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The United States-Ukraine Minerals Deal and MFN Clauses in Ukrainian Investment Treaties

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On 30 April 2025, the United States and Ukraine signed the long-awaited Agreement between the Government of Ukraine and the Government of the United States of America on the Establishment of a United States-Ukraine Reconstruction Investment Fund ("Minerals Deal"). The Minerals Deal, which, according to the Ukrainian government, will promote substantial investments in Ukraine, was approved by the Ukrainian parliament on 8 May 2025, paving the way for the formal constitution of the United States-Ukraine Reconstruction Investment Fund ("Fund").

But while the Minerals Deal has been celebrated in Ukraine, the privileges, tax exemption and other rights conferred by Ukraine on the Fund may trigger the application of the most-favoured-nation ("MFN") clauses contained in Ukrainian investment treaties. If the Fund is itself an investor investing in the Ukrainian territory, Ukraine may face claims that the same treatment accorded to the Fund must be extended to investors from third States with whom Ukraine has concluded investment treaties.

The Minerals Deal

The Minerals Deal, originally envisaged by President Donald Trump as a way to recover financial and military support given to Ukraine during President Joseph Biden's administration, establishes the legal framework for the future creation of the Fund by the United States International Development Finance Corporation ("DFC") and the Ukrainian Agency on Support Public-Private Partnership. Pursuant to Article II(1) of the Minerals Deal, the Fund will be formally established by a limited partnership agreement. According to the draft version of the limited partnership agreement available on the internet ("draft agreement"), the Fund will take the form of a Delaware limited partnership.

The Minerals Deals acknowledges in the Preamble that the agreement was concluded because, amongst other reasons, "the United States of America has provided significant financial and material support to Ukraine." In fact, according to the draft agreement, the United States' financial and material support to Ukraine would count as the contribution made by the DFC to the Fund. The actual money coming into the Fund would come from Ukraine only. According to Article VI(3) of the Minerals Deal, the Fund will be funded by 50% of all the revenue received by the Ukrainian government from activities related to the Ukrainian "Natural Resource Relevant Assets", which comprise a long list of minerals and other natural resources, including oil and gas.

In addition, the Minerals Deal confers on the Fund a number of privileges, including full tax exemption (Article IV(1) of the Minerals Deal), free convertibility of Ukrainian Hryvnia into U.S. Dollars (Article V(1) of the Minerals Deal) and "investment opportunity rights", which will work as a right of first refusal whereby anyone who seeks to raise capital for activities related to related to the Ukrainian "Natural Resource Relevant Assets" will have to "engage in good faith with the Partnership" and "refrain from granting to any third party materially more favorable financial or economic terms for a substantially similar investment opportunity as that offered to the Partnership" (Article VII(1)(d) of the Minerals Deal). Article II(3) of the Minerals Deal also contains a stabilisation clause in favour of the Fund, according to which Ukraine must ensure that, as a result of any new legislation or amendments to the existing legislation the Fund will not receive a treatment that is less favourable than the treatment accorded to it by the Minerals Deal. Finally, the DFC was also given "market-based offtake rights", which will give it priority to negotiate for "offtake rights on market-based commercial terms" (Article VIII(1) of the Minerals Deal).

One could argue that all the privileges, tax exemption and other rights conferred by Ukraine on the Fund and on the DFC must be understood in light of President Trump's demand for repayment of the United States' contribution to Ukraine. However, as the Fund will be an investor investing in Ukrainian territory, Ukraine may be forced to extend the beneficial treatment conferred under the Minerals Deal to investors from third States due to the MFN clause contained in the investment treaties to which Ukraine is contracting party.

MFN Clauses in Ukrainian Investment Treaties

According to the UNCTAD's Investment Policy Hub, Ukraine concluded seventy-eight bilateral investment treaties ("BITs"), sixty-five of which are in force. The list of Ukrainian counterparts includes traditional capital-exporting countries, such as the United States, United Kingdom, the Netherlands, Switzerland and other European States, as well as new capital-exporting countries, such as China, Saudi Arabia, Qatar and the United Arab Emirates. It also includes a long list of former socialist countries, amongst other developing countries. Ukraine is also a contracting party to the Energy Charter Treaty, which might be relevant because the definition of "Natural Resource Relevant Assets" in the Minerals Deal includes oil and gas, and minerals used in nuclear power plants.

The wording of the MFN clauses adopted in the Ukrainian investment treaties varies from one to another. Some investment treaties adopt a restrictive wording, whereby the obligation to accord a treatment not less favourable than the treatment conferred on investors nationals of third States is limited to investors who are in like situations. In this sense, Article 3(1) of the Canada-Ukraine BIT is also an example of the MFN clause being limited to investments "in like circumstances":

> "Each Contracting Party shall grant to investments, or returns of investors of the other Contracting Party, treatment no less favourable than that which, in like circumstances, it grants to investments or returns of investors of any third State."

In the context of the terminated NAFTA's Chapter Eleven, in which the national treatment and MFN clauses were limited to investments "in like circumstances", arbitral tribunals have decided that the "in like circumstances" requirement entails a basis of comparison to determine the similarity with the investment that is claimed to have the most favourable treatment. In *Pope & Talbot v. Canada*, the tribunal observed that "the application of the like circumstances standard will require evaluation of the entire fact setting surrounding." As such, Ukraine could argue that the particularities of the circumstances surrounding the conclusion of the Minerals Deal would leave investments of investors of third States not "in like circumstances" with the Fund and on the DFC.

However, most investment treaties concluded by Ukraine contain MFN clauses that are wider in scope, placing no restriction on the circumstances in which the most favoured treatment must be extended by a contracting party to investments to investors of the other contracting party, except for benefits granted under customs unions or free trade agreements, or under tax treaties or legislation. One example is the UK-Ukrainian BIT. Article 3(1) of the UK-Ukrainian BIT provides that:

> "Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State."

The exceptions to Article 3(1) are listed in Article 4 of the UK-Ukrainian BIT, which reads as follows:

> "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 the benefit of any treatment, preference or privilege resulting from:
>
> (a) any existing or future customs union 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."

The tax treaty or legislation exception is broader in the Saudi Arabia-Ukraine BIT. Article 3(5) of Saudi Arabia-Ukraine BIT provides that the MFN clause "shall not apply to tax matters."

Some Ukrainian investment treaties do not have any exception to the MFN clause. For instance, the Belgium-Luxembourge Economic Union-Ukraine BIT provides in Article 10 that "[in] all matters relating to the treatment of investments the investors of each Contracting Party shall enjoy most-favoured-nation treatment in the territory of the other Pary," without any exception.

The unfettered wording of the MFN clause adopted in most Ukrainian investment treaties could deprive Ukraine from the argument that the particular circumstances surrounding the conclusion of the Minerals Deal with the United State would exempt Ukraine from the obligation to extend to other investors the benefits conferred on the Fund and on the DFC. It would also be difficult to frame the tax exemption granted by Ukraine in the Minerals Deal as a benefit conferred under the tax treaty exception found in most investment treaties, as the Mineral Deals is not an international agreement relating wholly or mainly to taxation.

The *Ejusdem Generis* Rule

Arbitral tribunals have relied on the International Law Commission's Draft Articles on most-favoured-nation clauses (1978) ("Draft Articles") to apply the *ejusdem generis* rule in the context of investment treaties. The rule is expressed in Article 9(1) of the Draft Articles, which reads as follows:

> "Under a most-favoured-nation clause the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject-matter of the clause."

In *Doutremepuich v. Mauritius*, the tribunal applied the *ejusdem generis* rule to prevent claimants from using a dispute resolution provision of the Finland-Mauritius BIT, which, according to claimants, was more favourable than the France-Mauritius BIT, which did not contain consent to international arbitration. The tribunal considered that "[the] purpose of the *ejusdem generis* rule is to prevent a State, via the application of the MFN clause, from seeing its obligations extended to matters it did not contemplate." However, in that case, Article 8 of the France-Mauritius BIT expressly limited the MFN clause to "matters governed by this Convention".

In cases where the investment treaty adopts an unfettered wording in the MFN clause similar to most Ukrainian investment treaties, arbitral tribunals have decided differently. In *EDF v. Argentina*, under the Argentina-France BIT, the tribunal allowed an umbrella clause to be imported from other investment treaties concluded by Argentina, even though there was no umbrella clause in the Argentina-France BIT. Referring to the Draft Articles, the tribunal observed that "[in] giving effect to the MFN provisions, the Tribunal does not in any way accord investors anything other than 'those rights which fall within the limits of the subject matter of the clause.'"

These decisions show that the application of the *ejusdem generis* rule will always be dependent on the wording of the MFN clause of the specific investment treaty.

Conclusion

The Fund is yet to be constituted through the limited partnership agreement, which has not been concluded. However, the Minerals Deal may have unintended consequences for Ukraine if investors from States with whom Ukraine has investment treaties, particularly those with unfettered MFN clause, demand the same benefits conferred in the Minerals Deal, Ukraine may suffer severe financial consequences.

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