

[TRANSLATION — TRADUCTION]

**AGREEMENT¹ BETWEEN THE REPUBLIC OF AUSTRIA AND
UKRAINE FOR THE PROMOTION AND RECIPROCAL PROTEC-
TION OF INVESTMENTS**

The Republic of Austria and Ukraine, hereinafter referred to as “the Contracting Parties”,

Desiring to create favourable conditions for broader economic cooperation between the Contracting Parties,

Recognizing that the promotion and reciprocal protection of investments can enhance the willingness to undertake such investments and thereby make an important contribution to the development of economic relations between the Contracting Parties,

Have agreed as follows:

Article 1

DEFINITIONS

For the purposes of this Agreement:

1. The term “investment” means every kind of asset invested in connection with the economic activity of investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Contracting Party and, in particular but not exclusively:

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

(b) Shares and any other types of participation in companies;

(c) Claims to money which has been given in order to create an economic value, or claims to any performance having an economic value;

(d) Intellectual and industrial property rights, in particular but not exclusively: copyrights, trade marks, patents for inventions, industrial designs and models, technical processes, know-how, trade secrets, trade names and goodwill;

(e) Business concessions under public law to search for or extract natural resources.

2. The term “investor” means:

(a) Any natural person who is a national of either Contracting Party and makes an investment in the territory of the other Contracting Party;

(b) Any juridical person, company or commercial partnership constituted in accordance with the laws and regulations of either Contracting Party, having its seat

¹ Came into force on 1 December 1997 by the exchange of the instruments of ratification, which took place at Kiev, in accordance with article 12.

in the territory of one Contracting Party and making an investment in the territory of the other Contracting Party;

(c) Any juridical person or commercial partnership constituted in accordance with the laws and regulations of one Contracting Party or a third State and over which an investor referred to in subparagraphs (a) or (b) exercises decisive direct control.

3. The term “returns” means the amounts yielded by an investment, including, in particular but not exclusively, profits, interest, capital gains, dividends, royalties, licence and other similar fees.

4. The term “expropriation” also comprises nationalization or any other measure taken by one Contracting Party having equivalent effects with respect to investments of an investor of the other Contracting Party.

5. The term “territory” means the State territory of each of the Contracting Parties.

6. “Without undue delay” means the time period generally required for the completion of the necessary formalities with respect to transfer payments. This period shall begin on the date of submission of the request for the transfer payment and shall not exceed one month.

Article 2

PROMOTION AND PROTECTION OF INVESTMENTS

1. Each Contracting Party shall in its territory promote, as far as possible, investments of investors of the other Contracting Party, admit such investments in accordance with its legislation and in each case accord such investments fair and equitable treatment.

2. Investments admitted in accordance with article 1, paragraph 1, and their returns shall enjoy the full protection of this Agreement. The same shall apply without prejudice to the provisions of paragraph 1 also for their returns in the case of reinvestment of such returns. Any change in the form in which assets are invested or reinvested, including the legal extension, alteration or transformation of investments made in accordance with the laws of the relevant Contracting Party shall not impair their legal status as investments.

Article 3

TREATMENT OF INVESTMENTS

1. Each Contracting Party shall accord to investors of the other Contracting Party and their investments treatment no less favourable than that which it accords to its own investors and their investments or to investors of third States and their investments.

2. The provisions of paragraph 1 of this article shall not be construed as obliging one Contracting Party to extend to investors of the other Contracting Party and their investments the present or future benefit of any treatment, preference or privilege resulting from:

- (a) Any custom union, common market, free-trade area or membership in an economic community;
- (b) Any international agreement, international arrangement or domestic legislation regarding taxation;
- (c) Any regulation to facilitate border traffic.

Article 4

COMPENSATION FOR EXPROPRIATION

1. Investments of investors of either Contracting Party shall not be expropriated in the territory of the other Contracting Party except for a purpose which is in the public interest, by due process of law and against the payment of adequate compensation.

2. Such compensation shall amount to the real value of the investment expropriated immediately before or at the time when the decision concerning expropriation was announced or became public knowledge, whichever is the earlier. The market value shall be determined in accordance with internationally recognized practice, taking into consideration, *inter alia*, the invested capital, its repurchase value, appreciation, current return, goodwill and other important factors. If payment of compensation is delayed, compensation shall be paid in an amount which does not make the position of the investor less favourable than that which he would have been in had compensation been paid at the time of expropriation. Compensation shall include interest at the customary market rate, which shall in any case not be less than the current LIBOR rate or an equivalent rate, from the moment of expropriation until the date of payment. The amount of compensation finally determined shall be paid to the investor immediately in freely convertible currency and shall be freely transferable without delay. Provisions concerning the determination and payment of compensation shall be made in an appropriate manner no later than at the moment of expropriation.

3. Where one Contracting Party expropriates the assets of a company which is considered as its own company pursuant to article 1, paragraph 2, of this Agreement and in which an investor of the other Contracting Party owns shares, it shall apply the provisions of paragraph 1 so as to ensure that such an investor receives appropriate compensation.

4. The investor shall have the right to have the legality of the expropriation reviewed by the competent authorities of the Contracting Party which made the expropriation.

5. The investor shall have the right to have the amount of compensation and the arrangements for payment reviewed either by the competent authorities of the Contracting Party which made the expropriation or by an international arbitral tribunal in accordance with article 9 of this Agreement.

Article 5

COMPENSATION FOR DAMAGE OR LOSSES

1. Investors of one Contracting Party whose investments suffer damage or losses owing to war or any other armed conflict, a state of national emergency, a

revolt, civil unrest or insurrection, or to disturbances or similar events in the territory of the other Contracting Party shall be accorded 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 third States, whichever treatment is more favourable for the investor affected by the aforementioned events.

2. Notwithstanding the provisions of paragraph 1 of this article, investors of one Contracting Party who, owing to events enumerated in this article, suffer damage or losses in the territory of the other Contracting Party as a result of:

(a) Seizure of all or part of their property by the armed forces or the authorities of the latter Contracting Party; or

(b) Destruction of all or part of their property by the armed forces or the authorities of the latter Contracting Party,

which were not caused by hostilities or necessitated by the emergency situation, shall have the right to the immediate restitution or, if necessary, prompt, adequate and effective compensation for damage or loss. Payments in respect of such damage or losses shall be freely convertible and freely transferable without undue delay.

Article 6

TRANSFER

1. Each Contracting Party shall guarantee without undue delay to investors of the other Contracting Party the free transfer in freely convertible currency of payments in connection with an investment, in particular but not exclusively, of:

(a) Capital and additional amounts for the maintenance or extension of the investment;

(b) Amounts assigned to cover expenses relating to the management of the investments;

(c) Returns;

(d) Repayment of loans;

(e) Proceeds from the total or partial liquidation or sale of an investment;

(f) Compensation in accordance with articles 4 or 5 of this Agreement;

(g) Payments resulting from the settlement of disputes.

2. The payments referred to in this article shall be made at the exchange rates prevailing on the date of the transfer in the territory of the Contracting Party from which the transfer is made.

3. The rates of exchange shall be determined on the basis of the market exchange rates applicable in the territory of each Contracting Party or established by the respective banking system in the territory of each of the Contracting Parties. The bank charges shall be fair and equitable.

Article 7

SUBROGATION

Where one Contracting Party or an institution authorized by it makes payments to its investor by virtue of a guarantee for an investment in the territory of the other Contracting Party, the other Contracting Party shall, without prejudice to the rights of the investor of the first Contracting Party under article 9 of this Agreement, recognize the assignment to the first Contracting Party of all rights and claims of this investor by law or pursuant to an appropriate agreement. The latter Contracting Party shall also recognize the subrogation of the former Contracting Party to any such rights or claims which that Contracting Party shall be entitled to assert to the same extent as its predecessor in title. As regards the transfer of payments to the Contracting Party concerned by virtue of the acquired rights, articles 4, 5 and 6 of this Agreement shall apply *mutatis mutandis*.

Article 8

OTHER OBLIGATIONS

1. If the provisions of law of either Contracting Party or international obligations existing at present or established hereafter between the Contracting Parties in addition to this Agreement contain a rule, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such rule shall to the extent that it is more favourable prevail over this Agreement.
2. Each Contracting Party shall observe any contractual obligations which it may have assumed with respect to an investor of the other Contracting Party regarding investments approved by it in its territory.

Article 9

SETTLEMENT OF INVESTMENT DISPUTES

1. Any dispute between a Contracting Party and an investor of the other Contracting Party in relation to an investment shall, as far as possible, be settled through negotiations between the parties to the dispute.
2. If a dispute according to paragraph 1 cannot be settled within three months of the receipt of a written notification of a sufficiently detailed claim, the dispute shall, at the request of the Contracting Party or of the investor of the other Contracting Party, be subject to the following procedures:
 - (a) Conciliation or arbitration by the International Center for Settlement of Investment Disputes, established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington on 18 March 1965. In the case of arbitration, each Contracting Party, in accordance with this Agreement, irrevocably consents in advance, even in the absence of an individual arbitral agreement between the Contracting Party and the investor, to submit any such disputes to the Center and to accept the award as binding. Such consent implies renunciation of the requirement that the internal administrative or juridical resorts should be exhausted; or

(b) Arbitration by three arbitrators in accordance with the Arbitration Rules of the United Nations International Commission on Trade Law as amended by the most recent amendment accepted by the two Contracting Parties at the time of the request to initiate arbitral proceedings. In the case of arbitration, each Contracting Party irrevocably consents in advance, even in the absence of an individual arbitral agreement between the Contracting Party and the investor, to submit any such disputes to the aforementioned arbitral proceedings and to accept the award as binding.

3. The award in accordance with subparagraphs 2 (a) or 2 (b) shall be final and binding; it shall be executed according to national law. Each Contracting Party shall ensure the recognition and enforcement of the arbitral award in accordance with its relevant laws and regulations.

4. A Contracting Party which is a party to a dispute shall not, at any stage of the conciliation or arbitral proceedings or enforcement of an award, raise the objection that the investor who is the other party to the dispute has received in accordance with a guarantee indemnity in respect of some or all of his losses.

Article 10

DISPUTES BETWEEN CONTRACTING PARTIES

1. Disputes between the Contracting Parties concerning the interpretation or application of this Agreement shall, as far as possible, be settled through negotiations.

2. If a dispute according to paragraph 1 cannot be settled within three months it shall, at the request of either Contracting Party, be submitted to an arbitral tribunal.

3. Such arbitral tribunal shall be constituted on an *ad hoc* basis in the following way: each Contracting Party shall appoint one member and those two members shall agree on a national of a third State as their chairman. Such member shall be appointed within two months from the date on which one Contracting Party notifies the other that it intends to submit the dispute to an arbitral tribunal. The chairman shall be appointed within the following two months.

4. If the periods specified in paragraph 3 have not been observed, either Contracting Party may, in the absence of any other arrangement, invite the President of the International Court of Justice to make the necessary appointments. If the President of the International Court of Justice is a national of either Contracting Party, or if he is otherwise prevented from discharging the said function, the Vice-President, or in the case of his inability, the member of the International Court of Justice next in seniority shall be invited under the same conditions to make the necessary appointments.

5. The arbitral tribunal shall establish its own rules of procedure.

6. The arbitral tribunal shall reach its decision on the basis of this Agreement and pursuant to the generally recognized rules of international law. It shall reach its decision by a majority of votes; the decision shall be final and binding.

7. Each Contracting Party shall bear the costs of its own member and of its legal representation in the arbitral proceedings. The costs of the chairman and the remaining costs shall be borne in equal parts by the two Contracting Parties. The tribunal may, however, in its decision determine another distribution of costs.

Article 11

APPLICATION OF THE AGREEMENT

1. This Agreement shall apply to investments made or which will be made by investors of one Contracting Party in the territory of the other Contracting Party in accordance with its laws and regulations both before and after the entry into force of this Agreement.

2. The provisions of this Agreement which contradict future legislation of the European Union shall not be applied.

3. If necessary, the Contracting Parties may hold consultations on the questions referred to in paragraph 2 of this article.

Article 12

ENTRY INTO FORCE AND DURATION

1. This Agreement is subject to ratification and shall enter into force on the first day of the third month following the month in which the instruments of ratification are exchanged.

2. This Agreement shall remain in force for a period of 10 years. It shall be extended thereafter for an indefinite period and may be terminated by either Contracting Party by written notification through the diplomatic channel 12 months prior to the expiry of the Agreement.

3. In the case of investments made prior to the date of termination of this Agreement, the provisions of articles 1 to 10 of this Agreement shall remain in force for a further period of 10 years.

DONE at Graz on 8 November 1996 in duplicate, each in the German and Ukrainian languages, both texts being equally authentic.

For the Republic
of Austria:

SCHÜSSEL

For Ukraine:

UDOVENKO
