) on 11 August 2015; and
- *JKX Oil & Gas plc, et al v Ukraine*, UNCITRAL (consolidated with ICSID and SCC arbitral proceedings), the final award made on 6 February 2017.

All public awards are available at www.italaw.com. In addition, Ukraine is involved in eight pending proceedings:

- *City-State NV, Praktyka Asset Management Company LLC, Crystal-Invest LLC and Prodig LLC v Ukraine* (ICSID Case No. ARB/14/9);
- *Krederi Ltd v Ukraine* (ICSID Case No. ARB/14/17);
- *Gilward Investments BV v Ukraine* (ICSID Case No. ARB/15/33);
- *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v Ukraine*, SCC arbitral proceedings.
- *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; and
- *Misen Energy AB v Ukraine*.

25 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), the oil-refining industry (*JSC Tatnafta v Ukraine, Ministry of Land and Property of the Republic of Tatarstan v. Ukraine*), maritime operations (*Inmaris Perestroika v Ukraine and Laskaridis Shipping Co v Ukraine*) and the gas sector (*JKX Oil & Gas, et al v Ukraine, Littop Enterprises Limited, et al v Ukraine, Misen Energy AB v Ukraine*).

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

There are also other industries involved into the investment arbitration, such as banking sector (*City-State NV, Praktyka Asset Management Company LLC, Crystal-Invest LLC and Prodiz LLC v Ukraine*), air transport (*Gilward Investments BV v Ukraine*), aluminium production (*Emergofin B.V. and Velbay Holdings Ltd v Ukraine*) and confectionery (*Ihor Boiko v Ukraine*).

26 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 arbitrators appointed several times are Jürgen Voss (*Generation Ukraine Inc v Ukraine* and *Joseph C Lemire v Ukraine*; both in additional facility and arbitration proceedings) and Brigitte Stern (*GEA Group Aktiengesellschaft v Ukraine* and *City-State NV, Praktyka Asset Management Company LLC, Crystal-Invest LLC and Prodiz LLC v Ukraine*).

27 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

28 Is the state party to any international agreements regarding enforcement, such as the 1958 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.

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

There were six awards against Ukraine in the following cases: *Alpha Projektholding v Ukraine*, *Inmaris Perestroika v Ukraine*, *Remington Worldwide Limited v Ukraine*, *Joseph C Lemire v Ukraine (II)*, *JSC Tatnafta v Ukraine* and *JKX Oil & Gas, et al v Ukraine*.

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)*. Ukraine is now challenging the award rendered in *JSC Tatnafta v Ukraine*. The proceedings are pending. Final award in *JKX Oil & Gas, et al v Ukraine* was rendered on 6 February 2017. There is no publicly known detailed information on the enforcement.

30 If not, does the state appeal to its domestic courts or the courts where the arbitration was seated 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 in these cases. However, Ukraine appealed against enforcement of the emergency arbitrator award in the *JKX Oil & Gas* case. Ukraine has applied for setting aside the final award in *JSC Tatnafta v Ukraine*. Respective proceedings are pending. Ukraine also appealed against the final award in *JKX Oil & Gas, et al v Ukraine*. There is no information on the status of the relevant proceedings.

31 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. Therefore, enforcement is governed by the general provisions of Chapter VIII of the currently in force 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 UN 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, the enforcement may be dismissed on the grounds established in article 396 of the Civil Procedure Code of Ukraine, including that such enforcement would pose a threat to the interests of Ukraine.

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