

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 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. Therefore, the formation of a regulatory framework in relation to investment still continues.

In 2014, however, because of the unstable political and social situation in the country, military actions in the Donetsk and Lugansk regions and the difficulties of providing commercial activities in the Crimea, investment activities dropped significantly.

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 past year included finance and insurance, metal industry, food and beverage industry, electric and gas supply, manufacture of rubber and plastic products, real property and distribution.

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

The State Statistics Committee of Ukraine reports that as of 1 July 2014 the inflow of foreign direct investment in Ukraine is US\$59,791 million and the outflow of direct investment from Ukraine is US\$6,709.7 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, 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.

Ukraine has also 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 (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).

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. The above protections, however, 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.

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, 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); Ukraine's tax, commercial, civil and land codes, and 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).

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. 4473-1, 15 April 2014) 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. The business activities in the Crimea were not restricted by the Law and are governed by the specific Law On Tax and Customs Control in the Free Economic Zone of the Crimea and the Peculiarities of Economic Activity in the Temporarily Occupied Territories of Ukraine (1636-VII, 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.

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 the 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 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.

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).

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 awards are the awards in *Remington Worldwide Limited v Ukraine* and in *JSC Tatnafta 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 14 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;
 - *JSC Tatnafta v Ukraine*, ad hoc under UNCITRAL Arbitration Rules, Award dated 29 July 2014.
- All public awards are available at www.italaw.com/.

In addition, Ukraine is involved in two 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).

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*), oil-refining industry (*JSC Tatnafta 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 Jürgen Voss (*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 five 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)*, *JSC Tatnafta 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 preparing has applied to set aside the award rendered in *JSC Tatnafta v Ukraine in the Court of Appeal of Paris*. There is no publicly known detailed information on the enforcement

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. Therefore, 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 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. 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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