

HUMBOLDT-UNIVERSITÄT ZU BERLIN



Master Class

Humboldt-University Berlin
Faculty of Law

on

Walter Hallstein-Institute

**“International Investment Agreements
and the Ukrainian Legal and
Administrative System –
Meeting the International Standards of
Treatment of Foreign Investment”**

Chair of Public, International, and
European Law
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at

The National Academy of Sciences of Ukraine
Kiev University of Law

February 2010

Handout

A. Introduction

In recent years, direct expropriation has rarely been seen. States which wish to import capital do not like to be associated with posing a permanent, non-calculable threat to foreign-owned property but prefer to present themselves as jurisdictions with very stable, reliable and orderly regulatory environments. Expropriation, however, has by no means vanished; its execution has just become more subtle. Ambiguously or generously worded laws are ‘interpreted’ in a way that suits certain groups in the government or are only enforced when it suits a particular interest; administrative discretion is influenced by factors unrelated to the matter at issue, or administrations fail to conduct their processes in a transparent and comprehensible way. All these measures, turned against a foreign investor, can easily drive him out of business.

Virtually all bilateral investment treaties (BITs) and multilateral investment agreements (MIAs), therefore, reflect this development and also cover acts of State which may expropriate “indirectly through measures tantamount to expropriation or nationalisation” (indirect expropriation). Moreover, many international investment agreements (IIAs) not only provide rules on (indirect) expropriation but also establish treatment standards “which refer to the legal regime that applies to investments once they have been admitted by the host State.”

Administrative malfeasance, misfeasance and nonfeasance may also affect the investment adversely without amounting to “indirect expropriation”, constituting a less intense interference with the property. Indeed, there are arbitral awards which, while not accepting a claim based on “indirect expropriation”, established a compensable violation of “treatment standards”, i.e. in particular the “fair and equitable treatment” embodied in BITs or MITs.

B. Suggested Class Run

After a brief introduction to the law on foreign investment, my lecture will look at six typically posed challenges¹ to foreign investment posed by administrative acts, focusing on the issues of discrimination, mala fide and lack of transparency (see below C.), and I will discuss the response of public international rules applicable to the situation of indirect expropriation. I will do so by focusing on the legal remedies available under BITs.

Subsequently, I hope to learn more about the response of the Ukrainian legal and administrative system to the challenges posed to the foreign investor as described in the six hypothetical scenarios (below C.). The question that Ukrainian scholars and students would need to address is the following: Which *effective* legal remedies would be available to the foreign investor under Ukrainian law in each of the six given scenarios?

In a further step – together – we will evaluate whether the Ukrainian legal order can respond to the challenges described by the scenarios through striking a just balance between legitimate business interests of the foreign investor and the State’s sovereign right to regulate or whether it is the public international law on foreign investment (esp. BITs) which offers the more sophisticated framework for a balanced settlement of a foreign investment dispute.

C. Hypothetical Scenarios

I. State Measures Which Are Lawful by National Standards

First Scenario: A State Measure which Is Lawful by National Standards but Discriminatory

Under a hypothetical law of the country Utopia raw materials and subsoil resources are the property of the State. However, Utopian law provides for the right of a third party to acquire such assets. A mining licence is the legal instrument which is used to acquire title to a good that is being extracted from underground.

Due to its importance and special nature, a mining licence is typically acquired through a tender. One of the major criteria for decision under the tender regime is the minimal amount to be extracted (“Minimal Amount”) for the purpose of ensuring the efficient use of subsoil resources.

However, in many cases, the Minimal Amounts are not matched in practice. Also, formal violations of law reportedly take place frequently; that is, there are minor procedural deviations from the way the licence is to be issued, for instance the signatures on the licence are not being made on the document as anticipated by legislation.

In the first scenario, a number of investors receive a mining licence. The mining licence of one of these investors is withdrawn because of noncompliance with the terms of the licence (Minimum Amounts) and due to formal violations of the rules on licence issuance at the time of the granting of the licence. As a consequence of the withdrawal, he goes bankrupt. Under similar conditions, other investors’ licences remain intact.

¹ Those scenarios are taken from Gutbrod / Hindelang / Kim, *Protection against Indirect Expropriation under National and International Legal Systems*, GoJIL 1 (2009) 2, 291-327

Second Scenario: A State Measure which Is Lawful by National Standards but Discriminatory and Accompanied with *Mala Fide*

In the second scenario, the mining licence is defective as in scenario 1. The Utopian government does not want to withdraw the mining licence because it fears negative consequences for the country's reputation as a location for investment. It therefore suddenly, without giving any prior notice, starts enforcing a certain tax rule or changes the interpretation of a certain tax rule in general, knowing, however, that this change in administrative practice hits only a certain investor or even intending to hit a certain investor. As a consequence, one foreign company goes bankrupt.

Third Scenario: Investor Contributing to Bankruptcy

An investor holds a legally valid mining licence. The government starts enforcing a certain tax rule or changes the interpretation of a certain tax rule in general, with the stated aim to test the ability of companies to pay taxes. As the investor is afraid that his company will not survive, he withdraws money from the company. As a consequence, the company goes bankrupt.

Fourth Scenario: *Mala Fide*, Investor Acting Unlawfully

An investor holds a legally valid mining licence. He has used money in an unlawful manner, including by bribing officials, to ensure that taxation of revenues derived from the mining licence is not fully enforced against his business. Nevertheless, certain taxation rules are suddenly generally enforced, leading to the bankruptcy of the investor, which had been the ultimate intention of the State.

II. State Action which Is Unlawful by National Standards

Fifth Scenario: Unlawful State Action against the Management, Management Personally Involved in Crimes

In the fifth scenario, a foreign investor runs his business venture in a legal manner. However, the management is personally involved in crimes. The investor is imprisoned, however not for the personal crime that he has allegedly committed, but for a completely unrelated tax matter. The ultimate intention of the government is to hit the business. As a consequence of the management being imprisoned, banks withdraw their loans and, as a consequence of that, the business goes bankrupt.

Sixth Scenario: Illegality "All Around"

The foreign investor uses its company for financing a political campaign against taxation of oil proceeds in order to create a favourable business environment, including gaining significant influence on the Utopian State's legislature and administration for its company. The campaign, however, is partially illegal under the laws of the host country. Also, the investor is involved in murder and in bribing officials responsible for the prosecution of the murders in order to secure its favourable business environment. As a consequence, the foreign investor gains significant influence on the process of forming the host State's will. The State takes action illegal under the State's law against the company and the investor with a view to stop these activities. These activities comprise the engineering of arbitrary and unfounded tax claims, the arbitrary and non-proportionate seizure of production facilities, the arbitrary freezing of funds, the harassment of the management, non-transparent investigations and a public auction which from the beginning is anything but open to

bidders other than the pre-chosen winner. All these activities are conducted with the view to drive the company out of the business (total loss), at which the State ultimately succeeded.

D. Addenda

- Ukraine – The Netherlands BIT
- Ukraine – Denmark BIT

E. Miscellaneous

- http://www.unctadxi.org/templates/Startpage_718.aspx
 - http://www.oecd.org/departement/0,3355,en_2649_34863_1_1_1_1_1,00.html
 - <http://ita.law.uvic.ca/>
 - <http://www.sdgateway.net/default.htm>
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Agreement on promotion and reciprocal protection of investments between the Kingdom of the Netherlands and Ukraine

The Government of the Kingdom of the Netherlands
and
the Government of Ukraine,

(hereinafter referred to as "the Contracting Parties")

Desiring to strengthen the traditional ties of friendship between their countries, to extend and intensify the economic relations between them particularly with respect to investments by the nationals of one Contracting Party in the territory of the other Contracting Party,

Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment of investment on reciprocal basis will serve this aim,

Have agreed as follows:

Article 1

For the purposes of the present Agreement:

- (a) the term 'investments' shall comprise every kind of asset and more particularly, though not exclusively:
- i. movable and immovable property as well as any other rights in rem in respect of every kind of asset;
 - ii. rights derived from shares, bonds and other kinds of interests in companies and joint ventures;
 - iii. claim to money, to other assets or to any performance having an economic value;
 - iv. rights in the field of industrial and intellectual property, such as copyrights, patents, industrial design or models, trade or service marks, trade names, technical processes, goodwill and know-how and any other similar rights;
 - v. rights granted under public law, including rights to prospect, explore, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of competent authorities in accordance with the law.

(b) the term 'nationals' shall comprise with regard to either Contracting Party:

- i. natural persons having the nationality of that Contracting Party;
- ii. legal persons constituted under the law of that Contracting Party;
- iii. legal persons not constituted under the law of that Contracting

Party but controlled by natural persons as defined in i. or by legal persons as defined in ii. above.

(c) 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 of jurisdiction.

Article 2

Either Contracting Party shall, within the framework of its laws and regulations, promote economic cooperation through the protection in its territory of investments of nationals of the other Contracting Party. Subject to its right to exercise powers conferred by its laws of regulations, each Contracting Party shall admit such investments.

Article 3

- 1) Each Contracting Party shall in its territory accord to investments of nationals of the other Contracting Party treatment which is not less favourable than that which it accords to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the nationals concerned.
- 2) Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord to such investments full physical security and protection.
- 3) If a Contracting Party has accorded special advantages to nationals of any third State by virtue of agreements establishing customs unions, economic unions, monetary unions or similar institutions, or on the basis of interim agreements leading to such unions or institutions, that Contracting party shall not be obliged to accord such

advantages to nationals of the other Contracting Party.

- 4) Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party.
- 5) If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement, contain a regulation, whether general or specific, entitling investments by nationals of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such regulation shall to the extent that it is more favourable prevail over the present Agreement.

Article 4

With respect to taxes, fees, charges and to fiscal deductions and exemptions, each Contracting Party shall accord to nationals of the other Contracting Party who are engaged in any economic activity in its territory, connected with an investment, treatment not less favourable than that accorded in the same circumstances to its own nationals or to those of any third State, whichever is more favourable to the nationals concerned. For this purpose, however, there shall not be taken into account any special fiscal advantages accorded by that Party:

- (a) under an agreement for the avoidance of double taxation; or
- (b) by virtue of its participation in a customs union, economic union, free trade area or similar institution; or
- (c) on the basis of reciprocity with a third State.

Article 5

The Contracting Parties shall guarantee that payments relating to an investment may be transferred. The transfers shall be made in a freely convertible currency, without undue restriction or delay. Such transfers include in particular though not exclusively:

- (a) profits, interest, dividends and other current income;
- (b) funds necessary
 - i. for the acquisition of raw or auxiliary materials, semi-fabricated or finished products, or
 - ii. to replace capital assets in order to safeguard the continuity of an investment;

- (c) additional funds necessary for the development of an investment;
- (d) funds in repayment of loans;
- (e) royalties or fees;
- (f) earnings of natural persons;
- (g) the proceeds of sale or partial or total liquidation of the investment.

Article 6

Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments unless the following conditions are complied with:

- (a) the measures are taken in the public interest and under due process of law;
- (b) the measures are not discriminatory or contrary to any undertaking which the Contracting Party which takes such measures may have given;
- (c) the measures are taken against just compensation. Such compensation shall represent the fair market value of the investments affected at the time immediately before the measures became known in such a way as to affect the value of the investment, shall include interest at a commercial rate established on a market basis from the date the measures were taken until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.

Article 7

Nationals of the one Contracting Party who suffer losses in respect of their investments in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which that Contracting

Party accords to its own nationals or to nationals of any third State, whichever is more favourable to the nationals concerned.

Article 8

If the investments of a national of the one Contracting Party are insured against non-commercial risks under a system established by law, regulation or government contract, any subrogation of the insurer or re-insurer to the rights of the said national pursuant to the terms of such insurance shall be recognized by the other Contracting Party.

Article 9

- 1) Any dispute between either Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Party shall as far as possible be settled by the parties to the dispute in amicable way.
- 2) If such disputes cannot be settled within a period of three months from the date at which either party to the dispute requested amicable settlement, the dispute shall at the request of the national concerned be submitted to an arbitral tribunal.
- 3) In case both Contracting Parties have become members of the Convention on the settlement of investment disputes between States and Nationals of other States of 18 March 1965, disputes between either Contracting Party and a national of the other Contracting Party under the first paragraph of the present Article shall be submitted for settlement by conciliation or arbitration to the International Centre for Settlement of Investment Disputes.
- 4) In case the Contracting Party concerned is not or has not yet become a Contracting State of the Convention referred to in paragraph 3, the dispute may, at the choice of the national concerned, be referred either to:
 - (a) the International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in paragraph 3 under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility Rules): or
 - (b) an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law. The parties to the dispute may agree in writing to modify these Rules. The awards of arbitration shall be final

and binding and shall be enforced in accordance with domestic law.

- 5) A legal person which has the nationality of one Contracting Party and which before such a dispute arises is controlled by nationals of another Contracting Party shall for the purpose of Article 25 (2)(b) of the Convention referred to in paragraph 3 above be treated as a national of that other Contracting Party.
- 6) Each Contracting Party hereby gives its unconditional consent to the submission of disputes to international arbitration in accordance with the provisions of this Article.
- 7) Nothing in this Article impairs the right of parties to a dispute to settle amicably at any time the dispute between them.

Article 10

The provisions of this Agreement shall, from the date of entry into force thereof, also apply to investments, which have been made before that date.

Article 11

Either Contracting Party may propose to the other Party that consultations be held on any matter concerning the interpretation or application of the Agreement. The other party shall accord sympathetic consideration to the proposal and shall afford adequate opportunity for such consultations.

Article 12

- 1) Any dispute between the Contracting Parties concerning the interpretation or application of the present Agreement, which cannot be settled within a reasonable lapse of time by means of diplomatic negotiations, shall, unless the Parties have otherwise agreed, be submitted, at the request of either Party, to an arbitral tribunal, composed of three members. Each Party shall appoint one arbitrator and the two arbitrators thus appointed shall together appoint a third arbitrator as their chairman who is not a national of either Party.
- 2) If one of the Parties fails to appoint its arbitrator and has not proceeded to do so within two months after an invitation from the other Party to make such appointment, the latter Party may invite the President of the International Court of Justice to make

the necessary appointment.

- 3) If the two arbitrators are unable to reach agreement, in the two months following their appointment, on the choice of the third arbitrator, either Party may invite the President of the International Court of Justice to make the necessary appointment.
- 4) If, in the cases provided for in the paragraphs 2 and 3 of this Article, the President of the International Court of Justice is prevented from discharging the said function or is a national of either Contracting Party, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is prevented from discharging the said function or is a national of either party the most senior member of the Court available who is not a national of either party shall be invited to make the necessary appointments.
- 5) the tribunal shall decide on the basis of this Agreement and other relevant agreements between the two Contracting Parties, rules of international law and relevant rules of domestic law. Before the tribunal decides, it may at any stage of the proceedings propose to the Parties that the dispute be settled amicably. The foregoing provisions shall not prejudice the power of the tribunal to decide the dispute ex aequo et bono if the Parties so agree.
- 6) Unless the Parties decide otherwise, the tribunal shall determine its own procedure.
- 7) The tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding on the Parties.
- 8) Each Contracting Party shall bear the costs of the member appointed by that Contracting Party. The costs of the chairman as well as any other costs shall be borne in equal parts by the two Contracting Parties.

Article 13

As regards the Kingdom of the Netherlands, the present Agreement shall apply to the part of the Kingdom in Europe, to the Netherlands Antilles and to Aruba, unless the notification provided for in Article 14, paragraph 1 provides otherwise.

Article 14

- 1) The present 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 procedures constitutionally or legally required therefor in their respective countries have been complied with, and shall remain in force for a period of fifteen years.

- 2) Unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present Agreement shall be extended tacitly for periods of ten years, each Contracting Party reserving the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity.
- 3) In respect of investments made before the date of the termination of the present Agreement the foregoing Articles thereof shall continue to be effective for a further period of fifteen years from that date.
- 4) Subject to the period mentioned in paragraph 2 of this Article, the Government of the Kingdom of the Netherlands shall be entitled to terminate the application of the present Agreement separately in respect of any of the parts of the Kingdom.

IN WITNESS WHEREOF, the undersigned representatives, duly authorized thereto, have signed the present Agreement.

DONE in duplicate at [place] on [date], in the Netherlands, Ukrainian and English languages, the three texts being equally authentic. In case of difference of interpretation the English text will prevail.

For the Government of the
Kingdom of the Netherlands

For the Government of
Ukraine

Protocol to the Agreement between the Kingdom of the Netherlands and Ukraine on Promotion and Reciprocal Protection of Investments

On the signing of the Agreement between the Kingdom of the Netherlands and Ukraine on promotion and reciprocal protection of investments, the undersigned representatives have agreed on the following provision, which constitutes an integral part of the Agreement:

It is understood that, under Article 2, special conditions may apply according to Ukrainian legislation concerning the acquisition of property rights connected with privatization, concessions and the purchase of land.

For the Government of the
Kingdom of the Netherlands

For the Government of
Ukraine

Bestandsnaam: SCAN_Oekraine.doc
Map: C:\TEMP
Sjabloon: C:\program files\microsoft office\sjablonen\Normal.dot
Titel: 181 2
Onderwerp:
Auteur: JNieuwenhuysen
Trefwoorden:
Opmerkingen:
Aanmaakdatum: 05-10-00 16:03
Wijzigingsnummer: 6
Laatst opgeslagen op: 17-10-00 12:23
Laatst opgeslagen door: FNascivera
Totale bewerkingstijd: 44 minuten
Laatst afgedrukt op: 31-10-00 13:31
Vanaf laatste volledige afdruk
Aantal pagina's: 9
Aantal woorden: 2.327 (ong.)
Aantal tekens: 13.268 (ong.)

A g r e e m e n t

between the Government of Ukraine and the Government of the Kingdom of Denmark concerning the Promotion and Reciprocal Protection of Investments.

Preamble

The Government of Ukraine and the Government of the Kingdom of Denmark hereinafter referred to as the Contracting Parties,

DESIRING to create favourable conditions for investments in both States and to intensify the co-operation between private enterprises in both States with a view to stimulating the productive use of resources,

RECOGNIZING that a fair and equitable treatment of investments on a reciprocal basis will serve this aim,

HAVE AGREED as follows:

Article 1

Definitions

For the purpose of this Agreement,

(1) The term "investment" shall mean every kind of asset connected with economic activities acquired for the purpose of establishing lasting economic relations between an investor and an enterprise irrespective of the legal form including joint ventures and including any share of the capital to which investors are entitled as well as any capital appreciation and in particular, but not exclusively:

(i) shares, parts or any other form of participation in companies incorporated in the territory of one Contracting Party,

(ii) returns reinvested, claims to money or other rights relating to services having a financial value,

(iii) movable and immovable property, as well as any other rights as mortgages, privileges, guarantees and any other similar rights as defined in conformity with the law of the Contracting Party in the territory of which the property in question is situated,

(iv) industrial and intellectual property rights, technology, trademarks, goodwill, know-how and any other similar rights,

(v) business concessions conferred by law or by contract, including the concessions related to natural resources.

(vi) goods that under a leasing agreement, in relation to an investment under this agreement, are placed at the disposal of a lessee in the territory of one Contracting Party in conformity with its laws and regulations shall be treated not less favorable than an investment.

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

Such amounts, and in case of reinvestment amounts yielded from the reinvestment, shall be given the same protection as the investment.

(3) The term "investor" shall mean with regard to either Contracting Party.

(a) Natural persons having status as citizens of Ukraine and nationals of the Kingdom of Denmark according to their laws.

(b) Any entity established in accordance with, and recognized as a legal person by the law of that Contracting Party, such as corporations, firms, associations, development finance institutions, foundations or any similar organisation having the right to conduct economic activity in accordance with the laws of the Contracting Parties irrespective of whether their liabilities are limited and whether or not their activities are directed at profit.

(4) 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. Subject to Article 14 the present Agreement shall not apply to the Faroe Islands and Greenland.

(5) The term "without delay" shall be deemed to be fulfilled if a transfer is made within such period as is normally required by international financial custom and not later, in any case, than three months.

Article 2

Promotion of Investment

Each Contracting Party shall admit the investment by investors of the other Contracting Party in accordance with its legislation and administrative practice, and promote such investments as far as possible including facilitating the establishments of representative offices.

Article 3

Protection of Investment

(1) 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.

Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

(2) Neither Contracting Party shall in its territory subject investments made by investors of the other Contracting Party or returns of such investments to treatment less favourable than that which it accords to investments or returns of its own investors or any third State (whichever of these standards is more favourable from the point of view of the investor).

(3) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investment or returns, to treatment less favourable than that which it accords to its own investors or to investors of any third State (whichever of these standards is the more favourable from the point of view of the investor).

Article 4

Exceptions

(1) The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the investors of either Contracting Party or of any third State shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from:

(a) any existing or future customs union, regional economic organisations, or similar international agreement to which either of the Contracting Parties is or may become a party, or

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

(c) local incentives to promote trade with the neighbouring countries of Ukraine.

(2) The principle of national treatment referred to in section 2 and 3 of Article 3 is without prejudice to the special conditions which according to Ukrainian legislation apply to foreign investors concerning the acquisition of property rights connected with privatisation, concessions and the purchase of land.

(3) The provisions of article 7, section 1 of this Agreement shall be without prejudice to the right of each Contracting Party to take protective measures in respect of capital movements provided such measures are taken in accordance with multilateral agreements to which either of the Contracting Parties is or may become a party.

Article 5

Expropriation and Compensation

Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of the expropriating Party, on a basis of non-discrimination and against prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge, shall be made without delay and shall include interest at LIBOR until the date of payment, be effectively realisable in convertible currency and be freely transferable. There shall be legal provision giving an investor concerned a right to prompt review of the legality of the measure taken against the investment and of their valuation in accordance with the principles set out in this paragraph by due process of law in the territory of the Contracting Party making the expropriation.

Article 6

Compensation for Losses

Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection, riot in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State (whichever of these standards is the more favourable from the point of view of the investor). Payments resulting from any provision in this Article shall be freely transferable, made without delay and shall include interest at LIBOR until the day of payment and be effectively realisable in convertible currency.

Article 7

Repatriation and Transfer of Capital and Returns

(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 of investments,
- (b) amounts relating to loans incurred, or other contractual obligations undertaken, for the investment,
- (c) additional contribution of capital necessary for the maintenance or the development of the investment,
- (d) the invested capital or the proceeds, including possible capital appreciations, arising from the sale of the partial or total liquidation of the investment.
- (e) the earnings of the expatriates who are allowed to work in an investment made in the territory of the other Contracting Party.

(2) Transfers of currency pursuant to Article 5, 6 and section (1) of this Article shall be made in the convertible currency in which the investment has been made or in any convertible currency if so agreed by the investor, at the rate of exchange in force at the date of transfer.

Article 8

Subrogation

If one Contracting Party or its designated agency makes payment to its own investors 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:

(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 to 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 and shall assume the obligations related to the investment.

Article 9

Disputes between a Contracting Party and an Investor

(1) Any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment on the territory of that other Contracting Party shall be subject to negotiations between the parties in dispute.

(2) If any dispute between an investor of one Contracting Party and the other Contracting Party continues to exist after a period of three months, investor shall be entitled to submit the case either to:

(a) the International Centre for Settlement of Investment Disputes having regard to the applicable provisions 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, or in case one of the Contracting Parties has not become party to this Convention,

(b) an arbitrator or international ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law. The parties to the dispute may agree in writing

to modify these Rules. The arbitral awards shall be final and binding on both Parties to the dispute.

(3) Nothing in this article impairs the right of any party to a dispute to agree at any time to settle a dispute between them by amicable means of their choice.

Article 10

Disputes between the Contracting Parties

(1) Disputes between the Contracting Parties concerning the interpretation and application of this Agreement should, as far as possible, be settled through negotiations between the Contracting Parties.

(2) If such a dispute cannot be settled within three months from the beginning of negotiation, it shall upon the request of either Contracting Party, be submitted to an arbitral tribunal.

(3) Such an arbitral tribunal shall be constituted for each individual case in the following way:
Within three months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State, who on approval by the 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 any of the periods specified the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make the necessary appointments. If the President is 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 necessary appointments. If the Vice-President is a national of either Contracting Party or if he, too, 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 necessary appointments.

(5) The arbitral tribunal shall apply the provisions of this Agreement, other Agreements concluded between

the Contracting Parties, and the procedural standards called for by international law. It shall reach its decision by a majority of votes. Such decision shall be final and binding on both Contracting Parties. The arbitral tribunal determines its own procedure.

(6) Each Contracting Party shall bear the cost of its own member of the tribunal and of its representation in the arbitral proceedings. The cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The tribunal may however in its decision provide that a higher proportion of the costs shall be borne by one of the two contracting parties. This decision shall be binding on both Contracting Parties.

Article 11

Amendments

At the time of entry into force of this Agreement or at any time thereafter the provisions of this Agreement may be amended in such manner as may be agreed between the Contracting Parties. Such amendments shall enter into force when the Contracting Parties have notified each other through diplomatic channels that the legal requirement for the entry into force have been fulfilled.

Article 12

Consultations

Either Contracting Party may propose the other Party to consult on any matter affecting the application of the present Agreement. These consultations shall be held on the proposal of one of the Contracting Parties at a place and at a time agreed upon through diplomatic channels.

Article 13

Applicability of this Agreement

(1) The provisions of this Agreement shall apply to investments made by investors of one Contracting Party in the territory of the other Contracting Party after entry into force of this Agreement.

(2) The present Agreement shall also apply to investments in the territory of a Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party prior to the entry into force of this Agreement.

Article 14

Territorial Extension

At the time of entry into force of this Agreement, or at any time thereafter, the provisions of this Agreement may be extended to the Faroe Islands and Greenland as may be agreed between the Contracting Parties in an Exchange of Notes.

Article 15

Entry into Force

This Agreement shall enter into force thirty days after the date on which the Governments of the Contracting Parties have notified each other through diplomatic channels that the legal requirements for the entry into force of this Agreement have been fulfilled.

Article 16

Duration and Termination

(1) This Agreement shall remain in force for a period of ten years and shall continue in force thereafter unless, after the expiry of the initial period of ten years, either Contracting Party notifies in writing the other Contracting Party of its intention to terminate this Agreement. The notice of termination shall become effective one year after it has been received by the other Contracting Party.

(2) In respect of investments made prior to the date when the notice of termination of this Agreement becomes effective, the provisions of Articles 1 to 10 shall remain in force for a further period of ten years from that date.

In witness whereof the undersigned, duly authorized thereto by their respective Governments, have signed this Agreement.

Done in duplicate at Kiev on October 23, 1992 in the Danish, Ukrainian and English languages, all texts being equally authentic.

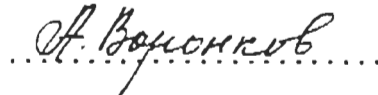
In the case of divergence of interpretation, the English text shall prevail.

For the Government
of the Kingdom of Denmark



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For the Government
of Ukraine



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