

Agreement between the Swiss Confederation and Ukraine on the Promotion and Reciprocal Protection of Investments

The Swiss Federal Council and the Government of Ukraine,

Hereinafter referred to as the contracting parties,

Desiring to intensify economic cooperation in the mutual interest of both States;

Intending to create and maintain favourable conditions for investments of investors of one Contracting Party in the territory of the other contracting party,

Recognizing the need to promote and protect foreign investment with a view to promoting economic prosperity of both States;

Have agreed as follows:

Article 1. Definitions

(1) The term "investor" refers with regard to either Contracting Party to

(a) natural persons who, according to the law of that Contracting Party are considered to be its nationals;

(b) legal entities, including companies, corporations, business associations and other organisations, which are constituted or otherwise duly organised under the law of that Contracting Party and have their seat, together with real economic activities, in the territory of that same Contracting Party;

(c) legal entities not established under the law of that Contracting Party but effectively controlled by natural persons as defined in (a) above or by legal entities as defined in (b) above.

(2) The term "investments" shall include every kind of assets and particularly:

(a) movable and immovable property as well as any other rights in rem, such as servitude, mortgages, liens, pledges;

(b) shares, parts or any other kinds of participation in companies;

(c) claims to money or to any performance having an economic value;

(d) copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and goodwill;

(e) concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law.

(3) The term "returns" means the amounts yielded by an investment and in particular though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees.

(4) The term "territory" means the territory of each Contracting Party and includes the maritime areas adjacent to the coast of the State concerned, i.e. the exclusive economic zone and the continental shelf, to the extent to which that State may exercise sovereign rights or jurisdiction in those areas according to international law.

Article 2. Scope of Application

The present Agreement shall apply to investments in the territory of one Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party prior to or after the entry into force of this Agreement

Article 3. Promotion , Admission

(1) Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its laws and regulations.

(2) When a Contracting Party shall have admitted an investment on its territory, it shall grant, in accordance with its laws and regulations, the necessary permits in connection with such an investment and with the carrying of licenses agreements and contracts for technical, commercial or administrative assistance. Each Contracting Party shall, whenever needed, endeavour to issue the necessary authorizations concerning the activities of consultants and other qualified persons of foreign nationality.

Article 4. Protection , Treatment

(1) Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and, should it so happen, liquidation of such investments.

(2) Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party. This treatment shall not be less favourable than that granted by each Contracting Party to investments made within its territory by its own investors, or than that granted by each Contracting Party to the investments made within its territory by investors of the most favoured nation, if this latter treatment is more favourable.

(3) If a Contracting Party accords special advantages to investors of any third State by virtue of an agreement establishing a free trade area, a customs union, a common market or a similar regional organization or by virtue of an agreement on the avoidance of double taxation, it shall not be obliged to accord such advantages to investors of the other Contracting Party.

Article 5. Transfers

(1) Each Contracting Party in whose territory investments have been made by investors of the other Contracting Party shall grant those investors the unrestricted transfer of the payments relating to these investments, particularly of:

(a) returns on investments;

(b) amounts relating to loans incurred, or other contractual obligations undertaken, for the investment;

(c) additional contributions of capital necessary for the maintenance or the development of the investment;

(d) the proceeds, including possible capital appreciations, arising from the sale or of the partial or total liquidation of the investment.

(2) Transfers shall be effected without delay in a freely convertible currency. They shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.

Article 6. Dispossession, Compensation

(1) Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measures having the same nature or the same effect against investments of investors of the other Contracting Party, unless the measures are taken in the public interest, on a non discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation. The amount of compensation, interest included, shall be settled in the currency in which the investment was made or in any other currency accepted by the investor. It shall be paid without delay to the investor entitled thereto without regard to its residence or domicile.

(2) The investors of one Contracting Party whose investments have suffered losses due to a war or any other armed conflict, revolution, state of emergency or rebellion, which took place in the territory of the other Contracting Party shall benefit, on the part of this latter, from a treatment in accordance with Article 4, paragraph (2) of this Agreement as regards restitution, indemnification, compensation or other settlement.

Article 7. More Favourable Treatments

Notwithstanding the terms set forth in this Agreement, more favourable provisions which have been or may be agreed upon by either of the Contracting Parties with an investor of the other Contracting Party are applicable.

Article 8. Principle of Subrogation

Where one Contracting Party has granted any financial guarantee against non-commercial risks in regard to an investment by one of its investors in the territory of the other Contracting Party, the latter shall recognize the rights of the first Contracting Party by virtue of the principle of subrogation to the rights of the investor when payment has been made under this guarantee by the first Contracting Party.

Article 9. Disputes between a Contracting Party and an Investor of the other Contracting Party

(1) With a view to an amicable solution of the disputes between a Contracting Party and an investor of the other Contracting Party and without prejudice to Article 10 of this Agreement (Disputes between Contracting Parties), consultations will take place between the parties concerned.

(2) If these consultations do not result in a solution within six months from the date of request of settlement, the investor may submit the dispute to an ad hoc arbitral tribunal which, unless otherwise agreed upon within three months by the parties to the dispute, shall be established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

(3) In the event of both Contracting Parties having become members of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington D.C., on 18 March 1965, disputes under this Article may, upon the request of the investor, as an alternative to the procedure mentioned in paragraph (2) of this Article, be submitted to the International Center for the Settlement of Investment Disputes (ICSID).

(4) Each Contracting Party hereby consents to the submission of an investment dispute to international arbitration.

(5) The Contracting Party which is a party to the dispute shall at no time whatsoever during the procedures involving investment disputes, assert as a defence its immunity or the fact that the investor has received compensation under an insurance contract covering the whole or part of the incurred damage or loss.

Article 10. Disputes between Contracting Parties

(1) Disputes between Contracting Parties regarding the interpretation or application of the provisions of this Agreement shall be settled through diplomatic channels.

(2) If both Contracting Parties cannot reach an agreement within twelve months after the beginning of the dispute between themselves, the latter shall, upon request of either Contracting Party, be submitted to an arbitral tribunal of three members. Each Contracting Party shall appoint one arbitrator, and these two arbitrators shall nominate a chairman who shall be a national of a third State.

(3) If one of the Contracting Parties has not appointed its arbitrator and has not followed the invitation of the other Contracting Party to make that appointment within two months, the arbitrator shall be appointed upon the request of that Contracting Party by the President of the International Court of Justice.

(4) If both arbitrators cannot reach an agreement about the choice of the chairman within two months after their appointment, the latter shall be appointed upon the request of either Contracting Party by the President of the International Court of Justice.

(5) If, in the cases specified under paragraphs (3) and (4) of this Article, the President of the International Court of Justice is prevented from carrying out the said function or if he is a national of either Contracting Party, the appointment shall be made by the Vice-President, and if the latter is prevented or if he is a national of either Contracting Party, the appointment shall be made by the most senior Judge of the Court who is not a national of either Contracting party.

(6) Subject to other provisions made by the Contracting Parties, the tribunal shall determine its procedure.

(7) The decisions of the tribunal are final and binding for each Contracting party.

Article 11. Observance of Commitments

Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.

Article 12. Final Provisions

(1) This Agreement shall enter into force on the day when both Governments have notified each other that they have complied with the legal requirements for the conclusion and entry into force of international agreements, and shall remain binding for a period of ten years. Unless written notice of termination is given six months before the expiration of this period, the Agreement shall be considered as renewed on the same terms for a period of two years, and so forth.

(2) In case of official notice as to the termination of the present Agreement, the provisions of Articles I to II shall continue to be effective for a further period of ten years for investments made before official notice was given.

Protocol

On signing this Agreement between the Swiss Confederation and Ukraine on the Promotion and Reciprocal Protection of Investments, the undersigned plenipotentiaries have agreed on the following provisions which shall be regarded as an integral part of the said Agreement.

Ad Article 1

(1) An investor according to Article I, paragraph (I), letter (c) may be required to submit proof of such control in order to be recognized by the Contracting Party in the territory of which the investment has been or is to be made as an investor of the other Contracting Party.

(2) Investors referred to in Article I, paragraph (I), letter (c) may not raise a claim based on Article 6 of this Agreement if compensation has been paid pursuant to a similar provision in another Investment Protection Agreement concluded by the Contracting Party in the territory of which the investment has been made.

Ad Article 4

The principle of national treatment referred to in Article 4, paragraph (2) is without prejudice to the special conditions which according to the legislation of the Contracting Parties apply to foreign investors concerning the acquisition of land and natural resources in their respective territories.

Done at____, on____, in duplicate in French, Ukrainian and English language, each text being equally authentic. In case of divergencies the English text shall prevail.