

Article 1(6) – Definitions

General comments and notes regarding the whole article

ECT 7 [CONF 96] (17/03/94)
Article 1 – Definitions
Chairman’s note to Article 1

Negotiations in the Plenary finished, except for the definition of the GATT and Related Instruments and the exclusion of maritime transport.

ECT 6 [CONF 82] (20/12/93)
ECT 5 [CONF 72] (11/10/93)
Article 1 – Definitions
Chairman’s note to Article 1

Negotiations in the Plenary finished, except for the question of “Control” and “Intellectual Property”.

ECT 4 [CONF 64] (07/07/93)
Article 1 – Definitions
Chairman’s note to Article 1

Negotiations in the Plenary finished, except for the question of “Control”, “Intellectual Property” and “Additional refinery products to Annexes EM and NI”. Plenary will not revert to remaining footnotes.

ECT 3 [CONF 60] (01/06/93)
Article 1 – Definitions
Chairman’s note to Article 1

Negotiations in the Plenary on paragraphs (1), (2), (3), (7), (10), (12), (14) and (15) finished.

BA-31 (21/12/92)
BA-26 (25/11/92)
Article 1 – Definitions

The Chairman of WG II asked delegations to provide him with comments and suggestions on definitions of Energy Materials and Products relevant for investment Articles in order for him to make a new draft of the definition of Investments.

BA-15 (12/08/92)
Article 1 – Definitions

Articles 1.4, 1.5, 1.6, 1.7, 1.12 and 1.13 are Chairman’s compromise Proposals.

BA 14 (24/06/92)
Article 1 – Definitions

Item (9) defines “Agreement Area”. However, for ease of reading, as a temporary measure, the word [Territory] has been kept in the text of the document.

BA 13 (19/06/92)
Article 1 – Definitions

Item (9) defines “[Territory]”. However, for ease of reading, as a temporary measure, the word “[Territory]” has been kept in the text of the document.

BA 12 (09/04/92)
Article 1 – Definitions

References of GATT and GATT-related instruments as currently drafted in items (10) and (11) are overlapping and will be reworked after the discussion on Article 5 A (document BA-11).

BA 6 (21/01/92)
Article 1 – Definitions

Former Article 4 “Protocols” has been moved to Article 1(9).

USA:

- the term “non-discrimination” appears often in the text. Some type of definition would be useful, preferably one that includes both national and MFN treatment.
- an alternative approach to the problem of definition might be similar to the form used in Chapter Nine of the US-Canada Free Trade Agreement.

USSR: Argues necessity to define “transport” and “transit”.

BA 4 (31/10/91)
Article 1 – Definitions

New texts in para (4), (5) and (8) based on suggestion of Chairman; in para (7) on basis of Australia proposal.

Romania: clarification of other notions mentioned in Basic Agreement is needed.

USA:

- the term “non-discrimination” appears often in the text. Some type of definition would be useful, preferably one that includes both national and MFN treatment.
- an alternative approach to the problem of definition might be similar to the form used in Chapter Nine of the US-Canada Free Trade Agreement.

BP 2 (11/09/91)
Explanatory Memorandum

Article 1 defines various terms used in the text of the Basic Protocol.

Article 1.6

Final Act and ECT as adopted (17/12/94)

Article 1.6 – Definitions

Understanding 3 – With respect to Article 1(6)+

Declaration 1 - With respect to Article 1(6)

“Investment” means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

- (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
- (b) company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
- (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
- (d) Intellectual Property;
- (e) Returns;
- (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

A change in the form in which assets are invested does not affect their character as investments and the term “Investment” includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the “Effective Date”) provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

“Investment” refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as “Charter efficiency projects” and so notified to the Secretariat.

Understanding 3 (With respect to Article 1(6))

For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's

- (a) financial interest, including equity interest, in the Investment;
- (b) ability to exercise substantial influence over the management and operation of the Investment; and

- (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.

Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, an Investor claiming such control has the burden of proof that such control exists.

Declaration 1 (With respect to Article 1(6))

The Russian Federation wishes to have reconsidered, in negotiations with regard to the supplementary treaty referred to in Article 10(4), the question of the importance of national legislation with respect to the issue of control as expressed in the Understanding to Article 1(6).

CONF 104 (Text for adoption) (14/09/94)
Article 1.6 – Definitions
Understanding 3 – With respect to Article 1(6)
Declaration 1 – With respect to Article 1(6)

“Investment” means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

- (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
- (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds, and debt of, a company or business enterprise;
- (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
- (d) Intellectual Property;
- (e) Returns;
- (f) any right conferred by law, contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

A change in the form in which assets are invested does not affect their character as investments and the term “Investment” includes all investments, whether existing at or made after the later of the dates of entry into force of this Treaty for the Contracting Party of the Investor making the investment and for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the “Effective Date”) provided that this Treaty shall only apply to matters affecting such investments after the Effective Date.

“Investment” refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as “Charter efficiency projects” and so notified to the Secretariat.

Understanding 3 (With respect to Article 1(6))

For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an

Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's

- (a) financial interest, including equity interest, in the Investment;
- (b) ability to exercise substantial influence over the management and operation of the Investment; and
- (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.

Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, an Investor claiming such control has the burden of proof that such control exists.

Declaration 1 (With respect to Article 1(6))

The Russian Federation wishes to have reconsidered, in negotiations with regard to the supplementary treaty referred to in Article 10(4), the question of the importance of national legislation with respect to the issue of control as expressed in the Understanding to Article 1(6).

Interim Text (25/06/94)
Article 1.6 – Definitions
Understanding 3 – To Article 1(6)
Declaration 1 – To Article 1(6)

“Investment” means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

- (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
- (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds, and debt of, a company or business enterprise;
- (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
- (d) Intellectual Property;
- (e) Returns;
- (f) any right conferred by law to undertake any Economic Activity In the Energy Sector, or conferred by contract or by virtue of any licences and permits granted pursuant to law.

A change in the form in which assets are invested does not affect their character as investments and the term “Investment” includes all investments, whether existing at or made after the later of the dates of entry into force of this Treaty for the Contracting Party of the Investor making the investment and for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the “Effective Date”) provided that this Treaty shall only apply to matters affecting such investments after the Effective Date.

For the purposes of this Treaty, “Investment” refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as “Charter efficiency projects” and so notified to the Secretariat.

Understanding 3 (To Article 1(6))

For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after an examination of the **factual** actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's

- (a) financial interest, including equity interest, in the Investment;
- (b) ability to exercise substantial influence over the management and operations of the Investment; and
- (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.

Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, **the** an Investor shall be responsible for demonstrating claiming such control has the burden of proof that such control exists.

Declaration 1 (To Article 1(6))

The Russian Federation wishes to have reconsidered, in negotiations with regard to the supplementary treaty referred to in Article 10(4), the question of the importance of national legislation with respect to the issue of control as expressed in the Understanding to Article 1(6).

Interim Text (20/06/94)
Article 1.6 – Definitions
Understanding 3 – To Article 1(6)
Declaration 1 – To Article 1(6)

“Investment” means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

- (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
- (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds, and debt of, a company or business enterprise;
- (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
- (d) Intellectual Property;
- (e) Returns;

- (f) any right conferred by law, contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

A change in the form in which assets are invested does not affect their character as investments and the term “Investment” includes all investments, whether existing at or made after the later of the dates of entry into force of this Treaty for the Contracting Party of the Investor making the investment and for the Contracting Party in which the investment is made (hereinafter referred to as the “effective date”) provided that this Treaty shall only apply to matters affecting such investments after the effective date.

For the purposes of this Treaty, “Investment” refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as “Charter Efficiency Projects”, and so notified to the Secretariat.

Understanding 3 (To Article 1(6))

For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after an examination of the factual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's

- (a) financial interest, including equity interest, in the Investment;
- (b) ability to exercise substantial influence over the management and operations of the Investment; and
- (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.

Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, the Investor shall be responsible for demonstrating that such control exists.

Declaration 1 (To Article 1(6))

The Russian Federation wishes to have reconsidered, in negotiations with respect to the supplementary treaty referred to in Article 13(4), the question of the importance of national legislation with respect to the issue of control as expressed in the Understanding to Article 1(6) .

Compromise text [CONF 98] (22/04/94)

Article 1.6 – Definitions

Ministerial Declaration 3 – To Article 1(6)

“Investment” means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

- (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;

- (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds, and debt of, a company or business enterprise;
- (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
- (d) Intellectual Property;
- (e) Returns;¹
- (f) any right conferred by law, contract or by virtue of any licences and permits granted pursuant to law.

A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the dates of entry into force of this Treaty for the Contracting Party of the Investor making the investment and for the Contracting Party in which the investment is made (hereinafter referred to as the "effective date") provided that this Treaty shall only apply to matters affecting such investments after the effective date.

For the purposes of this Treaty, "Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter Efficiency Projects", and so notified to the Secretariat.

Ministerial Declaration 3 (To Article 1(6))

For greater clarity as to whether an Investment is controlled, directly or indirectly, by an Investor, control of an Investment means control in fact, determined after an examination of the "factual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's

- (a) financial interest, including equity interest, in the Investment,
- (b) ability to exercise substantial influence over the management and operations of the Investment, and
- (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.

ECT 7 [CONF 96] (17/03/94)
 Article 1.6 – Definitions
Ministerial Declaration 3 – To Article 1(6)
Endnote to Article 1 – Definitions*

“Investment” means every kind of asset, owned or controlled directly or indirectly by an Investor [and includes]²:

¹ New addition.

* *Ed. note*: Endnote is included at the end of the Draft.

- (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
- (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds, and debt of, a company or business enterprise;
- (c) claims to money and claims to performance pursuant to contract having an economic value [and associated with an Investment];³
- (d) Intellectual Property;
- (e) [any right]⁴ conferred by law, contract or by virtue of any licences and permits granted pursuant to law.

5

A change in the form in which assets are invested does not affect their character as investments and the term “Investment” includes all investments, whether existing at or made after the later of the dates of entry into force of this Treaty for the Contracting Party of the Investor making the investment and Contracting Party in which the investment is made (hereinafter referred to as the “effective date”) provided that this Treaty shall only apply to matters affecting such investments after the effective date.

For the purposes of this Treaty, “Investment” refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as “Charter Efficiency Projects”, and so notified to the Secretariat.

Ministerial Declaration 3 (To Article 1(6))

For greater clarity as to whether an Investment is controlled, directly or indirectly, by an Investor, control of an Investment means control in fact, determined after an examination of the factual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's (1) financial interest, including equity interest, in the Investment; (2) ability to exercise substantial influence over the management and operations of the Investment, and (3) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.

Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, the Investor shall be responsible for demonstrating that such control exists.

² **Canada** suggests substituting with: “and consisting of the following”. **Canada** considers that clarity calls for an exclusive rather than an illustrative list. No support from other delegations.

³ **Canada** proposes replacing with: “and involving the commitment of capital or other resources in the Area of another Contracting Party to economic activity in such Area.”

⁴ **Norway** proposes substituting with: “business concessions”. Supported by **Romania**.

⁵ **Canada** suggests additional language following sub-paragraph (e) reading:

“For greater clarity:

(a) claims to money which arise solely from:

(i) commercial sales contracts of a national or enterprise in the Area of one Contracting Party to an enterprise in the Area of another Contracting Party; or

(ii) the extension of credit in connection with a commercial transaction (e.g. trade financing), or

(b) any other claims to money;

which do not involve the kinds of interests specified in sub-paragraphs (a) through (d) above shall not be considered investments.”

ECT 6 [CONF 82] (20/12/93)
ECT 5 [CONF 72] (11/10/93)
Article 1.6 – Definitions
Endnote to Article 1 – Definitions*

“Investment” means every kind of asset, [owned or controlled directly or indirectly by an Investor]⁶ [and includes]²:

- (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
- (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds, and debt of, a company or business enterprise;
- (c) claims to money and claims to performance pursuant to contract having an economic value [and associated with an Investment];³²
- (d) Intellectual Property;
- (e) [any right]³³ conferred by law, contract or by virtue of any licences and permits granted pursuant to law.

³⁴

A change in the form in which assets are invested does not affect their character as investments and the term “Investment” includes all investments, whether existing at or made after the later of the dates of entry into force of this Agreement for the Contracting Party of the Investor making the investment and Contracting Party in which the investment is made (hereinafter referred to as the “effective date”) provided that this Agreement shall only apply to matters affecting such investments after the effective date.

For the purposes of this Agreement, “Investment” refers to any investment associated with an “Economic Activity in the Energy Sector.”

ECT 4 [CONF 64] (07/07/93)
Article 1.6 – Definitions

“Investment” means every kind of asset, [owned or controlled directly or indirectly by an Investor]⁷ [and includes]²:

* *Ed. note:* Endnote is included at the end of the Draft.

⁶ Sub-Group Chairman advised a transitional measure until Russian Federation has completed required legislation related to the definition of control. (Russian Federation’s acceptance of Article 30(7) depends on a satisfactory solution of this question).

Japan understands that the Sub-Group could not establish a general definition of “controlled”, and therefore, interpretation of the meaning of “controlled” will be left to the discretion of each Contracting Party in which the Investment is made and each Contracting party will be able to decide the meaning of “controlled” in accordance with its national legislation. In this regard, Japan thinks that there should be an explicit record in the Ministerial Declaration to that effect in order to avoid any misunderstanding or confusion in the future.

⁷ As agreed in the Sub-Group the definition “Investment of an Investor” was deleted and the substance moved back to Article 1(6). A solution for Russian Federation on definition on control has not yet been found. **Russian Federation**’s acceptance of Article 30(7) depends on a satisfactory solution on this question. Sub-Group Chairman advised a transitional measure until Russian Federation has completed required legislation.

- (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
- (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds, and debt of, a company or business enterprise;
- (c) claims to money and claims to performance pursuant to contract having an economic value [and associated with an Investment];^{Error! Bookmark not defined.}
- (d) Intellectual Property;
- (e) [any right]^{Error! Bookmark not defined.} conferred by law, contract or by virtue of any licences and permits granted pursuant to law.
^{Error! Bookmark not defined.}

A change in the form in which assets are invested does not affect their character as investments and the term “Investment” includes all investments, whether existing at or made after the later of the dates of entry into force of this Agreement for the Contracting Party of the Investor making the investment and Contracting Party in which the investment is made (hereinafter referred to as the “effective date”) provided that this Agreement shall only apply to matters affecting such investments after the effective date.

For the purposes of this Agreement, “Investment” refers to any investment associated with an “Economic Activity in the energy Sector.”

<p>ECT 3 [CONF 60] (01/06/93) Articles 1.6 + 1.8 – Definitions</p>

- (6) “Investment” means every kind of asset, [and includes]⁸:
 - (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
 - (b) [a company or business enterprise]⁹, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds, and debt of a company or business enterprise;
 - (c) claims to money and claims to contract having an economic value [and associated with an Investment];¹⁰
 - (d) Intellectual Property;
 - (e) [any right]^{Error! Bookmark not defined.} conferred by law, contract or by virtue of any licences and permits granted pursuant to law.

11

⁸ **Canada** suggests substituting with: “and consisting of the following”. Canada considers that clarity calls for an exclusive rather than an illustrative list.

⁹ **Russian Federation** scrutiny reserve for linguistic check of these words.

¹⁰ **Canada** proposes replacing with: “and involving the commitment of capital or other resources in the Domain of another Contracting Party to economic activity in such Domain.”

¹¹ **Canada** suggests additional language following sub-paragraph (e) reading: “For greater clarity:

A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the dates of entry into force of this Agreement for the Contracting Party of the Investor making the investment and Contracting Party in which the investment is made (hereinafter referred to as the "effective date") provided that this Agreement shall only apply to matters affecting such investments after the effective date.

[For the purposes of this Agreement, "Investment" refers to any investment associated with an "Economic Activity in the Energy Sector."]¹²

(8) ["Investment of an Investor" means an Investment owned [or controlled directly or indirectly,]¹³ by an Investor.]¹⁴

<p style="text-align: center;">ECT 2 [CONF 56] (01/05/93) (Compromise text) ECT 1 [CONF 50] (15/03/93) Articles 1.6 + 1.8 – Definitions</p>

- (6) "Investment" means every kind of asset, [DL] and includes:
- (a) tangible and intangible, and movable and immovable, property, and any property, rights such as leases, mortgages, liens, and pledges;
 - (b) a company or business enterprise, or shares, stock, or other forms of equity participation in, and bonds, debentures and debt of a company or business enterprise;
 - (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
 - (d) Intellectual Property;
 - (e) any right conferred by law, contract or by virtue of any licences and permits granted pursuant to law;

A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made

-
- (a) claims to money which arise solely from:
- (i) commercial sales contracts of a national or enterprise in the Domain of one Contracting Party to an enterprise in the Domain of another Contracting Party; or
 - (ii) the extension of credit in connection with a commercial transaction (e.g. trade financing),
- or
- (b) any other claims to money; which do not involve the kinds of interests specified in subparagraphs (a) through (d) above shall not be considered investments."

¹² **Russian Federation** scrutiny reserve for linguistic check of this sentence. The Chairman asked Canada and Norway to withdraw their footnotes.

¹³ **Russian Federation** wants deletion of this paragraph. **Russian Federation** specified that a possible compromise on this question might be found through:

- a) a reflection of this question in Article 19; and
- b) a Ministerial Declaration to specify guidance for international arbitration in the case of a dispute arising over the question of direct/indirect control and indirect ownership.

A Sub-Group consisting of Switzerland, European Communities, Canada and Russian Federation will draft such a Ministerial Declaration. The Group will report to the Secretariat by mid-June.

¹⁴ **Switzerland** contingency reserve; change of definition can call for consequential amendments in other Articles.

after the later of the dates of entry into force of this Agreement for the Contracting Party of the Investor making the investment and Contracting Party in which the investment is made (hereinafter referred to as the “effective date”) provided that [DL] this Agreement shall only apply to matters affecting such investments after the effective date.

For the purposes of this Agreement, “Investment” refers to any investment associated with an “Economic Activity in the Energy Sector.”

- (8) “Investment of an investor” means an asset owned or controlled, directly or indirectly, by an investor.

BA-37 (01/03/93) Article 1.5 – Definitions
--

“Investment” means every kind of asset owned [[or controlled,]¹⁵ directly or indirectly,]¹⁶ by investors of one or more Contracting Parties in the Domain of another Contracting Party. [In particular, though not exclusively, Investments include:]³⁷

- (a) tangible and intangible, and movable and immovable, property and any property rights such as leases, mortgages, liens, and pledges;
- (b) a company or business enterprise, or shares, stock, or other forms of equity participation in, and bonds, debentures and debt of¹⁷, a company or business enterprise;
- (c) claims to money and claims to performance pursuant to contract having an economic value [and associated with an Investment]¹⁸;
- (d) [Intellectual Property]¹⁹;
- (e) [any right]²⁰ conferred by law, contract or by virtue of any licences and permits granted pursuant to law;²¹

40

[A change in the form in which assets are invested does not affect their character as investments and the term “Investment” includes all investments, whether existing at or made after the later of the dates of entry into force of this Agreement for the Contracting Party of the investor making the investment and Contracting Party in which the investment is made (hereinafter referred to as the “effective date”) provided that with respect to investments made before the effective date and continuing after the effective date, this Agreement shall only apply to matters affecting such investments after the effective date.]²²

¹⁵ **Russian Federation** reserve. **Russian Federation** wants explicit guidelines used on case by case basis or a definition of control. **USA** and **Russian Federation** will discuss this.

¹⁶ **Norway** asks for deletion. However, Norway is prepared to lift up its position if its concerns be resolved elsewhere in the BA.

¹⁷ **Canada** proposes the addition of: “with a repayment period of one year or more”.

¹⁸ **Canada** proposes replacing with: “and involving the commitment of capital or other resources in the Domain of another Contracting Party to economic activity in such Domain.” **Canada** will reconsider its proposal in the light of current draft of this definition (chapeau and third paragraph).

¹⁹ **Canada** maintains a reserve pending definition and relations between Articles 7, 16 and 18.

²⁰ **Norway** proposes substituting with: “business concessions”.

²¹ **Canada** proposes addition of the provision that “such activity includes the commitment of capital or other resources in the Domain of another Contracting Party.” **Canada** will reconsider its proposal in the light of current draft of this definition (chapeau and third paragraph).

²² Legal Sub-Group will consider this para with the view of ensuring clarity and avoiding of redundancy.

For the purposes of this Agreement, “Investment” refers to any investment associated with an “Economic Activity in the Energy Sector.”²³

...

BA-35 (09/02/93)
Article 1.5 – Definitions
General comments on Article 1(5)

“Investment” means every kind of asset owned [or controlled,]²⁴ directly or indirectly, by Investors of one or more Contracting Parties in the Domain of another Contracting Party. [In particular, though not exclusively, Investments include:]²⁵ Error! Bookmark not defined.

- (a) tangible and intangible, and movable and immovable, property and any property rights such as leases, mortgages, liens, and pledges;
- (b) a company or business enterprise or shares, stock, or other forms of equity participation (including minority participation) in, and bonds, debentures and debt of⁴⁶, a company or business enterprise;
- (c) claims to money and claims to performance pursuant to contract having an economic value [and associated with an Investment]²⁵;
- (d) [Intellectual Property]⁴⁸;
- (e) [any right conferred by law,]²⁶ contract or by virtue of any licences and permits granted pursuant to law;²⁷

40

A change in the form in which assets are invested does not affect their character as investments and the term “Investment” includes all investments, whether existing at or made after the later of the dates of entry into force of this Agreement for the Contracting Party of the Investor making the investment and Contracting Party in which the investment is made (hereinafter referred to as the “effective date”) provided that with respect to investments made before the effective date and continuing after the effective date, this Agreement shall only apply to matters affecting such investments after the effective date.

For the purposes of this Agreement, “Investment” refers to any investment associated with an economic activity (*)²⁸ in the Energy Sector.²⁹

²³ Some delegations wanted the content of this paragraph to form the basis of a definition of scope, preferably placed in the beginning of Part IV.

Norway comments if its proposal as recorded in footnote 16.2 be accepted this sentence should be deleted. Moreover, the term “investment associated with an economic activity in the energy sector” is quite vague and not easily applicable from a legal point of view, and should be avoided also for that reason. To the extent that it is considered necessary to link Investment with economic activity in the Energy Sector, it should be done in the relevant substantive Articles of the Basic Agreement, and not in the definition of Investment.

²⁴ **Russian Federation** reserve. **Russian Federation** wants explicit guidelines used on case by case basis.

²⁵ **Canada** proposes replacing with: “and involving the commitment of capital or other resources in the Domain of another Contracting Party to economic activity in such Domain.”

²⁶ **Norway** scrutiny reserve.

²⁷ **Canada** proposes addition of the provision that “such activity includes the commitment of capital or other resources in the Domain of another Contracting Party.”

²⁸ Note for accompanying document:

Economic Activity in the Energy Sector includes, for example:

General comments on Article 1(5)

- Legal limitations to the coverage should be done in the relevant Articles or Parts of the Basic Agreement (e.g. Article 16(10)).
- The Sub-Group on the definition of “Investment” has not excluded from the coverage of this definition the investments in power generating plants or co-generating plants dedicated exclusively for the use of industrial or service facilities.
- Text should be found in the Preamble of the Basic Agreement to cover the importance of energy efficiency.

<p style="text-align: center;">BA-31 (21/12/92) Article 1.4 – Definitions</p>
--

[(*)³⁰ “Investment” means every kind of asset owned [or controlled, directly or indirectly], by Investors of one or more Contracting Parties [in the Domain of another Contracting Party] employed in association with the exploration, production, conversion, storage, transport, distribution and [supply] of Energy Materials and Products [and related services]. In particular, Investments include:]³¹

-
- the prospecting and exploration for, and extraction of, e.g. oil, gas, coal and uranium;
 - the construction and operation of power generation facilities, including those powered by wind and other renewable energy sources;
 - the transportation, distribution, storage and supply of Energy Materials and Products, e.g. by way of transmission and distribution grids and pipelines or dedicated rail lines, and construction of facilities for such, including the laying of oil, gas, and coal-slurry pipelines;
 - removal and disposal of wastes from energy related facilities such as power stations, including of radioactive wastes from nuclear power stations;
 - decommissioning of energy related facilities, including oil rigs, oil refineries and power generating plants;
 - the marketing, and sale of, and trade in Energy Materials and Products, e.g. retail sales of gasoline;
 - research, consulting, planning, management and design activities, related to the activities mentioned above, including those aimed at improving energy efficiency.

²⁹ Some delegations wanted the content of this paragraph to form the basis of a definition of scope, preferably placed in the beginning of Part IV.

³⁰ (*) Note for accompanying document:

The energy field includes, for example, such energy specific activities as the laying of energy pipelines, the provision of energy meters, the decommissioning of oil rigs and nuclear power stations and contract energy management; but excludes activities which are not principally devoted to energy, such as road, rail, maritime and air transport, or the manufacture of energy consuming equipment.

Working Groups preparing Protocols are invited further to define the operations covered by their work in which Investments should be given the protection of this Agreement. Such definitions could be incorporated in this Agreement by way of amendment or be applied only by the parties to the relevant Protocol. It is particularly urgent to provide appropriate coverage of activities relating to energy efficiency.

³¹ The chapeau was discussed during the WG II meeting on 18 December 1992. The current draft is based on Chairman's proposal as contained in BA-30 and USA suggestion presented during negotiation. Square bracketed words indicate certain concerns by delegations.

Chairman invited delegations to forward to the Secretariat in a written form their comments on both definitions related to Investment including the note for the accompanying document under Article 1 or under Part IV by 17 January 1993.

The delegations should also focus on deletions of inappropriate suggestions, comments or reserves in footnotes in relation to the most recent drafts. Reflecting those responses the Secretariat will prepare a separate document containing all options together with a possible architecture for the next WG II meeting.

- (a) tangible or intangible, movable and immovable property and any other related property rights such as mortgages, liens or pledges as well as leases;³²
- (b) [shares in, or stock, or other forms of equity, bonds or debentures or debt⁴⁶ of, or any other form of participation including minority forms in, a company or business enterprise;]³³
- (c) claims to money and claims to performance [under contract]³⁴ having an economic value [and associated with an Investment;]³⁵
- (d) [Intellectual Property³⁶];³⁷
- (e) [any right conferred by law or contract, [relating to an Investment or by virtue of]³⁸ any licences and permits pursuant to law];^{39,40, 41}

40

A change in the form in which assets are invested does not affect their character as investments and the term “Investment” includes all investments, whether existing at or made after the later of the dates of entry into force of this Agreement for the Contracting Party of the Investor making the investment and Contracting Party in which the investment is made (hereinafter referred to as the “effective date”) provided that with respect to investments made before the effective date and continuing after the effective date, this Agreement shall only apply to matters affecting such investments after the effective date.

<p>BA-26 (25/11/92) Article 1.4 – Definitions</p>
--

“Investment” means every kind of [asset in energy field]⁴² owned [or controlled, directly or indirectly],⁴³ by Investors of one Contracting Party⁴⁴. [In particular, though not exclusively, it includes any of the following:]⁴⁵

³² **Canada** proposes the addition of: “acquired in the expectation or used for the purpose of economic benefits or business purposes”.

³³ **USA** suggests a tighter reformulation as follows: “shares, stock, or other forms of equity participation (including minority participation) in, and bonds, debentures and debt instruments of, a company or business enterprise”.

³⁴ **USA** suggests substituting with: “pursuant to contract”.

³⁵ **Canada** proposes replacing with: “and involving the commitment of capital or other resources in the Domain of another Contracting Party to economic activity in such Domain.”

USA requests retention of the phrase in the main text.

³⁶ **Hungary** asks for adding: “related to industrial projects”.

³⁷ **Canada** scrutiny reserve pending clarification of relationship between Articles 7, 16 and 18.

³⁸ **USA** suggests replacing with: “and”.

³⁹ Subject to scrutiny reserve by all delegations.

⁴⁰ On the basis of the previous text, **Canada** proposed the addition of the proviso that “such activity includes the commitment of capital or other resources in the Domain of another Contracting Party.” The Chairman suggested consideration of this as a substantive provision under Article 16.

⁴¹ **Romania** asks for adding: “including concessions to search for, extract or exploit natural resources in the energy field”.

⁴² The Chairman seeks to draft a proposal in light of written observations.

⁴³ **Russian Federation** scrutiny reserve.

⁴⁴ **Hungary** suggests insertion of: “acquired after 17 December 1991”.

⁴⁵ **Canada** proposes substituting with: “It consists of the following.” **Canada** considers the list should be exclusive rather than illustrative.

- (a) tangible or intangible, movable and immovable property and any other related property rights such as mortgages, liens or pledges as well as leases;⁶¹
- (b) shares in, or stock, or other forms of equity, bonds or debentures or debt⁴⁶ of, or any other form of participation including minority forms in, a company or business enterprise;
- (c) claims to money and claims to performance under contract having an economic value [and associated with an Investment;]⁶⁴
- (d) [Intellectual Property⁶⁵];⁶⁶
- (e) [any right conferred by law or contract, relating to an Investment or by virtue of any licences and permits pursuant to law];^{68,69}

40

A change in the form in which assets are invested does not affect their character as investments and the term “Investment” includes all investments, whether existing at or made after the later of the dates of entry into force of this Agreement of the Contracting Party of the Investor making the investment and Contracting Party in which the investment is made (hereinafter referred to as the “effective date”) provided that with respect to investments made before the effective date and continuing after the effective date, this Agreement shall only apply to matters affecting such investments after the effective date.

<p>BA-22 (21/10/92) Article 1.4 – Definitions</p>
--

“Investment” means every kind of [energy asset]⁴⁶ owned [or controlled, directly or indirectly],⁴³ by Investors of one Contracting Party. [In particular, though not exclusively, it includes any of the following:]⁴⁵

- (a) tangible or intangible, movable and immovable property and any other related property rights such as mortgages, liens or pledges as well as leases;^{Error! Bookmark not defined.}
- (b) shares in, or stock, or other forms of equity, bonds or debentures or debt^{Error! Bookmark not defined.} of, or any other form of participation including minority forms in, a company or business enterprise;
- (c) claims to money and claims to performance under contract having an economic value [and associated with an Investment;]^{Error! Bookmark not defined.}
- (d) [Intellectual Property;]^{Error! Bookmark not defined.}
- (e) [any right conferred by law or contract, relating to an Investment or by virtue of any licences and permits pursuant to law];^{Error! Bookmark not defined.,Error! Bookmark not defined.}

40

A change in the form in which assets are invested does not affect their character as investments and the term “Investment” includes all investments, whether existing at or made after the later of the dates of entry into force of this Agreement or the Contracting Party of the Investor making the investment and Contracting Party in which the investment is made (hereinafter referred to as the “effective date”) provided that with respect to investments made before the effective date and

⁴⁶ **Hungary** and **Japan** scrutiny reserve. **Japan** suggests replacing with: “asset in energy field”.

continuing after the effective date, this Agreement shall only apply to matters affecting such investments after the effective date.

BA-15 (12/08/92)
Article 1.4 – Definitions

“Investment” means every kind of energy investment owned or controlled, directly or indirectly, by Investors of one Contracting Party. In particular, though not exclusively, it includes any of the following:

- (a) tangible or intangible, property and any other related property rights such as mortgages, liens or pledges as well as leases;
- (b) a company or business enterprise or shares in, or stock, bonds or debentures or debt of, or any other form of participation including minority forms in, a company or business enterprise;
- (c) claims to money and claims to performance under contract having a financial value and associated with an Investment;
- (d) Intellectual Property;
- (e) rights conferred by law or under contract, to undertake any commercial activity, including concessions or other rights for the search for, or the cultivation, extraction or exploitation of natural resources;

A change in the form in which assets are invested does not affect their character as investments and the term “Investment” includes all investments, whether existing at or made after the later of the dates of entry into force of this Agreement for the Contracting Party of the Investor making the Investment and Contracting Party in which the Investment is made (hereinafter referred to as the “effective date”) provided that with respect to investments made before the effective date and continuing after the effective date, this Agreement shall only apply to matters affecting such investments after the effective date.

BA 14 (24/06/92)
BA 13 (19/06/92)
Article 1.4 – Definitions

“Investment” means every kind of asset^{47,48}, which has been used or is used in connection with [the implementation of the principles of the Charter [and in accordance with the provisions of this Agreement]^{49,50}]⁵¹. In particular, though not exclusively, includes any of the following:

⁴⁷ **USA** and **Switzerland** suggest inserting “owned or controlled, directly or indirectly, by Investors of one Contracting Party in the [Territory] of another Contracting Party”.

⁴⁸ **Australia** suggests inserting “owned or controlled, directly or indirectly, by Investors of one Contracting Party”.

⁴⁹ **USA** suggests deletion and instead adding “in the energy field”.

⁵⁰ **Switzerland** reserve.

⁵¹ **Japan** suggests substituting with “exploration, production, conversion, storage, transport and distribution of [Energy Materials and Products]”.

- (a) [tangible or intangible]⁵² property and any other related property rights such as mortgages, liens or pledges as well as leases;
- (b) ⁵³ shares in, and stock, bonds and debentures of, and any other form of participation including minority forms⁵⁴ in, a company or business enterprise⁵⁵;
- (c) [claims to money and claims to performance under contract having a financial value⁵⁶]⁵⁷;
- (d) [intellectual property as defined in item (12)]⁵⁸;
- (e) [rights, conferred by law or under contract, to undertake any commercial activity, including the search for, or the cultivation, extraction or exploitation of natural resources]⁵⁹;

A change in the form in which assets are invested does not affect their character as investments [and the term “Investment” includes all investments, whether existing at or made after the date of entry into force of this Agreement (hereinafter referred to as the “effective date”)]⁶⁰ provided that with respect to investments made before the effective date and continuing after the effective date, this Agreement shall only apply to matters affecting such investments after the effective date]^{61,62}.

⁶³

⁵² **Austria** asks for replacing with: “movable and immovable”.

⁵³ **USA** suggests adding for clarity at an appropriate place : “a company, equity or debt”.

⁵⁴ **Japan** requests clarification and examples on minority forms.

⁵⁵ **EC** suggests adding: “having its principal place of business within the [Territory] of a Contracting Party”.

⁵⁶ **USA** suggests adding: “and associated with an Investment”.

⁵⁷ **Canada** requests that claims to money in connection with commercial contracts for the sale of goods and services or licences to provide services should not be included.

⁵⁸ **Canada** does not consider appropriate the inclusion of intellectual property in the definition of Investment.

⁵⁹ **Austria** suggests substituting with: “rights to carry out economic activities based on a concession or other rights for the search for, the cultivation, extraction or exploitation of natural resources”.

⁶⁰ **Japan** argues that “effective date” should be the date when the Investor's country or the country where its Investment is made, enter into the BA, whichever is the latest. Deferred to a later stage dependent on discussions on Article 39.

⁶¹ **Austria** suggests replacing with: “, even if a new authorization is required”.

⁶² **Canada** is of that opinion that definitions should not establish substantive obligations, so the square bracketed part should be placed to Part IV of BA e.g. to Article 16 as a new para reading: “This Agreement applies to all Investments, whether existing at or made after the date of entry into force of this Agreement (hereinafter referred to as the “effective date”)] provided that with respect to Investments made before the effective date and continuing after the effective date, this Agreement shall only apply to matters affecting such Investments after the effective date.”

⁶³ **Canada** proposes replacing the whole item (4) with the following:

Investment

1. Investment of an Investor of a Contracting Party means an investment that is owned or controlled directly or indirectly by an Investor of such Contracting Party.
2. For the purposes of paragraph (1), an Investor owns or controls an investment indirectly when he has a determining influence on the management of such investment.
3. Investment consists of:
 - a) a business enterprise located in the [Territory] of another Contracting Party that is controlled by such Investor;
 - b) equity of debt securities of a business enterprise located in the [Territory] of another Contracting Party, or any interest in such enterprise that entitles the owner to share in the income or profits or to share in the assets on dissolution;
 - c) real estate or other tangible property located in the [Territory] of another Contracting Party;
 - d) a loan to a business enterprise located in the [Territory] of another Contracting Party made or guaranteed by an affiliate of such business enterprise;
 - e) interests arising from the commitment of significant capital in the [Territory] of another Contracting Party to a major project or permanent commercial presence in that [Territory] related to (i) contracts

BA 12 (09/04/92)
Article 1.4 – Definitions

“Investment” means every kind of asset⁶⁴, which has been used or is used in connection with the implementation of the principles of the Charter [and in accordance with the provisions of this Agreement]^{65,66} in particular, though not exclusively, includes any of the following:

- (a) tangible or intangible property and any other related property rights such as mortgages, liens or pledges as well as leases;
- (b) shares in, and stock, bonds and debentures of, and any other form of participation including minority forms in, a company or business enterprise⁶⁷;
- (c) claims to money, and claims to performance under contract having [a financial]⁶⁸ value;
- (d) intellectual property as defined in item (12);
- (e) rights, conferred by law or under contract, to undertake any commercial activity, including the search for, or the cultivation, extraction or exploitation of natural resources;

A change in the form in which assets are invested does not affect their character as investments [and the term]⁶⁹ “Investment” includes all investments, whether existing at or made after the date of entry into force of this Agreement [(hereinafter referred to as the “effective date”)⁸⁹ provided that with respect to investments made before the effective date and continuing after the effective

involving the presence of the Investor's property in [Territory] of another Contracting Party (e.g., concession agreements, turnkey or construction contracts) or (ii) contracts where the remuneration depends substantially on the production, revenues or profits of a business enterprise.

4. For greater clarity, investment excludes the following kinds of interest :
 - a) claims to money that arise solely from:
 - i) commercial contracts for the sale of goods or services by a national or entity in the [Territory] of one Contracting Party to a business enterprise in the [Territory] of another Contracting Party;
 - ii) the extension of credit in connection with a commercial transaction (e.g. trade financing); or
 - iii) any other claims to money;and that do not involve the kinds of interests listed in paragraph (3);
 - b) any loan to a business enterprise other than a loan between affiliated business enterprises described in paragraph (3)(d); and
 - c) bonds, treasury bills, or any other kind of debt security issued by a Contracting Party, including those issued by regional or local governments or authorities of a Contracting Party.
5. a) “Equity or debt securities” includes voting and non-voting shares, bonds, convertible debentures, stock options and warrants.
 - b) “Business enterprise” means an enterprise that has, or in the case of an establishment thereof will have:
 - i) a place of business;
 - ii) an individual or individuals employed or self employed in connection with the business; and
 - iii) assets used in carrying on the business, and that involves a financial commitment for the purpose of commercial gain.
 - c) “Enterprise” means any entity constituted or organized under applicable law, including any corporation, trust, partnership, sole proprietorship, joint venture or other association.

⁶⁴ **USA, Australia and Switzerland** suggest inserting “owned or controlled, directly or indirectly, by Investors of one Contracting Party in the Territory of another Contracting Party”.

⁶⁵ **USA** suggests deletion and instead adding “in the energy field”.

⁶⁶ **Switzerland** reserve.

⁶⁷ **EC** suggests adding: “having its principal place of business within the Territory of a Contracting Party”.

⁶⁸ **Norway** asks for substituting with “an economic”.

⁶⁹ **Austria** suggests replacing with: “provided that the reinvestments are undertaken in accordance with the laws of the Party concerned. The term...”

date, this Agreement shall only apply to matters affecting such investments after the effective date]⁷⁰.

BA 6 (21/01/92)
Article 1.4 – Definitions

“Investment” means every kind of asset⁷¹, which are used in connection with the implementation of the principles of the Charter and in accordance with the provisions of this Agreement. In particular, though not exclusively, includes any of the following:

- (a) [movable and immovable]⁷² property and any other related property rights such as mortgages liens or pledges;
- (b) shares in, and stock, bonds and debentures of, and any other form of participation in, a company or business enterprise;
- (c) claims to money, and claims to performance under contract having a financial value;
- (d) intellectual⁷³ property rights, goodwill, technical processes, know-how and any other benefit or advantage attached to a business;
- (e) [rights]⁷⁴, conferred by law or under contract, to undertake any commercial activity, including the search for, or the cultivation, extraction or exploitation of natural resources;⁷⁵
- (f) goods which under a leasing agreement are placed at the disposal of a lessee in the Territory of one Contracting Party in conformity with its laws and regulations;

A change in the form in which assets are invested does not affect their character as investments and the term “Investment” includes all investments, whether existing at or made after the date of entry into force of this Agreement (hereinafter referred to as the “effective date”) provided that this Agreement shall only be applicable to Investments made before the effective date and which continue after the effective date with respect to matters affecting such Investments after the effective date.

BA 4 (31/10/91)
Article 1.4 – Definitions

“Investment” means every kind of asset¹⁰⁰, and in particular, though not exclusively, includes any of the following:

⁷⁰ **Austria** suggests deletion.

⁷¹ **(Australia)**: Insert “owned or controlled by Investors of one Contracting Party and admitted by one of the other Contracting Parties subject to its laws and investment policies”.

⁷² **(Australia)**: Replace by “tangible and intangible”.

⁷³ **(Australia)**: Insert “and industrial”.

⁷⁴ **(Australia)**: Replace by “business concessions and other rights required to conduct economic activity and having economic value”.

⁷⁵ **(Australia)**: Add a new wording:

“and to manufacture, use and sell products; and

(g) activities associated with investments, such as the organisation and operation of business facilities, the acquisition, exercise and disposition of property rights including intellectual property rights, the raising of funds and the purchase and sale of foreign exchange.”

- (a) [movable and immovable]¹⁰¹ property and any other related property rights such as mortgages liens or pledges;
- (b) shares in, and stock, bonds and debentures of, and any other form of participation in, a company or business enterprise;
- (c) claims to money, and claims to performance under contract having a financial value;
- (d) Intellectual¹⁰² property rights, goodwill, technical processes, know-how and any other benefit or advantage attached to a business;
- (e) [rights]¹⁰³, conferred by law or under contract, to undertake any commercial activity, including the search for, or the cultivation, extraction or exploitation of natural resources;⁷⁶

which are used in connection with the implementation of the principles of the Charter and in accordance with the provisions of this Agreement.

A change in the form in which assets are invested does not affect their character as investments and the term “Investment” includes all investments, whether made before or after the date of entry into force of this Agreement;

BP 2 (11/09/91) Article 1.1(e) – Definitions	Basic Protocol (20/08/91) Article 1.1(e) – Definitions
--	--

- (e) “Investment” means every kind of asset, including changes in the form in which assets are invested and in particular, though not exclusively, includes any of the following:
 - (i) movable and immovable property and any other related property rights such as mortgages liens or pledges;
 - (ii) shares in, and stock, bonds and debentures of, and any other form of participation in, a company or business enterprise;
 - (iii) claims to money, and claims to performance under contract having a financial value;
 - (iv) intellectual property rights, goodwill, technical processes , know-how and any other benefit or advantage attached to a business;
 - (v) rights, conferred by law or under contract, to undertake any commercial activity, including the search for, or the cultivation, extraction or exploitation of natural resources;

which is used in connection with the implementation of the principles of the Charter and in accordance with the provisions of this Agreement.

⁷⁶ (Australia): add a new wording: “and to manufacture, use and sell products; and

(f) activities associated with investments, such as the organisation and operation of business facilities, the acquisition, exercise and disposition of property rights including intellectual property rights, the raising of funds and the purchase and sale of foreign exchange.”