

AMERICAN BAR ASSOCIATION
SECTION OF INTERNATIONAL LAW AND PRACTICE
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

- | | |
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| BE IT RESOLVED, That the American Bar Association | 1 |
| ("ABA") urges the United States government to conclude and | 2 |
| to implement as expeditiously as possible a multilateral | 3 |
| agreement on investment designed to -- | 4 |
| | 5 |
| | 6 |
| • liberalize existing national investment | 7 |
| restrictions, | 8 |
| | 9 |
| • provide the highest standards of investment | 10 |
| protection, including the provision of prompt, | 11 |
| adequate, and effective compensation for | 12 |
| expropriation, | 13 |
| | 14 |
| • create effective dispute settlement mechanisms, | 15 |
| and | 16 |
| | 17 |
| • encourage the broadest possible participation by | 18 |
| all states in any such accord. | 19 |

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The negotiation of a multilateral agreement on investment would fill a critical gap in the framework of international economic law.¹ The primacy of the rule of law and the certainty it provides to investors is essential to development, technology transfer, and economic growth.

In the interests of furthering the rule of law and fostering the benefits that would flow from a multilateral investment accord, the American Bar Association should urge the President to negotiate and the Congress to implement a multilateral agreement on investment as expeditiously as possible.

I. Need For a Multilateral Agreement on Investment

Multilateral agreements such as the General Agreement on Tariffs and Trade ("GATT") and the Articles of Agreement of the International Monetary Fund ("IMF") have facilitated investment as well as trade. Their contribution to world economic growth and to the development of international law is well established.²

¹ See Jeffery Atik, Fairness and Managed Foreign Direct Investment, 32 Colum. J. Transnat'l. L. 1, 2-3 (1994) ("[u]nlike foreign trade, which is protected and promoted under the liberal principles of GATT, [foreign direct investment] enjoys no internationally coordinated approach, nor has such an approach been seriously pursued") ("Atik"); Thomas L. Brewer & Stephen Young, The Multilateral Agenda for Foreign Direct Investment -- Problems, Principles and Priorities for Negotiations at the OECD and WTO, 18 World Comp. L. & Econ. Rev. 67-68 ("Brewer & Young").

² The "liberalization of trade and financial flows promoted by [the] postwar system -- sometimes broadly called
(continued...)

Yet, neither the GATT nor the IMF Articles of Agreement fully provides for the protection of foreign investors or the elimination of investment barriers. For example, while the IMF Articles of Agreement do impose certain disciplines on Fund members' use of exchange controls or limits on capital transfers, thereby eliminating some of the risks associated with international investment,³ the IMF rules do not address outright restraints on foreign direct investment or provide any protection, such as a guarantee against expropriation without adequate compensation, once an investment is made.⁴

²(...continued)

the Bretton Woods system -- . . . foster[ed] an unprecedented surge of trade and . . . demonstrate[d] the economic benefits that flow from such liberalization." John H. Jackson, The World Trading System: Law and Policy of International Economic Relations 4 (1989); see also Michael D. Bordo, The Bretton Woods International Monetary System: A Historical Overview, in A Retrospective on the Bretton Woods System (Michael D. Bordo & Barry Eichengreen, eds., 1993) 3, 12, 27. At the same time, the agreements that made up the Bretton Woods system -- the GATT and the IMF Articles of Agreement -- became the cornerstone of a rules-based international economic system. See, e.g., Louis Henkin, Richard C. Pugh, Oscar Schachter & Hans Smit, International Law 1163 (2d ed. 1987) (highlighting the importance of the General Agreement on Tariffs and Trade and the Articles of Agreement of the International Monetary Fund to the development of international economic law); see also John H. Jackson, World Trade and the Law of GATT 9-10 (1969) (on the role of the GATT in the development of a rule-based international trading system).

³ See, e.g., Articles of Agreement of the International Monetary Fund, arts. IV (obligations regarding exchange arrangements), VI (restricting use of controls on capital transfers), and VIII (limiting restrictions on current payments); see also Joseph Gold, Exchange Rates in International Law and Organization 225-246 (1988).

⁴ Id.; see also Kenneth W. Dam, The Rules of the Game 98-100 (1982) (explaining the limited nature of IMF

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The same analysis applies to the GATT and its successor, the World Trade Organization ("WTO"). While the recently concluded Uruguay Round negotiations addressed investment to a limited extent, those rules do not afford investors the basic protection that could be guaranteed under a multilateral investment accord.⁵

The gap created by existing multilateral arrangements on trade and monetary relations cannot be filled by expanding the existing network of U.S. bilateral investment treaties ("BIT"). The BIT initiative was never envisioned as the exclusive means for achieving progress on investment or as a substitute for a multilateral approach.⁶ The BIT program does, however, provide a

⁴(...continued)
restrictions on the use of capital controls).

⁵ The Uruguay Round addresses investment in three main contexts. The General Agreement on Trade in Services or "GATS" includes foreign direct investment as one means of supplying internationally traded services. The Agreement on Trade-Related Aspects of Intellectual Property Rights or "TRIPS" establishes international rules concerning patents, trademarks, tradenames, and other property rights of critical importance to international investors. The Agreement on Trade-Related Investment Measures or "TRIMS" creates limited protection against the imposition of trade-distorting conditions on in-bound foreign direct investment. See Pierre Sauve, A First Look at Investment in the Final Act of the Uruguay Round, 28 J.W.T. 5, 7-14 (1994). The United States advocated a more comprehensive approach to investment, but the terms of reference of the Punta del Este Declaration that started the Uruguay Round expressly rejected that initiative in favor of one that focussed solely on those investment measures with "restrictive and distortive effects on trade." Id. at 5.

⁶ Brewer & Young at 67 (suggesting that "[r]ecent multilateral, regional and bilateral agreements concerning foreign direct investment (FDI) have added to the complexity and uncertainty of an international regime for FDI that was
(continued...)

natural starting point for the negotiation of a multilateral investment accord.

The United States took a significant step in the direction of a multilateral agreement on investment in the context of the North American Free Trade Agreement ("NAFTA"), which includes perhaps the farthest-reaching set of investment disciplines yet negotiated.⁷ The extension of those principles throughout the Western Hemisphere has been discussed in the context of a proposed hemispheric Free Trade Agreement of the Americas.

Multilateral investment negotiations are currently underway or have been concluded in a variety of other fora as well. The negotiation of non-binding investment principles, if not enforceable disciplines, is currently under way in the context of the Asia-Pacific Economic Cooperation forum.⁸ Although limited by its sectoral approach and criticized

⁶(...continued)

already a patchwork of agreements and institutions, involving overlaps, gaps and inconsistencies in the competencies of the organizations and the commitments of the national governments"). Ironically, the bilateral approach -- both the European effort in the 1960s and 1970s and the U.S. BIT program in the 1980s -- represented a response to the failure of previous efforts to create a multilateral accord on investment. See Bernard Kishoiyian, The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law, 14 Nw. J. Int'l L. & Bus. 327, 331 (1994).

⁷ See NAFTA, arts. 1101-1139 and related annexes; see also Daniel M. Price & P. Bryan Christy, III, An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement in The North American Free Trade Agreement: A New Frontier in International Trade and Investment in the Americas 165 (Judith H. Bello, Alan F. Holmer, & Joseph J. Norton, eds., 1994) ("Price & Christy").

⁸ M. Sornarajah, Protection of Foreign Investment in the Asia-Pacific Economic Co-operation Region, 29 J.W.T 105, 123-25 (1995).

initially as an attempt by the European Union ("EU") to establish preferences favoring investors from EU member countries, the European Energy Charter Treaty agreed to by EU member states, Canada, Australia, Japan and most countries in Eastern Europe and the Commonwealth of Independent States in December, 1994, establishes a framework for the protection of international investment in the energy sector.⁹

Perhaps the most promising avenue, however, is the negotiation under way among the members of the Organization for Economic Cooperation and Development ("OECD").¹⁰ In May, 1995, representatives of OECD member countries launched negotiations on a Multilateral Agreement on Investment ("MAI").¹¹ In concept, the MAI would liberalize existing investment restraints, afford protection to investors, create appropriate mechanisms for the settlement of investment disputes between states and between investors and states, and encourage the early accession of non-OECD countries.¹²

⁹ See Thomas W. Waelde, International Investment Under the 1994 Energy Charter Treaty, 29 J.W.T. 5, 6-9 (1995).

¹⁰ The OECD provides a natural forum for negotiations on investment, given its prior work on investment issues and, equally important, no comprehensive agreement on investment exists among OECD member countries, many of whom represent the most significant sources of foreign investment in the United States and the destination of most U.S. investment abroad. See Brewer & Young at 68 N.4; Price & Christy at 182 (noting that the NAFTA commitments between the United States and Canada "represent[ed] the first occasion when two developed OECD countries have made the same commitments to each other that they have demanded of developing countries").

¹¹ Ministerial Communiqué, Meeting of Ministers, Organization for Economic Cooperation and Development, reprinted in OECD Observer, June, 1995, at 39 (announcing agreement to "the immediate start of negotiations in the OECD aimed at reaching a Multilateral Agreement on Investment by the Ministerial meeting of 1997").

¹² The Ministerial communiqué indicated that the
(continued...)

The OECD effort appears likely to yield the greatest immediate progress toward the principles advocated in this recommendation and report.¹³ The majority of international investment takes place among OECD member countries and there is a strong mutual interest in ensuring both the greatest liberalization of investment restrictions and the strongest guarantee of investment protection. The Ministerial Communiqué that marked the formal start of the MAI process bears that out.

A number of commentators and U.S. trading partners have expressed a preference for negotiating multilateral rules on investment under the auspices of the recently created WTO. Their preference for negotiations within the WTO is motivated by two primary concerns -- (1) that negotiating an agreement first among the industrialized countries of the OECD and then opening it for accession to members of the developing world may not be the best

¹²(...continued)

eventual MAI was designed to:

- provide a broad multilateral framework for international investment with high standards for the liberalization of investment regimes and investment protection and with effective dispute settlement procedures, [and]
- be a free-standing international treaty open to all OECD members and the European Communities, and open to accession by non-OECD member countries, which will be consulted as the negotiations progress.

Id.

¹³ Brewer & Young at 68 (noting that the OECD "has had [investment] issues on its agenda since its creation"); Atik at 3 (arguing that, in the absence of rules on investment, economic relations between the advanced industrial economies of the United States, Canada, Japan, and the European Union carry both the area of greatest risk of conflict and, correspondingly, the greatest potential for advancement and benefit from a multilateral approach to investment).

vehicle for encouraging maximum participation in any eventual accord and (2) that an agreement reached within the OECD may not mesh with the existing WTO rules on investment, such as those embodied in the General Agreement on Trade in Services ("GATS").

The current effort under way in the OECD need not conflict with the eventual negotiation of a fully multilateral investment accord, whether within the WTO framework or elsewhere. It does, however, require an effort to structure the OECD arrangement so that it fosters, rather than impedes, progress toward a fully multilateral agreement.

This recommendation and report support the conclusion of an agreement embodying the highest possible standards of investment protection and maximum liberalization of investment barriers regardless of the forum. Consistent with that approach, the ABA should support the progress that U.S negotiators have made within the OECD framework. At the same time, the ABA should encourage an approach that will ultimately result in an accord that is open to any country willing to accede to those principles and that takes into account existing NAFTA and WTO rules and the prospect of negotiating investment disciplines within the WTO in the future.¹⁴

¹⁴ One example of particular importance is how the OECD initiative would meet the requirements of Article V of the GATS. The GATS rules apply to "commercial presence" as one means of engaging in trade in services covered by the agreement. Commercial presence will likely be one of the forms of foreign investment protected by the MAI or any other multilateral investment agreement. Given that the GATS requires that preferences be extended to all WTO member countries, it may be that the United States will owe the protection agreed to in the MAI to all WTO members, unless it finds some rationale under the GATS that excuses its failure to provide most-favored-nation treatment. One logical starting point for analysis, would be Article V of the GATS which, excuses preferential arrangements if made in the context of a free trade agreement or a customs union. It is not clear how the MAI would qualify under that definition.

II. Principles of a Multilateral Agreement

This recommendation and report identifies three basic goals that a multilateral agreement on investment must achieve --

- the liberalization of existing investment barriers,
- the protection of investments, and
- the implementation of effective measures for resolving investment disputes.

The following discussion sets forth the principles upon which a multilateral accord capable of achieving these goals can be built.

A. Liberalization of Existing Restraints

A multilateral investment accord should secure the greatest possible liberalization of existing unjustified investment restraints as a condition of the agreement's entry into force. In other words, the agreement should, to the maximum extent possible, encourage liberalization at the outset, rather than a simple "stand-still" arrangement that leaves existing, non-conforming measures in place or phases them out only after a lengthy period of time has passed.

Effective liberalization requires a broad definition of investment like that employed in U.S. bilateral investment treaties and the NAFTA -- one that reaches the widest range of investments possible, including direct and portfolio investment, real estate, and all forms of tangible and intangible property, as well as ownership and other interests in an enterprise, and interests that entitle an owner to share in the income or profits of an enterprise. Investment would thus include physical assets, intellectual property rights, goodwill, securities, long-term loans linked to investment, joint ventures, concession agreements, licensing agreements and similar rights arising under contract.¹⁵

¹⁵ At the same time, the definition of "investment"
(continued...)

Nondiscriminatory treatment is central to effective liberalization as well. As in the NAFTA, it would be preferable if a multilateral agreement afforded investors and their investments the better of national or most-favored-nation treatment with respect to the establishment, operation, and disposition of investments. The negotiators should also consider how best to negotiate specific commitments regarding individual sectors currently reserved for investment by host country nationals, the elimination of general investment screening requirements, and nondiscriminatory participation in the privatization of state-owned enterprises or the sale of state-granted monopolies.

A multilateral investment agreement would ideally include other provisions designed to foster an open investment environment, including --

- elimination of performance requirements, such as domestic content, trade balancing and technology transfer requirements;
- freedom to make financial transfers related to their investments, including the repatriation of earnings, principal and interest payments, management and licensing fees, and access to foreign exchange to permit imports necessary to the investors' operations subject to those limitations necessary for enforcement of legitimate governmental objectives, such as law enforcement, effective regulation of securities markets, the collection of taxes, and the

¹⁵(...continued)

must be carefully crafted to avoid encompassing disputes that are and should be beyond the reach of the dispute settlement mechanism chosen. The definition of "investment" should not, for example, be so broad as to convert conventional contract litigation into government-to-government investment disputes. That result would not further the interests of investors or states and would undermine the legitimacy of the dispute settlement process.

prudential supervision of financial institutions;¹⁶ and

- freedom to appoint and move key personnel, including engineers, scientists, legal counsel, consultants, and other technical, service, and managerial personnel, while preserving a state's sovereign right to control its borders and impose visa requirements that are not unduly restrictive.

The liberalizations put in place by a multilateral investment agreement will only be as effective as its exceptions are limited. The narrower the exception, the greater the de facto liberalization.¹⁷ At the same time, negotiating a

¹⁶ A broader concern voiced by some commentators relates to what the freedom for financial transfers might mean in an international monetary system they view as beset with the destabilizing effects of rapid short-term investment capital movements. See, e.g., Stephen Zamora, Regulating the Global Banking Network -- What Role (If Any) for the IMF?, 62 Fordham L. Rev. 1953, 1962-67 (1994) (arguing that the incidence under the current international monetary system of exchange rate instability, speculative attacks on various national currencies, and dramatic short-term capital movements implies a need for greater international regulation of capital markets). That issue may be ripe for resolution through the existing mechanisms for cooperation and coordination in the international monetary system, particularly the IMF, as the ABA itself supported in a resolution passed by the House of Delegates in 1995. The sensible approach in the context of a multilateral agreement on investment is to obtain a commitment to the maximum freedom for financial transfers possible, while permitting those measures authorized by the IMF Articles of Agreement or similar multilateral framework within which the broader issue of concern is likely to be resolved.

¹⁷ One salient example is the type of exception commonly permitted in multilateral arrangements for subgroups of countries that want to pursue greater liberalization without granting the benefits on a multilateral basis.

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multilateral agreement on investment will, as a practical matter, require the flexibility to permit exceptions, reservations, or derogations for significant state interests, such as national security. The ABA should encourage an approach that would ensure that exceptions are narrowly drawn and clearly articulated.

Another issue that a fully multilateral accord on investment will likely confront in the context of investment liberalization is the question of investor responsibility. Throughout the 1970s, the United Nations focused considerable attention on the development of codes intended to govern the activities of so-called "transnational corporations." That approach never developed a sufficient consensus (particularly in the developed world) to result in adoption of the codes, and the trend has since turned toward relying on national standards as the most appropriate means of regulating investment activities within a system of sovereign states. Nonetheless, there is still support among certain states for many of the principles underlying the original U.N. codes and the issue of investor responsibility will undoubtedly surface again as part of the negotiation of any fully multilateral agreement.

Indeed, the trend toward reliance on national measures as a means of establishing an investor's responsibilities may simply mean that a multilateral agreement on investment will be obliged to address such measures individually. An agreement on investment will, at a minimum, need to address, among other potential issues, the protection of human health, the environment, and workers' rights in order to ensure that investment liberalization does not undercut national standards,

¹⁷(...continued)

Permitting broad exceptions for regional economic integration organizations could render illusory national and most-favored-nation treatment commitments. While recognizing the value of making further progress in a variety of bilateral and multilateral fora may prove essential to the eventual success of any fully multilateral investment accord, a sound multilateral arrangement would adopt an approach designed to ensure that any exception for regional economic integration organization does not impede progress toward that goal.

particularly in a manner that creates a competitive disadvantage for the United States.

In that regard, the NAFTA sets a useful precedent for a multilateral agreement on investment, including --

- (1) language like that in the NAFTA preamble which expressly provides that investment liberalization will be "undertaken in a manner consistent with protection of human health, environmental protection and conservation," "strengthens the development and enforcement of environmental laws," "promotes sustainable development," and "protects, enhances and enforces basic workers' rights;"
- (2) a provision that specifies that nothing in the accord creates a conflict with a state's ability to comply with international agreements among the parties on health, environmental, or labor matters;
- (3) safeguards protecting the right of a state and its political subdivisions to adopt regulatory measures considered appropriate to ensure that investment within the state's territory is environmentally sound; and
- (4) an injunction against the relaxation of or derogation from domestic health, environmental, or labor standards as a means of providing an incentive to investors.¹⁸

Adopting the NAFTA approach should offer the assurance that nothing in the agreement is intended to encourage any party to lower its health, safety, or environmental standards as an

¹⁸ See NAFTA, Preamble and arts. 104, 1114, H. Doc. 159, 103d Cong., 1st Sess. 726, 728, 1108 (1993); NAFTA and the Environment: Substance and Process 13-14 (Daniel Magraw, ed. 1995) (discussing the NAFTA provisions addressing environmental concerns).

incentive for investment (referred to as the "pollution haven" problem in the environmental context), while at the same time ensuring that environmental, health and labor standards are not misused to disguise the imposition of barriers to investment.

B. Guarantee of Investment Protection

One of the principal goals of any multilateral accord on investment must be the establishment of the highest level of investment protection possible. The central focus of that effort will be obtaining assurances against expropriation and other governmental takings without providing prompt, adequate, and effective compensation -- a basic protection that the U.S. has long believed reflects a customary principle of international law and one that lies at the core of previous U.S. agreements on international investment.

A multilateral agreement on investment should provide for protection of foreign investors against expropriation and nationalization, whether direct or indirect. Expropriations must be for public purposes, carried out in a nondiscriminatory fashion, and be accompanied by prompt, adequate, and effective compensation. Any such agreement must guard against so-called "creeping expropriation," where the conditions surrounding an investment are eroded, as well as outright governmental takings. Investments should be accorded fair and equitable treatment as required by international law.

C. Central Role of Effective Dispute Resolution

The utility of a multilateral agreement on investment will ultimately depend on the effectiveness of its dispute resolution process. Binding dispute resolution is central to any accord that purports to offer investors enforceable commitments concerning the treatment of their property in the host country. Incorporating both state-to-state and investor-to-state dispute mechanisms, as the NAFTA does, would represent a significant step toward securing the benefits of a multilateral accord on investment and ensuring the primacy of the rule of law.

1. Investor-State

A multilateral agreement on investment should provide the investor with the option of initiating binding arbitration proceedings in appropriate cases against the host state in internationally recognized fora, such as the International Centre for the Settlement of Investment Disputes ("ICSID") or other international arbitral bodies, without first having to resort to the local courts. At the same time, without establishing a prerequisite to entering into binding arbitration, an agreement should provide for resort to local courts if the parties so choose. Provisions on investor-state dispute resolution should record the consent of the state to arbitration initiated by the investor and the state's commitment to honor and comply with the terms and conditions of any eventual award.

To make dispute settlement procedures effective, a multilateral accord should also require a definition of "investment agreements" broad enough to encompass the kinds of agreements concluded between investors and governments. The U.S. negotiators should consider whether such an agreement should afford, in addition to the prospect of monetary damages, the possibility of specific performance by calling upon the state party to comply.

2. State-to-State

A multilateral accord on investment should include provisions for the resolution of disputes among the signatories as well. Any such agreement should provide both for consultation with respect to any matter affecting the operation of the agreement and for binding arbitration of any disputes. Measures that affect many industries or present systemic problems for investors may be particularly appropriate for state-to-state dispute resolution.

That being said, the current trend in the resolution of investment disputes is toward expanding direct investor-state arbitration, rather than converting such disputes into state-to-state conflicts. Indeed, it is reasonable to expect that ICSID, which establishes a system in which investor-state arbitration takes priority over the state-to-state settlement of investment disputes, will serve as the primary model for a multilateral investment accord's dispute settlement mechanism.

Given that fact, it is worth underscoring the significant role that the private bar has to play in the process of elucidating the rights and responsibilities embodied in any multilateral investment agreement. If such an agreement is to achieve its basic objectives, much will depend on the perceived authority and legitimacy of the dispute settlement process. That is fundamentally the responsibility of the advocates before the arbitral tribunals established under the agreement's mandate and the arbitrators who hear the disputes.

III. Previous ABA Positions on International Investment

The American Bar Association has been a strong advocate of the principles a multilateral agreement on investment would embody. Endorsement of the negotiation of a multilateral agreement on investment would be entirely consistent with the ABA's prior advocacy of liberalized investment rules, enhanced protection for investors, binding dispute resolution, and the broadest possible application of those principles.

The ABA has consistently called for the recognition of customary principles of international law that would afford adequate protection to foreign investment. A report and recommendation of the Section of Natural Resources Law, approved at the ABA's 1973 annual meeting, captures much of what the ABA has advocated over the years regarding international investment.

The recommendation --

"[u]rges the United States Government in its participation in international organizations as well as in its bilateral relations to insist on the application of the . . . rules of international law respecting foreign private investment," including the injunction that -- the property of a foreign private investor may not be expropriated, otherwise taken, or the investment impaired except:

- (1) for a public purpose,
- (2) on a nondiscriminatory basis, and
- (3) upon payment of prompt adequate and effective compensation.

The recommendation further called on the U.S. government to "secure the establishment and acceptance of an international tribunal with compulsory jurisdiction to decide private investment disputes between a foreign private investor and the host state."

The ABA has been equally consistent in its support of similar rules assuring an open, nondiscriminatory environment for foreign investment in the United States. In 1987, for instance, the Board of Governors adopted a resolution opposing proposed legislation (the so-called "Bryant Amendment") that would have imposed "unreasonable and burdensome public disclosure requirements on foreign investors." In the same vein, at its 1988 Annual Meeting, the ABA passed a resolution forwarded by the Real Property, Probate and Trust Law Section urging "Congress to continue its policy of limiting regulation of foreign investments in the United States to reasonable information gathering and regulation relating to sensitive industries" in order to avoid the damage such proposals may do "to our domestic economy in inhibiting capital investment from abroad, and to American investors subject to retaliatory measures overseas." Consistent with that approach, the ABA, in a resolution passed at its 1992 midyear meeting, urged Congress to avoid certain tax measures that would discriminate against foreign investors by "burden[ing] foreign direct investment in the United States with a second level tax not imposed on U.S. individual investors similarly situated."

The ABA has, furthermore, consistently supported the negotiation and ratification of the international accords that will provide much of the basic framework for a multilateral investment accord. At its 1986 annual meeting, the ABA supported the ratification of the initial round of U.S. bilateral investment treaties. A year later, at its 1987 annual meeting, the ABA went on record in support of the U.S. effort in the Uruguay Round of GATT talks to obtain adoption of "appropriate

measures to discourage the use of trade related investment measures (TRIMs) that significantly distort international trade and investment flows." In 1992 and 1993 respectively, the ABA lent its support to the conclusion of both the NAFTA and Uruguay Round, which included the investment provisions outlined above, and specifically supported the effort to secure binding dispute settlement procedures in both agreements.

In short, approval of this recommendation and report would be consistent with ABA policy of thirty years standing supporting the liberalization of investment restraints, affording the highest standards of protection for international investment, and the establishment of binding dispute settlement mechanisms for parties to international investment.

Respectfully submitted,

Michael D. Sandler
Chair
August, 1996

GENERAL INFORMATION FORM

Submitting Entity: Section of International Law and Practice

Submitted By: Michael D. Sandler, Chair, Section of
International Law and Practice

1. Summary of Recommendation.

The recommendation urges the American Bar Association's support for the negotiation of a multilateral accord on investment designed to liberalize current barriers to foreign direct investment, offer protection to investors from actions such as expropriation without prompt and adequate compensation, and establish effective means for resolving investment disputes.

2. Approval by Submitting Entity.

Approved by the Council of the Section of International Law and Practice at its meeting on April 27, 1996.

3. Has this or a similar recommendation been submitted previously to the House of Delegates or the Board of Governors previously?

None.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

As reflected in the report accompanying the recommendation, adoption of the proposed recommendation would be consistent with long-standing American Bar Association support for the negotiation of international agreements on investment and for the principles the proposed recommendation would vindicate.

5. What urgency exists which requires action at this meeting of the House?

Negotiations are underway in a variety of fora. One significant set of talks is to be concluded in early 1997. In order to make the American Bar Association's views known to the negotiators in order that they may be taken into account and in order for the ABA to play a constructive role, action must be taken at the 1996 Annual Meeting.

6. Status of legislation.

None.

7. Cost to the Association.

None.

8. Disclosure of Interest.

None.

9. Referrals.

The recommendation and report were prepared by the Section's Task Force on Multilateral Investment Agreements. It was circulated to the following Section committees, task forces and liaisons for their comment in January, 1996:

- Liaison, ABA Business Law Section
- International Institutions Committee
- ABA/CBA/Barra Mexicana Joint Working Group on Settlement of International Disputes
- International Environmental Law Committee
- International Trade Committee
- International Investment and Development Committee
- Foreign Investment in the United States Committee
- International Commercial Arbitration Committee
- International Banking and Finance Committee
- International Litigation Committee
- Liaison, ABA Litigation Section
- Corporate Counsel Committee
- International Communications Committee
- International Intellectual Property Rights Committee

- Liaison, ABA Intellectual Property Law Section
- International Securities Transactions Committee
- International Taxation Committee
- International Antitrust Law Committee
- Working Group on Multilateral Trade Agreements

To the extent the Task Force received comments, they were uniformly supportive of the effort to secure the American Bar Association's support for a multilateral accord in investment.

10. Contact Person.

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11. Person who will present the report to the House.

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12. Contact Person Regarding Amendments to this Recommendation.

No amendments have been proposed. The contact person is the same as that listed in item 10 above.

Executive Summary

1. Summary of the recommendation

investment disputes.

2. Summary of the issue which the recommendation addresses

The recommendation addresses a critical gap in international economic law. Unlike the areas of international trade and monetary relations, international investment does not benefit from a multilateral set of rules that would permit the free flow of direct investment capital that provides the engine for economic growth. Previous efforts at bilateral negotiations, while establishing a helpful precedent, have proved inadequate to the task of establishing a consistent set of investment rules.

Negotiations on international investment are underway in a variety of fora. The recommendation does not favor one forum or one approach over another. Rather, the intent is to support the negotiation of a fully multilateral accord that satisfies the standards set out in the recommendation, regardless of the forum.

3. Explain how the proposed policy position will address the issue

The proposed recommendation addresses that issue by enlisting the American Bar Association's support for the negotiation of a multilateral accord on investment that would result in liberalization of existing investment restraints, protection for investors from actions such as expropriation with prompt and adequate compensation, and the establishment of effective means for resolving investment disputes.

4. Summary of any minority views or opposition which have been identified

While there are differing views over the appropriate forum for multilateral negotiations, the breadth of exceptions that would be allowed, and the need to build in appropriate safeguards to ensure that sovereign states are free to ensure that their basic interests are met, there is general consensus on the need for a multilateral agreement on international investment.