

Agreement between the Government of the Kingdom of Sweden and the Government of the Ukraine on the Promotion and Reciprocal Protection of Investments

The Government of the Kingdom of Sweden and the Government of Ukraine (hereinafter referred to as the "Contracting Parties"),

Desiring to intensify economic cooperation to the mutual benefit of both Countries,

Intending to create and maintain fair and favourable conditions for investments of investors of one State in the territory of the other State, and

Conscious that the promotion and reciprocal protection of investments, according to the present Agreement, stimulates the business initiatives in this field,

Have agreed as follows:

Article 1. Definitions

For the purposes of this Agreement:

1. The term "investment" shall comprise every kind of asset, invested in connection with economic activities by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter and shall include, in particular, though not exclusively:

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

(b) A company or shares, stocks and debentures of companies or any other form of participation in a company;

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

(d) Intellectual property rights, including copyrights, trade marks, patents, industrial designs, trade names as well as technical processes, know-how, trade secrets and goodwill;

(e) Any right conferred by law or under contract and any licenses and permits pursuant to law, including the concessions to search for, extract, cultivate or exploit natural resources.

Any alteration of the form in which assets are invested shall not affect their character as investment.

2. Goods that under a leasing agreement are placed at the disposal of a lessee in the territory of one Contracting Party by a lessor being a national of the other Contracting Party or a legal person having its seat in the territory of that Contracting Party, shall be treated no less favourably than an investment.

3. The term "investors" shall mean:

(a) Any natural person having the nationality of either Contracting Party in accordance with its laws;

(b) Any juridical person or other entity, with or without legal personality, incorporated or constituted in accordance with the laws of either Contracting Party and whether or not its activities are directed at profits; and

(c) Any legal person having its seat in a third country in which the effective control is exercised by an investor of either Contracting Party. Where there is doubt as to whether an investor of either Contracting Party exercises effective control of a legal person in a third country, an investor claiming such control has the burden of proof that such control exists.

4. The term "returns" shall mean amounts yielded by an investment and in particular, though not exclusively, include profit,

interest, capital gains, shares, dividends, royalties or fees.

5. The term "territory" shall mean in respect. of each Contracting Party the territory under its sovereignty and the sea and submarine areas over which the Contracting Party exercises in conformity with international law, sovereignty, sovereign rights or jurisdiction.

Article 2. Promotion and Protection of Investments

1. Each Contracting Party shall in its territory encourage and admit in accordance with its laws and regulations, investments of investors of the other Contracting Party.

2. Each Contracting Party shall at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party and shall not impair the management, maintenance use, enjoyment or disposal thereof as well as the acquisition of goods and services and the sale of their production through unreasonable or discriminatory measures.

3. Subject to the laws and regulations relating to the entry and sojourn, of aliens, individuals working for an investor of one Contracting Party, as well as members of their household, shall be permitted to enter into, remain on and leave the territory of the other Contracting Party for the purpose of carrying out activities associated with investments in the territory of the latter Contracting Party.

4. In order to create favourable conditions for assessing the financial position and results of activities related to investments in the territory of one of the Contracting Parties, this Contracting Party shall – notwithstanding its own national requirements for bookkeeping and auditing – permit the investment to be subject also to bookkeeping and auditing according to standards which the investor is subjected to by his national requirements or according to internationally accepted standards (e.g. International Accounting Standards (IAS) drawn up by the International Accounting Standards Committee (IASC). The result of such accountancy and audit shall be freely transferable to the investor.

5. Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.

Article 3. National and Most-favoured-nation Treatment

1. Each Contracting Party shall in its territory accord to investments and returns of investors of the other Contracting Party treatment which is fair and equitable and not less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State, whichever is more favourable.

2. Each Contracting Party shall in its territory accord to investors of the other Contracting Party, as regards management, maintenance use, enjoyment or disposal of their investment, treatment which is fair and equitable and not less favourable than that which it accords to its own investors or of any third State whichever is more favourable.

3. The provisions of paragraph 1 and 2 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege which may be extended by the former Contracting Party by virtue of:

(a) Any existing or future customs union, free trade area or similar international agreements leading to such unions, institutions or other forms of regional economic cooperation to which either of the Contracting Party is or may become a Party;

(b) Any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

Article 4. Compensation for Losses

1. When investments by investors of either Contracting Party suffer losses owing to war, armed conflict, a state of national emergency, revolt, insurrection, riot or other similar events in the territory of the other Contracting Party, they shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, not less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State.

2. Without prejudice to Paragraph 1 of this Article, investors of one Contracting Party who in any of the events referred to in that Paragraph suffer losses in the territory of the other Contracting Party resulting from:

(a) Requisitioning of their property by its forces or authorities

(b) Destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation

Shall be accorded prompt, adequate and effective compensation for the losses sustained during the period of the requisitioning or as a result of the destruction of the property. Resulting payments shall be freely transferable in freely convertible currency without delay.

Article 5. Expropriation

1. Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public interest. The expropriation shall be carried out under due process of law, on a non-discriminatory basis and shall be accompanied by provisions for the payment of prompt, adequate and effective compensation. Such compensation shall be paid in the currency in which the investment was made or in any other currency acceptable to the investor and shall amount to the fair market value of the investment expropriated immediately before the expropriation or the impending expropriation became public knowledge, shall include interest from the date of expropriation, shall be made without delay and shall be effectively realizable and freely transferable.

2. The investor affected shall have a right to prompt review, by a judicial or other independent authority of that Contracting Party of his or its case and of the valuation of his or its investment in accordance with the principles set out in this Article.

3. The provisions of paragraph 1 of this Article shall also apply where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares.

Article 6. Transfers

1. The Contracting Parties shall guarantee the transfer of payments related to investments and returns. The transfers shall be made in a freely convertible currency, without any restriction and delay. Such transfers shall include in particular, though not exclusively:

(a) Capital and additional amounts to maintain or increase the investment;

(b) Returns from an investment

(c) Funds in repayment of loans;

(d) Proceeds of the sale or liquidation of the investment;

(e) The earnings of individuals, not being its nationals, allowed to work in connection with an investment in its territory.

2. For the purpose of this Agreement the exchange rates shall be the prevailing market rate on the date of transfer with respect to spot transactions in the currency to be transferred.

Article 7. Subrogation

1. If a Contracting Party or its designated agency makes payment under a guarantee it has accorded in respect of an investment in the territory of the other Contracting Party, the latter Contracting Party shall recognize without prejudice to the rights of the former Contracting Party under Article 9 of this Agreement

(a) The assignment, whether under the law or pursuant to a legal transaction in that country, of any right or claim by the investor to the former Contracting Party or its designated agency, as well as,

(b) That the former Contracting Party or its designated agency is entitled by virtue of subrogation to exercise the rights and enforce the claims of that investor.

2. The subrogated rights or claims shall not exceed the original rights or claims of the investor.

Article 8. Disputes between a Contracting Party and an Investor of the other Contracting Party

1. Any dispute concerning an investment between an investor of one Contracting Party and the other Contracting Party shall, if possible, be settled amicably.
2. If the dispute cannot thus be settled within six months following the date on which the dispute has been raised by either party, the investor shall be entitled to submit the dispute to international arbitration for a definitive settlement. The investor has the choice between submitting the case either to:
 - (a) The International Centre for Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965, as soon as Ukraine becomes a party to this Convention. For the time being, when the Ukraine is not a party to the said Convention, the dispute may be settled under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID;
 - (b) An ad hoc tribunal to be established, unless otherwise agreed upon by the parties to the dispute, under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).
3. Each Contracting Party hereby consents to the submission of any investment dispute for the settlement by binding arbitration in accordance with the choice of the investor under Paragraph (2). This consent and the submission of the dispute by an investor under Paragraph (2) shall satisfy the requirement of:
 - (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the additional Facility Rules for written consent of the parties to the dispute;
 - (b) Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (the New York Convention); and
 - (c) An agreement in writing by parties to a contract for the purposes of Article 1 of the UNCITRAL Arbitration Rules.
4. Any arbitration under Paragraph 2 shall be held in a state (that is a party to the New York Convention).
5. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute and will be executed according to national law. Each party shall carry out without delay the provisions of any such award and provide in its territory for its enforcement.
6. In any proceeding involving an investment dispute, a party shall not assert, as a defense, counterclaim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an insurance or guarantee contract.
7. For purposes of Article 25(2) (b) of the ICSID Convention and this Article, a company of a Contracting Party, in which the effective control is exercised by investors of the other Contracting Party immediately before the occurrence of the event or events giving rise to an investment dispute, shall be treated as a company of the other Contracting Party.

Article 9. Settlement of Disputes between the Contracting Parties

1. Disputes between the Contracting Parties concerning the interpretation or application of this Agreement shall, if possible, be settled through consultation or negotiation.
2. If the dispute cannot be thus settled within six months following the date on which such negotiations were requested by either Contracting Party, it shall upon the request of either Contracting Party, be submitted to an Arbitral Tribunal in accordance with the provisions of this Article.
3. The Arbitral Tribunal shall be constituted for each individual case in the following way. Within two months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the Tribunal. These two members shall then select a national of a third State who on approval of the two Contracting Parties shall be appointed Chairman of the Tribunal (hereinafter referred to as the "Chairman"). The Chairman shall be appointed within three months from the date of appointment of the other two members.
4. If within the periods specified in paragraph 3 of this Article the necessary appointments have not been made, a request may be made to the President of the International Court of Justice to make the appointments. If he happens to be a national of either Contracting Party, or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the appointments. If the Vice-President also happens to be a national of either Contracting Party or is prevented from discharging the said function, the member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the appointments.

5. The Arbitral Tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding. Each Contracting Party shall bear the cost of its own arbitrator and its representation in the arbitral proceedings; the cost of the Chairman and the remaining costs shall be borne in equal parts by both Contracting Parties. The Arbitral Tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the Contracting Parties. In all other respects, the procedure of the Arbitral Tribunal shall be determined by the tribunal itself.

Article 10. Application of other Rules and Special Commitments

1. Where a matter is governed simultaneously both by this agreement and by another international agreement to which both Contracting Parties are parties, nothing in this Agreement shall prevent either Contracting Party or any of its investors who own investments in the territory of the other Contracting Party from taking advantage of whichever rules are more favourable to his case.

2. If the treatment to be accorded by one Contracting Party to investors of the other Contracting Party in accordance with the provisions of international law, its domestic laws and regulations or other specific provisions of contracts is more favourable than that accorded by the Agreement, the more favourable shall be accorded.

Article 11. Applicability of this Agreement

The provisions of this Agreement shall apply to investments made by investors of one Contracting Party in the territory of the other Contracting Party prior as well as after the entry into force of this Agreement, but shall not apply to any dispute concerning an investment which arose, or any claim concerning an investment which was settled before its entry into force.

Article 12. Entry Into Force, Duration and Termination

1. This Agreement shall enter into force on the first day of the second month following the date on which the Contracting Parties have notified each other in writing, that the legal procedures required for the entry into force of the Agreement in their respective countries have been complied with.

2. This Agreement shall remain in force for a period of 15 years and shall continue in force thereafter unless, one year before the expiry of the initial or any subsequent periods, either contracting Party notifies the other in writing of its intention to terminate the Agreement.

3. In respect of investments made prior to the termination of this Agreement, the provisions of this Agreement shall continue to be effective for a period of ten years from the date of termination.

In witness whereof, the undersigned duly authorized have signed this Agreement.

Done in duplicate at Kiev, this 15 day of August, 1995, in the Swedish, Ukrainian and English languages, the three texts being equally authentic. In case of divergence of interpretation the English text shall prevail.

FOR THE GOVERNMENT OF THE KINGDOM OF SWEDEN

Pierre Schori

FOR THE GOVERNMENT OF UKRAINE

O. I. Homcharuk