

Article 1(7) – 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 1.7

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| <p>ECT as adopted (17/12/94) CONF 104 (Text for adoption) (14/09/94)* Interim Text (25/06/94) Interim Text (20/06/94) Article 1.7 – Definitions</p> |
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“Investor” means:

- (a) with respect to a Contracting Party:
 - (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;
 - (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;
- (b) with respect to a “third state”, a natural person, company or other organization which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party.

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| <p>Compromise text [CONF 98] (22/04/94) Article 1.7 – Definitions</p> |
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“Investor” means:

- (a) with respect to a Contracting Party
 - (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable laws;
 - (ii) a company or other organization organized in accordance with the laws applicable in that Contracting Party
- (b) with respect to a “third state”, a natural person, company or other organization which fulfils, mutatis mutandis, the conditions specified in sub-paragraph (a) for a Contracting Party.

* *Ed. note:* Appendix II in document CONF 104 contains “Main changes since Interim text”. With respect to Article 1(7)(b) it states:

“In accordance with Article 1(7)(b) the term “third state” has been used throughout the revised Treaty text instead of the phrase “state that is not a Contracting Party”.”

ECT 7 [CONF 96] (17/03/94)
ECT 6 [CONF 82] (20/12/93)
Article 1.7 – Definitions
Endnote to Article 1 – Definitions*

["Investor" means:

- (a) with respect to a Contracting Party
 - (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable laws;
 - (ii) a company or other organization organized in accordance with the laws applicable in that Contracting Party
- (b) with respect to a "third state", a natural person, company or other organization which fulfills, mutatis mutandis, the conditions specified in sub-paragraph (a) for a Contracting Party.]¹

ECT 5 [CONF 72] (11/10/93)
Article 1.7 – Definitions
Endnote to Article 1 – Definitions*

["Investor" means:

- (a) with respect to a Contracting Party
 - (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable laws²;
 - (ii) a company or other organisation organised in accordance with the laws¹⁰⁷ applicable in that Contracting Party
- (b) with respect to a "third state", a natural person, company or other organisation which fulfills, mutatis mutandis, the conditions specified in sub-paragraph (a) for a Contracting Party.]¹⁰⁶

ECT 4 [CONF 64] (07/07/93)
Article 1.7 – Definitions
Endnote to Article 1 – Definitions*

["Investor" means:

- (a) with respect to a Contracting Party
 - (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable laws;

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

¹ **Norway** scrutiny reserve.

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

² **Japan** requests for insertion of "and regulations".

- (ii) a company or other organisation organised in accordance with the laws applicable in that Contracting Party
- (b) with respect to a “third state”, a natural person, company or other organisation which fulfills, mutatis mutandis, the conditions specified in sub-paragraph (a) for a Contracting Party.]¹⁰⁶

ECT 3 [CONF 60] (01/06/93)
Article 1.7 – Definitions

[“Investor” of a Contracting Party means:

- (a) natural persons having the citizenship or nationality of or who are permanently residing in that Contracting Party in accordance with its applicable laws;
- (b) companies or other organisations organised in conformity with the laws and regulations applicable in that Contracting Party.]¹⁰⁶

ECT 2 [CONF 56] (01/05/93)
(Compromise text) ECT 1 [CONF 50] (15/03/93)
Article 1.7 – Definitions

“Investor” [DL] of a Contracting Party means:

- (a) natural persons having the citizenship or nationality of, or who are permanently residing in, that Contracting Party in accordance with its applicable laws;
- (b) companies or other organisations under the laws and regulations applicable in that Contracting Party.

BA-37 (01/03/93)
BA-35 (09/02/93)
Article 1.6 – Definitions

“Investor” means with regard to a Contracting Party:

- (a) natural persons having the citizenship or nationality of [or who are permanently residing in]³ that Contracting Party in accordance with its applicable laws;
- (b) [companies or other organisations under the laws and regulations applicable in that Contracting Party.]⁴

³ **Canada, Australia and USA** will propose a compromise text for solving up Australia and Canada concerns.

⁴ **Romania** wants this para should read as follows: “companies and other entities, legally constituted under the laws and regulations applicable in that Contracting Party, whether or not organised for pecuniary gain, or privately or governmentally owned or controlled”.

Norway reserve its right to revert to this definition when no satisfactory solution be found under footnote 41.3.

BA-31 (21/12/92)
Article 1.5 – Definitions

“Investor” means with regard to a Contracting Party:

- (a) natural persons having the citizenship or nationality of [or who are permanently residing in]⁵ that Contracting Party in accordance with its⁶ laws;
- (b) [companies or other organisations under the laws and regulations applicable in that Contracting Party.]¹⁰⁹

BA-26 (25/11/92)
Article 1.5 – Definitions
Footnote 22 of Article 27 – Exceptions

Article 1.5

“Investor” means with regard to a Contracting Party:

- (a) natural persons having the citizenship or nationality of [or who are permanently residing in]⁷ that Contracting Party in accordance with its laws;
- (b) companies or other organisations under the laws and regulations applicable in that Contracting Party.

Footnote 22 of Article 27⁸

Australia proposes new para, which provides wording to prevent “double-dipping” (i.e. repeated action on the same matter by an investor who is a citizen/national of one Contracting Party and a permanent resident of another Contracting Party):

“() This Agreement shall not apply to a natural person who is not a citizen or national of a Contracting Party (the first Contracting Party) but who is a permanent resident of that Contracting Party, if :

- (a) that person has already invoked the provisions of this Agreement against the Contracting Party in which that person has made an Investment (the second Contracting Party), provided that this has occurred in respect of the same matter or,
- (b) the person is a citizen or national or permanent resident of the second Contracting Party.”

⁵ Final position pending the discussion of Article 27 and Article 16.

⁶ **Romania** request insertion of: “applicable”.

⁷ Final position pending the discussion of Article 27, in particular F.N. 27.22.

⁸ **Note:** The proposed new para (4) should be read in conjunction with Article 1(5)(a) (Definition of “Investor”), as it would read with the insertion of the words “or who are permanently residing in”. [*Ed. note:* the reference to “The proposed new para (4)” seems to be erroneous.]

BA-22 (21/10/92)
Article 1.5 – Definitions
Footnote 22 of Article 27 – Exceptions

Article 1.5

“Investor” means [with regard to a Contracting Party:]⁹

- (a) natural persons having the citizenship [or nationality]¹⁰ of¹¹ that Contracting Party in accordance with its laws;
- (b) [companies or other organisations under the laws and regulations applicable in that Contracting Party.]¹²

Footnote 22 of Article 27¹¹³

Australia proposes new para, which provides wording to prevent "double-dipping" (i.e. repeated action on the same matter by an investor who is a citizen/national of one Contracting Party and a permanent resident of another Contracting Party):

"() This Agreement shall not apply to a natural person who is not a citizen or national of a Contracting Party (the first Contracting Party) but who is a permanent resident of that Contracting Party, if :

- (a) that person has already invoked the provisions of this Agreement against the Contracting Party in which that person has made an Investment (the second Contracting Party), provided that this has occurred in respect of the same matter or,
- (b) the person is a citizen or national or permanent resident of the second Contracting Party.”

BA-15 (12/08/92)
Article 1.5 – Definitions

“Investor” means with regard to a Contracting Party:

- (a) natural persons having the citizenship or nationality of that Contracting Party in accordance with its laws;
- (b) companies or firms constituted under civil or commercial law, including cooperative societies and other legal persons governed by public or private law in force in the territory of

⁹ Drafting group established for 5(b) recommends change in language of the chapeau which will require either discussion in WG II or assignment to Legal Sub-Group for consideration.

¹⁰ **Hungary** scrutiny reserve.

¹¹ **Australia** asks for insertion of : “or who are permanently residing in”.

¹² **USA, Norway and Canada** reserve. All reserve right to revisit this definition should a satisfactory solution not be reached to the issue expressed in USA footnote 1.33 contained in BA-14. Footnote 1.33 In BA-14, which the USA suggested be added to Article 1 or Article 16, read as follows : “Each Contracting Party reserves the right to deny the advantages of this Agreement to a legal entity if citizens or nationals of a non-signatory country control such entity and if that entity has non substantial business activities in the Domain of the Contracting Party in which it is organised; or the denying Contracting Party does not maintain normal economic relations with the non-signatory country the nationals of which control such entity.”

that Contracting Party or otherwise having the nationality of a Contracting Party in accordance with its laws and having its registered office, central administration or principal place of business within the territory of a Contracting Party;

BA 14 (24/06/92)
BA 13 (19/06/92)
Article 1.6 – Definitions

“Investor” means with regard to a Contracting Party:

- (a) natural persons having the citizenship or [nationality of that Contracting Party]¹³ in accordance with its laws;
- (b) any [legal entities]¹⁴ incorporated or constituted under the law in force in the [Territory] of that Contracting Party [whether or not organised for pecuniary gain or privately or governmentally owned or controlled] and having [real economic]¹⁵ activities within the [Territory] of that Contracting Party¹⁶;
- (c) [any [legal entities]^{19,17} controlled by nationals of that Contracting Party or by legal entities incorporated or constituted under the law in force in the [Territory] of that Contracting Party]¹⁸;

¹⁹provided that that natural persons or [legal entities]¹⁹ are [not prohibited by]²⁰ the laws of that Contracting Party from making Investments in the [Territory] of another Contracting Party in connection with [Energy Materials and Products], [or to trade in [Energy Materials and Products] or equipment or services related to the extraction, production, conversion, treatment, carriage or supply of [Energy Materials and Products] in or to the [Territory] of another Contracting Party]^{123,21}.

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¹³ **Australia** asks for replacing with “or who are permanently residing”.

¹⁴ **Japan** asks for replacing either with “company” or “entity” so as to include bodies which both do and do not have legality.

¹⁵ **USA** suggests substituting with: “substantial business”.

¹⁶ **Austria** suggests deletion.

¹⁷ **USA** asks for insertion of “owned or”.

¹⁸ **Austria** suggests deletion.

¹⁹ **USA** can accept last clause starting “provided that” and ending by the end of this para, but sees no need for it.

²⁰ **Norway** reserve, subject to substituting “not prohibited by” with “competent”.

²¹ **Canada** proposes replacing subparagraphs (b) and (c) with the following text:

“b) such Contracting Party or an agency thereof;

c) a local or regional authority or government of such Contracting Party, or an agency of such authority or government; or

d) an entity ultimately controlled directly or indirectly through the ownership of voting interests by :

i) such Contracting Party or an agency or agencies thereof;

ii) one or more local or regional authorities or governments of a Contracting Party, or an agency or agencies of such authority or government;

iii) one or more natural persons having the citizenship or [nationality of that Contracting Party in accordance with

iv) any combination of persons or entities described in (i), (ii) and (iii);

that makes or has made an Investment.

To this Canada adds that “Investors” should have a more substantive connection to a Contracting Party than required by the current definition. Legal entities controlled directly or indirectly by nationals of states not signatory to the Basic Agreement should not be included in the definition of Investor.”

²² **USA** suggests adding here or in Article 16 the following text: “Each Contracting Party reserves the right to deny the advantages of this Agreement to a legal entity if citizens or nationals of a non-signatory country control

BA 12 (09/04/92)
Article 1.6 – Definitions

“Investor” means with regard to a Contracting Party:

- (a) natural persons having the citizenship or [nationality of that Contracting Party in accordance with its laws]²³;
- (b) any legal entities incorporated or constituted under the law in force in the Territory of that Contracting Party whether or not organised for pecuniary gain or privately or governmentally owned or controlled and having real economic activities within the Territory of that Contracting Party;
- (c) any legal entities controlled by nationals of that Contracting Party or by legal entities incorporated or constituted under the law in force in the Territory of that Contracting Party;

provided that that natural persons or legal entities are not prohibited by the laws of that Contracting Party from making Investments in the Territory of another Contracting Party in connection with [Energy Materials and Products], [or to trade in [Energy Materials and Products] or equipment or services related to the extraction, production, conversion, treatment, carriage or supply of [Energy Materials and Products] in or to the Territory of another Contracting Party]²⁴.

BA 6 (21/01/92)
Article 1.5 – Definitions

“Investor” means with regard to a Contracting Party:

- (a) natural persons having the citizenship or [nationality of that Contracting Party in accordance with its laws]²⁵;
- [(b) any corporations, companies, firms, enterprises, organisations and associations incorporated or constituted under the law in force in the Territory of that Contracting Party;]^{26,27}

provided that that natural person, corporation, company, firm, enterprise, organisation or association is competent, in accordance with the laws of that Contracting Party to make investments in the Territory of another Contracting Party in connection with [Energy Materials and Products], or to trade in [Energy Materials and Products] or equipment or services related to

such entity and if that entity has no substantial business activities in the [Territory] of the Contracting Party in which it is organized; or the denying Contracting Party does not maintain normal economic relations with the non-signatory country the nationals of which control such entity.”

²³ **Australia** asks for replacing with “or whose residence in that Contracting Party is not limited as to time under its laws”. Due to strong reservations by other countries Australia comes up with a compromise text by 7 April 1992.

²⁴ **Austria** suggests deletion.

²⁵ (**Australia**): Replace by “or whose residence in that Contracting Party is not limited as to time under its laws”;

²⁶ (**Switzerland**): Replace the subpara (b) with: “any corporations, companies, firms, enterprises, organisations and associations controlled by nationals of that Contracting Party or by corporations, companies, firms, enterprises, organisations and associations incorporated or constituted under the law in force in the Territory of that Contracting Party”

²⁷ (**USA**): Adding after Party following wording: “whether or not organised for pecuniary gain or privately or governmentally owned or controlled.”

the extraction, production, conversion, treatment, carriage or supply of [Energy Materials and Products] in or to the Territory of another Contracting Party.

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| <p style="text-align: center;">BA 4 (31/10/91) Article 1.5 – Definitions</p> |
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“Investor” means with regard to a Contracting Party:

- (a) natural persons having the citizenship or [nationality of that Contracting Party in accordance with its laws]¹³⁰;
- (b) any corporations, companies, firms, enterprises, organisations and associations incorporated or constituted under the law in force in the Territory of that Contracting Party;

provided that that natural person, corporation, company, firm, enterprise, organisation or association is competent, in accordance with the laws of that Contracting Party;

- (i) make investments in the Territory of another Contracting Party in connection with Energy Materials and Products, or
- (ii) trade in Energy Materials and Products or equipment or services related to the extraction, production, conversion, treatment, carriage or supply of Energy Materials and Products in or to the Territory of another Contracting Party.

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| <p style="text-align: center;">BP 2 (11/09/91) Basic Protocol (26/08/91) Article 1.1(f) – Definitions</p> |
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(f) “Investor” means with regard to a Contracting Party:

- (i) natural persons having the citizenship or nationality of that Contracting Party in accordance with its laws;
- (ii) any corporations, companies, firms, enterprises, organisations and associations incorporated or constituted under the law in force in the Territory of that Contracting Party;

provided that that natural person, corporation, company, firm, enterprise, organisation or association is competent, in accordance with the laws of that Contracting Party, to make Investments in the Territory of another Contracting Party;