authorize the existing Joint Working Group to continue its work in this area, to review the progress of the Agreement, and to make suggestions from time to time.

The two Bar Associations, if asked by the two Governments, may also provide assistance in the selection of panelists, and in particular provide advice on the qualification of various proposed candidates, in the same manner and independent spirit as is being done in the United States with respect to nominees for judgeships.

January 13, 1988

American Bar Association Section of International Law and Practice Recommendations and Reports to the Board of Governors

I. Report on Public Disclosure by Foreign Investors*

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association opposes the provisions of Section 703 of the Trade and International Economic Policy Reform Act of 1987 (H.R.3) passed by the House of Representatives, the so-called Bryant Provision, which imposes unreasonable public disclosure requirements on foreign investors and urges that the provision be deleted from any legislation enacted by the Congress.

REPORT

(1) The Bryant Provision requires that foreign investors who presently hold or acquire in the future the beneficial ownership of a relatively small

*This resolution and report was prepared by the Section Committee on International Trade.

equity in any U.S. business, including real property, must make significant public disclosure of their holdings. The thresholds which trigger the disclosure obligation are: (a) ownership of 5 percent or more of the equity of a single U.S. property whose assets exceed $5 million in market value or whose sales exceed $10 million; (b) ownership of 5 percent of the equity in two or more properties whose assets in the aggregate exceed $20 million in market value or whose sales in the aggregate exceed $40 million; (c) ownership of an equity interest in real property when the holding has a market value of $10 million regardless of the value of the real property or the percentage of ownership held by the foreign investors; or, (d) ownership of a major portfolio interest, defined to be an interest with a value of $50 million or more, in any U.S. business enterprise, regardless of the size of the U.S. enterprise or the percentage of the foreign holding.

(2) When the thresholds are met, the foreign investor must register his interest with the Department of Commerce and disclose various information including the identity, address, industry, nationality and legal nature of the acquirer; the size of the interest acquired and the price paid; a description of the property, its location and its industry; the date of acquisition; and such other information as may be required by the Department of Commerce.

(3) In addition, if the foreign ownership interest constitutes 25 percent of the equity of a business enterprise that has assets of $20 million or gross sales of $20 million, the foreign investor's registration must also furnish information about the U.S. business enterprise including a current balance sheet and income statement, and a statement of sales, assets, operating income, changes in financial condition and depreciation by industrial segment, all of which must be prepared in accordance with generally accepted accounting principles and accompanied by an auditor's statement. (This information must be furnished by the investor whether or not the business enterprise normally prepares such financial statements.) Such registration by a 25 percent owner must also include for the U.S. business enterprise, the identity and nationality of all executive officers and directors, the compensation of all executive officers and a list of any related business transactions of any director; a description of any significant civil litigation in which the enterprise has been involved within the past year; and the location of all facilities within the United States. Finally, the registration must also include an English translation of any public financial disclosure statement which the investor must file in his home country.

(4) The disclosure requirements described in 3, above, will apply to branch offices, wholly owned subsidiaries and 100 percent owned investments and whether the interest was acquired from a U.S. owner or developed by the foreign investor.

(5) All registration reports are open to the public and an index must be prepared to permit easy access.

(6) These registration and disclosure requirements for foreign investors are not imposed on domestic investors by either federal or state law, although some of the information required to be disclosed is modeled after SEC required disclosures for publicly traded companies. The Bryant Provision registration and disclosure requirement arises whether or not the foreign investor is a publicly held company, and whether or not the U.S. business enterprise in which the investment is made is a publicly held company. Also, in the case of the 25 percent investment in a U.S. business enterprise, the foreign investor may not know or have the ability to obtain the information required to be filed for the U.S. business enterprise, in which case it would be impossible to comply with the statute.

(7) All reports must be updated annually. Late reports are subject to a civil penalty of $10,000 per week and criminal penalties are also provided.

(8) Senior officials of the Treasury Department, Commerce Department and the SEC have testified that existing reporting requirements imposed on foreign investors (which do not permit disclosure to the public of individual filing information) are adequate for statistical, analytical and policymaking purposes and that the Bryant Provision is unnecessary.

(9) The Bryant Provision was strongly opposed in a joint letter by the Secretaries of State, Treasury, Commerce, Labor, Agriculture, Defense, Transportation, Energy, and Education, the U.S. Special Trade Representative, the Chairman of the Council of Economic Advisors and the Director of the Office of Management and Budget.

(10) The public disclosure aspects of the Bryant Provision would appear to violate existing treaties of friendship, commerce and navigation and bilateral investment treaties. Such treaties typically provide that foreign investors in the U.S. shall have at least the rights that U.S. citizens have with respect to the activities of their investments except for such measures necessary to protect national security. Although the national security exception would probably be applicable to the information filing requirements of the Bryant Provision, there appears to be no justification for mandatory public disclosure of such information.

(11) The scope of the information required, the public disclosure and the severe penalties imposed will constitute a major burden to prospective investors and will constitute a significant deterrent to investment in the U.S.

(12) The Bryant Provision is inconsistent with the position the United States has consistently taken for many years in favor of the free flow of capital investment and enactment of the Bryant Provision will greatly undercut U.S. efforts in the GATT, the OECD and other international negotiations to remove host country barriers to the free flow of capital investment which would greatly benefit U.S. investors.