

Article 9(1) – Access to Capital

General comments regarding the whole Article

Final Act (17/12/94)
CONF 104 (Text for adoption) (14/09/94)
Understanding 9 (With respect to Articles 9, 10 and Part V)

As a Contracting Party's programmes which provide for public loans, grants, guarantees or insurance for facilitating trade or Investment abroad are not connected with Investment or related activities of Investors from other Contracting Parties in its Area, such programmes may be subject to constraints with respect to participation in them.

Interim text (25/06/94)
Understanding 9 (To Articles 10 and Part V)

Insofar as a Contracting Party's programmes which provide for public loans, grants, guarantees or insurance for facilitating trade or Investment abroad are not connected with Investment or related activities of Investors from other Contracting Parties in its Area, such programmes may be subject to constraints with respect to participation in them.

Interim text (20/06/94)
Understanding 9 (To Article 10 and Part V)

As a Contracting Party's programmes which provide for public loans, grants, guarantees or insurance for facilitating trade or Investment abroad are not connected with Investment or related activities of Investors from other Contracting Parties in its Area, such programmes may be subject to constraints with respect to participation in them.

ECT 6 [CONF 82] (20/12/93)
[Article 10] – Access to Capital

Only paragraph (1) of this Article was discussed in a Formal Sub-Group in October and December.

EC scrutiny reserve.

ECT 5 [CONF 72] (11/10/93)
Article 10 – Access to Capital

In the formal Sub-Group on 8 October a discussion on paragraph (1) was conducted but not finalised. The text reflects this discussion. A few USA proposals on the text of paragraph (2) have been also footnoted.

The Chairman of the Sub-Group invited delegations to forward him written comments on this text before the close of play on 29 October 1993 so that the new draft could be circulated before the next Plenary.

ECT 4 [CONF 64] (07/07/93)
Article 10 – Access to Capital

- During the May Plenary the Chairman asked WG II Chairman to prepare consolidated text for Article 10 taking account of the alternative texts submitted by Hungary, Romania, Russian Federation and USA. The new text indicates the differences in relation to the text comprised in CONF-60 by deletion marks [DL] or by underlining the new text. Alternative suggestions are included in the footnotes under specific comments.
- Sub-Group which met on 28 June only made little progress so that the June Plenary did not discuss this colated text.

ECT 3 [CONF 60] (01/06/93)
Article 10 – Access to Capital

Chairman's note During the May Plenary several delegations presented alternative texts for this Article: Hungary (Room Document 1); Romania (Room Document 6); USA (Room Document 9) and Russian Federation (Room Document 37). The Chairman asked WG II Chairman to prepare a consolidated text for discussion at the next Plenary meeting.

ECT 2 [CONF 56] (01/05/93)
[Article 10] – Access to Capital

Several Eastern European countries preferred the earlier version of this Article and expressed the view that the needs of economies in transition should explicitly be taken into account in this Article.

Russian Federation will come up with its own text. Other delegations might do the same.

BA-37 (01/03/93)
BA-35 (09/02/93)
[Article 13] – Access to Capital

The discussion in WG II on 4 February 1993 had been based on the analysis prepared by USA delegation exploring the relationship between issues addressed in this Article and Article 16, particularly para (7) (see Room Document 9 of 1 February 1993). USA's view is that issues contained in Article 13 are sufficiently covered by Article 16 and consequently do not require any coverage by Article 13. Some delegations supported this view. Some delegations however, pointed out that its retention, particularly of para (2), has merits.

Chairman asked Russian Federation and USA to discuss the need for this Article once again in the light of the deductions indicated in Room Document 9 and come up with a clear statement of what should be covered in this Article that is not covered by Article 16(7).

General scrutiny reserve.

BA-31 (21/12/92)
[Article 13] – Access to capital

In the December WG II meeting it was decided that, in good time for the next WG II meeting:

- Russian Federation will produce a note indicating the need for this Article and, if so, which paragraphs need to be maintained. Other delegations which see advantage in maintaining this Article, are invited to do the same.
- USA will explore in a note the relation with Article 16(7) and provide - if necessary - adaptive formulations which should minimise any restrictions on a free flow of capital.

Reference is also made to the Romanian notes on this subject as indicated in Room Documents 19 of 17 December 1992 and 23 of 18 December 1992.

General scrutiny reserve.

BA-26 (25/11/92)
[Article 13] – Access to Capital

This Article shall be revisited at the December WG II meeting. To this end Canada shall circulate the OECD definition on capital market and Hungary will forward to the Secretariat by 30 November 1992 the description of its financial schemes.

General scrutiny reserve.

BA-22 (21/10/92)
BA-15 (12/08/92)
BA-14 (24/06/92)
[Article 13] – Access to Capital

General scrutiny reserve.

BA-12 (09/04/92)
[Article 13] – Access to Capital

Article based on Russian Federation suggestion.

The Chairman is concerned to ensure that the current wording of this Article does not jeopardize national provisions to protect private Investors or hamper the ability of lenders to demand appropriate security for loans. EC and Japan stressed the need to clarify the objective of these provisions, as well as the criteria and appreciation modalities which are referred to. EC points out that guarantee mechanism for political risks cannot be globally provided by other Parties.

Scrutiny reserve by many delegations.

BA-6 (21/01/92)
[Article 13] – Access to Capital

Scrutiny reserve by many delegations.

New Article based on USSR suggestions.

The Chairman had previously asked delegations to send proposals on this subject to the Secretariat by 15 December 1991. No responses were received. The Chairman is concerned to ensure that the current wording of this Article does not jeopardize national provisions to protect private Investors or hamper the ability of lenders to demand appropriate security for loans.

Article 9.1

ECT as adopted (17/12/94)
CONF 104 (Text for adoption) (14/09/94)
Article 9.1 – Access to Capital

The Contracting Parties acknowledge the importance of open capital markets in encouraging the flow of capital to finance trade in Energy Materials and Products and for the making of and assisting with regard to Investments in Economic Activity in the Energy Sector in the Areas of other Contracting Parties, particularly those with economies in transition. Each Contracting Party shall accordingly endeavour to promote conditions for access to its capital market by companies and nationals of other Contracting Parties, for the purpose of financing trade in Energy Materials and Products and for the purpose of Investment in Economic Activity in the Energy Sector in the Areas of those other Contracting Parties, on a basis no less favourable than that which it accords in like circumstances to its own companies and nationals or companies and nationals of any other Contracting Party or any third state, whichever is the most favourable.

Interim text (25/06/94)
Article 10.1 – Access to Capital

The Contracting Parties acknowledge the importance of open capital markets in encouraging the flow of capital to finance trade in Energy Materials and Products and for the making of and assisting with regard to Investments in Economic Activity in the Energy Sector in the Areas of other Contracting Parties, particularly those with economies in transition. Each Contracting Party shall accordingly endeavour to promote conditions for access to its capital market for by companies and nationals of other Contracting Parties, for the purpose of financing trade in Energy Materials and Products and for the purpose of Investment in Economic Activity in the Energy Sector of those in the Area of that Contracting Parties y. on terms a basis no less favourable than those required that which it accords in like circumstances of to its own companies and nationals or companies and nationals of any other Contracting Party or any third state. that is not a Contracting Party.

Interim text (20/06/94)
Article 10.1 – Access to Capital

Contracting Parties acknowledge the importance of open capital markets in encouraging the flow of capital to finance trade in Energy Materials and Products and for making and assisting Investments in the Energy Sector of other Contracting Parties, particularly those with economies in transition. Each Contracting Party shall accordingly endeavour to promote conditions for access to its capital market for companies and nationals of other Contracting Parties for the purpose of financing trade in Energy Materials and Products and for the purpose of Investment in Economic Activity in the Energy Sector of those Contracting Parties on terms no less favourable than those required in like circumstances of its own companies and nationals or companies and nationals of any other Contracting Party or any state that is not a Contracting Party.

Compromise text [CONF 98] (22/04/94)
Article 10.1 – Access to Capital

Contracting Parties acknowledge the importance of open capital markets in encouraging the flow of capital to finance trade in Energy Materials and Products and to finance Investment in the Economic Activity in the Energy Sector of Contracting Parties, particularly those with economies in transition. Accordingly each Contracting Party shall endeavour to promote conditions for access to its capital market for its companies and nationals and for companies and nationals of other Contracting Parties for making or assisting Investment in Economic Activity in the Energy Sector in the Area of other Contracting Parties. [Except where a preference to domestic Investment or Investment in another Contracting Party or a state which is not a Contracting Party is extended under domestic law or]¹ existing international agreements, no Contracting Party shall require terms for access to commercially available sources of finance within its jurisdiction which render generally unavailable such access for the purpose of Investment in the Economic Activity in the Energy Sector of another Contracting Party on terms no less favourable than those required in like circumstances for the purpose of Investment by nationals or companies of the Contracting Party in its own energy sector or in that of any other Contracting Party or any state that is not a Contracting Party, whichever is the most favourable.

ECT 7 [CONF 96] (17/03/94)
Article 10.1 – Access to Capital

Contracting Parties acknowledge the importance of open capital markets in encouraging the flow of capital to finance trade in Energy Materials and Products and to finance Investment in the Economic Activity in the Energy Sector of Contracting Parties, particularly those with economies in transition. Accordingly each Contracting Party shall endeavour to promote conditions for access to its capital market for its companies and nationals and for companies and nationals of other Contracting Parties for making or assisting Investment in Economic Activity in the Energy Sector in the Area of other Contracting Parties. [Consistent with]² existing international agreements, no Contracting Party shall require terms for access to [commercially available]³ sources of finance within its jurisdiction which render generally unavailable such access for the purpose of Investment in the Economic Activity in the Energy Sector of another Contracting Party on terms no less favourable than those required in like circumstances for the purpose of Investment by nationals or companies of the Contracting Party in its own energy sector or in that of any other Contracting Party or any state that is not a Contracting Party, whichever is the most favourable.

ECT 6 [CONF 82] (20/12/93)
[Article 10].1 – Access to Capital

Contracting Parties acknowledge the importance of open capital markets in encouraging the flow of capital to finance trade in Energy Materials and Products and to finance Investment in the Economic Activity in the Energy Sector of Contracting Parties, particularly those with economies in transition.

¹ Addition, following a USA proposal.

² USA proposes substituting with: "Except where a preference to domestic Investment or investment in another Contracting Party or a state which is not a Contracting Party is extended under domestic law or". Additionally USA wants to revert to wording of the third sentence as in CONF 85.

Russian Federation cannot accept these USA proposals.

³ Russian Federation scrutiny reserve.

Accordingly each Contracting Party will endeavour to promote conditions for access to its capital market for its companies and nationals and for companies and nationals of other Contracting Parties for Making or assisting Investment in Economic Activity in the Energy Sector in the Area of other Contracting Parties. [Consistent with]⁴ existing international agreements, no Contracting Party shall apply terms for access to private sources of finance within its Jurisdiction for the purposes of Investment in the Economic Activity in the Energy Sector of another Contracting Party less favourable than those applied in like circumstances for the purposes of Investment by nationals or companies of the Contracting Party in its own energy sector or in that of any other Contracting Party or any third state, whichever is the most favourable.

ECT 5 [CONF 72] (11/10/93)
Article 10.1 – Access to Capital

Contracting Parties acknowledge the importance of open capital markets in encouraging the flow of capital to finance trade in Energy Materials and Products and to finance Investment in the energy sector of Contracting Parties, particularly those with economies in transition. [Accordingly each Contracting Party will endeavour to promote conditions for access to its capital market for its companies and nationals and for companies and nationals of other Contracting Parties for Making or assisting Investment in Economic Activity in the Energy Sector in the Area of other Contracting Parties]⁵. [Consistent with]⁶ existing international agreements, no Contracting Party shall [require]⁷ terms for access to private sources of finance within its jurisdiction for the purposes of Investment in the energy sector of another Contracting Party less favourable than those [required]⁷ in like circumstances for the purposes of Investment by nationals or companies of the Contracting Party in its own energy sector or in that of any other Contracting Party or any third state⁸.

ECT 4 [CONF 64] (07/07/93)
Article 10.1 and 10.2 – Access to Capital

- (1) Contracting Parties [acknowledge the importance of conditions which promote the flow of capital to finance]⁹ trade in Energy Materials and Products and investment in the Energy Sector of Contracting Parties particularly those with economies in transition. Accordingly each Contracting Party shall:
- a) [[facilitate access to its capital market for its companies and nationals and not hinder access of companies and nationals of other Contracting Parties to its market]¹⁰ for Making or

⁴ USA proposes substituting with: “Except where a preference to domestic investment or investment in another Contracting Party or a third state is extended under domestic law or”.

USA agreed to have a further look at the formulation of this footnote in order to avoid concerns of other delegations (especially Russian Federation) about possible discrimination.

⁵ USA scrutiny reserve.

⁶ USA proposes substituting with: “Except where a preference to domestic Investment or Investment in third states is extended under domestic law or”.

⁷ USA proposes replacing with: “apply” resp. “applied”.

⁸ USA wants to add: “whichever is most favourable”.

⁹ Romania proposes replacing with: “shall endeavour to encourage the flow of capital by financing”.

¹⁰ Hungary proposes substituting for: “encourage companies and nationals within its Domain and particularly international financial institutions”.

assisting Investment in Economic Activity in the Energy Sector in the Area of other Contracting Parties]¹¹;

- b) [examine economic, fiscal or other measures that may contribute to the expansion of trade and Investment in Economic Activity in the Energy Sector in countries of transition]¹²;
- c) [regularly report to the Charter Conference the initiation of such measures and the results thereof]¹²

- (2) [[DL] To the extent permitted by the laws and consistent with measures appropriate for prudential regulation [and with existing international agreements]^{13,14}, Contracting Parties shall [not require entities subject to their jurisdiction to provide]^{15,16} [DL] to companies and nationals from other Contracting Parties seeking to borrow funds or issue and sell equity shares or other securities in connection with [DL] [financing trade or Making Investment]¹⁷ in the Energy Sector treatment [no]^{18,19} less favourable than that provided [in like circumstances]²⁰ to their own [DL] companies and nationals or to [DL] companies and nationals from any other Contracting Party or any third State.]²¹

ECT 3 [CONF 60] (01/06/93)

Article 10.1 – Access to Capital

Contracting Parties acknowledge the importance of conditions which promote the flow of capital to finance trade in Energy Materials and Products and Investment in the Energy Sector of Contracting Parties particularly those with economies in transition. Accordingly in accordance with their laws and with their measures necessary for prudential regulation. Contracting Parties shall not require entities subject to their jurisdictions provide to traders and Investors from other Contracting Parties seeking to borrow funds or issue and sell equity shares or other securities in connection with Economic Activity in the Energy Sector treatment less favourable than that provided in like circumstances to their own traders and Investors or to traders and Investors from any other Contracting Party or any third State.

¹¹ **Russian Federation** proposal.

¹² **Hungarian** proposal.

¹³ **USA** proposal.

¹⁴ **Russian Federation** seeks deletion.

¹⁵ **USA** suggests replacing with: “endeavour to provide”.

¹⁶ **Russian Federation** suggests replacing with: “provide”.

¹⁷ **Russian Federation** proposal.

¹⁸ **Russian Federation** proposal.

¹⁹ **USA** proposal.

²⁰ **Russian Federation** seeks deletion.

²¹ **Hungary** suggests alternative text for this paragraph reading:

“Each Contracting Party shall endeavour to encourage such capital flows by facilitating, in accordance with its laws and prudential regulations, access to its capital markets for Investors of another Contracting Party with respect to the borrowing of funds and the issues and sale of equity shares and other securities in connection with Economic Activity in the Energy Sector.”

ECT 2 [CONF 56] (01/05/93)
[Article 10].1 – Access to Capital

Contracting Parties acknowledge the importance of conditions which promote the flow of capital to finance trade in Energy Materials and Products and Investment in the Energy Sector of Contracting Parties particularly those with economies in transition. [Accordingly in accordance with their laws and with their measures necessary for prudential regulation, Contracting Parties shall not require entities subject to their jurisdiction]²² to provide to [traders and]²³ Investors from other Contracting Parties seeking to borrow funds or issue and sell equity shares or other securities in connection with Economic Activity in the Energy Sector treatment less favourable than that provided in like circumstances to their own [traders and]²³ Investors or to [traders and]²³ Investors from any other Contracting Party or any third State.

(Compromise text) ECT 1 [CONF 50] (15/03/93)
Article 10.1 – Access to Capital

Each Contracting Party shall endeavour to encourage such capital flows by facilitating, in accordance with its laws, [DL] access to its capital markets [DL] for Investors of [DL] another Contracting Party [DL] with respect to the borrowing of funds and the issuance and sale of equity shares and other securities in connection with [DL] Economic Activity in the Energy Sector. Nothing in this Article is intended to impair the ability of financial institutions to establish and apply their own lending practices based on market principles.

BA-37 (01/03/93)
BA-35 (09/02/93)
BA-31 (21/12/92)
BA-26 (25/11/92)
[Article 13].1 – Access to Capital

Each Contracting Party shall accord to Investors of another Contracting Party access to capital markets no less favourable than that accorded in like situations to its own Investors or to Investors of any other Contracting Party or of any third state with respect to the borrowing of funds and the issuance and sale of equity shares and other securities in connection with extraction, production, conversion, treatment, carriage or supply of Energy Materials and Products. Nothing in this Article is intended to impair the ability of financial institutions to establish and apply their own lending practices based on market principles.

²² USA proposes to replace this wording with: “Accordingly to the extent permitted by their laws Contracting Parties shall endeavor”. Furthermore, the word “no” should be inserted in the 10th line, so that it reads “treatment no less favourable”.

²³ USA suggests to look for new wording as the word “trader” is not very precise. The suggestion was made to look for a more general wording which could include the concept of a “trader”.

BA-22 (21/10/92)
[Article 13].1 – Access to Capital

[Each Contracting Party shall accord to Investors of another Contracting Party access to capital markets no less favourable than that accorded in like situations to its own Investors or to investors of any other Contracting Party or of any third state with respect to the borrowing of funds and the insurance and sale of equity shares and other securities in connection with extraction, production, conversion, treatment, carriage or supply of Energy Materials and Products. Nothing in this Article is intended to impair the ability of financial Institutions to establish and apply their own lending practices based on market principles].²⁴

BA-15 (12/08/92)
BA-14 (24/06/92)
[Article 13].1 – Access to Capital

[Each Contracting Party shall accord to Investors of another Contracting Party access to capital markets no less favourable than that accorded in like situations to its own Investors or to Investors of any other Contracting Party or of any third state with respect to the borrowing of funds and the insurance and sale of equity shares and other securities in connection with extraction, production, conversion, treatment, carriage or supply of [Energy Materials and Products]. Nothing in this Article is intended to impair the ability of financial institutions to establish and apply their own lending practices based on market principles].²⁴

BA 13 (19/06/92)
Article 13 – Access to Capital

Each Contracting Party shall accord to Investors of another Contracting Party access to capital markets no less favourable than that accorded in like situations to its own Investors or to Investors of any other Contracting Party or of any third state with respect to the borrowing of funds and the insurance and sale of equity shares and other securities in connection with extraction, production, conversion, treatment, carriage or supply of [Energy Materials and Products]. Nothing in this Article is intended to impair the ability of financial institutions to establish and apply their own lending practices based on market principles.²⁴

BA 12 (09/04/92)
[Article 13].1 – Access to Capital

²⁵Each Contracting Party shall accord to Investors of another Contracting Party treatment no less favourable than that accorded in like situations to its own Investors or to Investors of any other Contracting Party or of any third state with respect to the borrowing of funds and the purchase, insurance, and sale of equity shares and other securities in connection with extraction, production, conversion, treatment, carriage or supply of [Energy Materials and Products]²⁶.

²⁴ **Japan** scrutiny reserve on para (1).

²⁵ **Japan** asks for deletion of paragraphs (1) and (3).

²⁶ **USA** asks for adding a new clarifying sentence:

“Nothing in this Article is intended to impair the ability of private institutions to establish and apply their own lending practices based on market principles”.

BA 6 (21/01/92)
Article 3.7 – Principles
[Article 13].1 – Access to Capital

*Each Contracting Party shall grant Investors of another Contracting Party non-discriminatory access to capital markets for energy investments and shall support the operations and expertise of relevant international institutions in mobilizing private investments.**

[Article 13].1 – Access to Capital

Each Contracting Party shall accord to Investors of another Contracting Party treatment no less favourable than that accorded in like situations to its own Investors or to Investors of any other Contracting Party or of any third state with respect to the borrowing of funds and the purchase, insurance, and sale of equity shares and other securities in connection with extraction, production, conversion, treatment, carriage or supply of [Energy Materials and Products].

* *Ed. note:* Italics added to emphasise the part relevant to current Article 9.1